

PUBLIC

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



In the Matter of)

BENCO DENTAL SUPPLY CO.,)
a corporation,)

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

PATTERSON COMPANIES, INC.,)
a corporation.)

DOCKET NO. 9379

PUBLIC

RESPONDENTS' REPLY TO COMPLAINT COUNSEL'S POST-TRIAL PROPOSED
FINDINGS OF FACT

TABLE OF CONTENTS

I. JURISDICTION	1
II. THE BIG THREE.....	2
<i>A. Benco.....</i>	<i>2</i>
<i>B. Patterson.....</i>	<i>11</i>
<i>C. Schein.....</i>	<i>20</i>
<i>D. Competition Among the Big Three.....</i>	<i>26</i>
III. DENTAL INDUSTRY BACKGROUND.....	35
<i>A. Industry Definitions</i>	<i>36</i>
1. Independent Dentist	36
2. Corporate Dentistry.....	37
3. Buying Group.....	44
4. Buying Groups Are Distinguished from DSOs and MSOs.	52
5. Buying Groups Are Also Distinguished from Medical or Healthcare GPOs.	58
<i>B. Practice of Dentistry.....</i>	<i>62</i>
<i>C. Respondents' Customer Segments</i>	<i>68</i>
1. Independent Dentists Make Up the Vast Majority of Respondents' Revenues.....	69
2. Corporate Dentistry.....	74
3. Other Institutional Customers	78
IV. INDEPENDENT DENTISTS JOIN BUYING GROUPS TO SAVE MONEY ON DENTAL PRODUCTS.....	81
<i>A. Changes in the Dental Industry Gave Rise to Buying Groups.....</i>	<i>81</i>
<i>B. Buying Groups Cropped Up As a Means for Independent Dentists to Compete with Corporate Dentistry.....</i>	<i>88</i>
<i>C. Buying Groups Have Grown in the Dental Industry in Past Decade Coinciding with the Increasing Pressures on Independent Dentistry.....</i>	<i>98</i>
<i>D. Buying Groups Save Dentists Money and Help Preserve Independent Dentistry.....</i>	<i>103</i>
<i>E. Respondents Had a Common Understanding of the Term Buying Group.....</i>	<i>114</i>
<i>F. Buying Groups Successfully Entered Other Industries As a Means For Practitioners to Save Money.....</i>	<i>117</i>
<i>G. Kois Buyers Group Background.....</i>	<i>132</i>
<i>H. Smile Source Background.....</i>	<i>138</i>
<i>I. Other Buying Groups Background</i>	<i>148</i>

V. THE BIG THREE FEARED COMPETITION FOR BUYING GROUPS WOULD LEAD TO A “PRICE WAR” AND A “RACE TO THE BOTTOM” FOR THE INDUSTRY.....	155
<i>A. Executives of The Big Three Viewed Buying Groups as a Threat.....</i>	<i>155</i>
<i>B. Respondents Knew Buying Groups in The Medical Supplies Industry Drove Down Margins.....</i>	<i>226</i>
VI. BENCO MAINTAINED AN “OPEN RELATIONSHIP” WITH PATTERSON AND SCHEIN FOR THE BIG THREE’S “MUTUAL BEST INTEREST.”	246
<i>A. Open Relationship Among The Big Three Presidents.....</i>	<i>246</i>
<i>B. Pattern of Cooperation Among the Big Three to Confront Threats to Distributors Together.....</i>	<i>268</i>
<i>C. Summary of Communications Between the Big Three Executives.....</i>	<i>328</i>
VII. BENCO WAS FIRST TO ADOPT A NO BUYING GROUP POLICY.....	399
VIII. SCHEIN AND PATTERSON STARTED DIPPING THEIR TOES INTO BUYING GROUP BUSINESS TO GAIN SALES.....	445
<i>A. Schein Sold to Buying Groups Before 2011.....</i>	<i>445</i>
<i>B. Patterson Also Planned to Start Selling to Buying Groups.....</i>	<i>458</i>
IX. BENCO ORCHESTRATED AN AGREEMENT WITH PATTERSON THAT NEITHER WOULD DISCOUNT TO BUYING GROUPS.....	471
<i>A. Benco Discovered Patterson Was On the Cusp of Discounting to a Buying Group.....</i>	<i>471</i>
<i>B. Benco and Patterson Exchanged Assurances that Neither Would Discount to Buying Groups.....</i>	<i>491</i>
<i>C. Patterson Ended Negotiations With a Buying Group Three Days After Exchange of Assurances with Benco.....</i>	<i>505</i>
<i>D. Benco Worried That Communications With Patterson About Buying Groups Could Lead to Price Fixing Allegations.....</i>	<i>513</i>
<i>E. Benco Informed Its Team the Big Three Will Maintain a United Front Against Buying Groups.....</i>	<i>520</i>
<i>F. Patterson Also Informed Its Team the Big Three All “Stay Out” of Buying Groups.....</i>	<i>533</i>
<i>G. Patterson Confronted Benco When It Suspected Benco of Discounting to a Buying Group..</i>	<i>562</i>
<i>H. Benco Reassured Patterson It Will Continue to Abide By a No Buying Group Policy.....</i>	<i>570</i>
<i>I. Patterson Ensured Compliance with Agreement Internally.....</i>	<i>585</i>
<i>J. Patterson Instructed Its Sales Team to Refuse to Do Business with Buying Groups.....</i>	<i>612</i>
<i>K. “We’ve Signed an Agreement that We Won’t Work with GPO’s.”</i>	<i>643</i>
X. BENCO ORCHESTRATED AN AGREEMENT WITH SCHEIN THAT NEITHER WOULD DISCOUNT TO BUYING GROUPS.....	646

<i>A. Benco and Schein Exchanged Assurances that Neither Would Discount to Buying Groups.</i>	646
<i>B. Schein Ensured Compliance With the Agreement Internally.....</i>	682
1. Schein Historically Worked With Buying Groups.	683
2. By December 21, 2011, Schein “no longer participate[d] in Buying Groups.”.....	703
3. In February 2012, Sullivan Informed Employees He Wanted to “KILL the Buying Group Model.”	710
4. Following Sullivan’s Guidance, Schein Executives Directed the Salesforce to Refuse to Sell to Buying Groups.....	714
<i>C. Benco Confronted Schein When It Suspected Schein of Discounting to Buying Groups.</i>	875
1. Unified Smiles (2012).....	875
2. Smile Source (2012)	902
3. Dental Alliance (2013).....	924
4. Smile Source (2013)	936
<i>D. Benco and Schein Communicated When They Were Uncertain Whether a Customer Qualified as a Buying Group.</i>	956
<i>E. Benco Shared Competitively Sensitive Information with Schein to Show It Was Not Deviating From Prior Assurances.</i>	1007
XI. BENCO PLANNED TO SHORE UP THE AGREEMENT WITH SCHEIN AND PATTERSON.....	1060
XII. THE BIG THREE COMMUNICATED ABOUT THE TDA BUYING GROUP.	1071
<i>A. Background on TDA Perks</i>	<i>1071</i>
<i>B. Cohen Instructed Regional Manager to Contact Competitors Regarding TDA.....</i>	<i>1083</i>
<i>C. Patterson and Schein Communicated About TDA Buying Group.</i>	<i>1091</i>
<i>D. Benco Communicated With Both Schein and Patterson About TDA Buying Group.</i>	<i>1101</i>
<i>E. Following Inter-Firm Communications, the Big Three Did Not Attend TDA’s Annual Meeting.</i>	<i>1105</i>
<i>F. The Big Three Previously Attended the TDA Meeting but Wanted to Send a Strong Message.....</i>	<i>1117</i>
<i>G. The Big Three Followed the Same Pattern of Inter-firm Communications With Respect to the Arizona Dental Association Meeting.</i>	<i>1127</i>
XIII. THE BIG THREE BEGAN COMPETING FOR BUYING GROUPS IN LATE 2015.	1130
XIV. THE BIG THREE HAVE NOT OFFERED A PROCOMPETITIVE EXPLANATION FOR THESE INTER-FIRM COMMUNICATIONS REGARDING A CUSTOMER SEGMENT.	1137

XV. THE BIG THREE WERE PART OF ON OVERARCHNG CONSPIRACY ORCHESTRATED BY BENCO AS RINGLEADER.....	1151
XVI. BENCO INVITED BURKHART TO REFUSE TO DISCOUNT TO BUYING GROUPS.....	1189
XVII. “PLUS-FACTOR” EVIDENCE CONFIRMS THE EXISTENCE OF AN UNLAWFUL AGREEMENT.....	1237
<i>A. The Big Three Engaged in Repeated Unexplained Communications about Buying Groups with Their Top Competitors.....</i>	<i>1237</i>
<i>B. The Big Three Acted Against Their Unilateral Self Interest.....</i>	<i>1238</i>
1. Discussion of Buying Group Strategies.....	1238
2. Refusing to Bid on Buying Groups.....	1239
3. The Big Three Changed Their Conduct.....	1317
4. The Big Three Shared a Common Motive to Conspire.	1368
5. The Executives of the Big Three Communicated Regularly and Had Opportunities to Conspire.	1369
XVIII. RESPONDENTS’ CONSPIRACY WAS ANTICOMPETITIVE.....	1373
<i>A. Respondents’ Buying Group Discounts Before And After The Conspiracy Period.....</i>	<i>1373</i>
1. Smile Source Discounts	1373
2. KlearImpakt Member Discounts	1376
3. Teeth Tomorrow Discounts	1378
4. Mastermind Discounts	1379
5. Elite Dental Alliance Discounts.....	1380
6. Patterson’s Other Post-Conspiracy Discounts To Buying Groups.	1382
<i>B. Respondents’ Conspiracy Harmed Competition.....</i>	<i>1384</i>
<i>C. Dr. Marshall’s Empirical Work Shows Harm To Competition.</i>	<i>1398</i>
1. Prices And Margins Drop When Full-Service Distributors Discount To Buying Group Members Dentists.	1414
2. Prices And Margins Increase When Full-Service Distributors Do Not Work With Buying Groups.....	1441
3. Respondents’ Conspiracy Slowed The Formation And Growth Of Dental Buying Groups.....	1455
XIX. MARKET DEFINITIONS.....	1464
<i>A. Channels of Distribution for Dental Products.....</i>	<i>1464</i>
1. Full-Service Distributors.....	1464
2. Non-Full-Service Distributors (Mail-Order, Telesales, and Online Distributors).....	1494

3. Direct-Selling Manufacturers.....	1507
<i>B. The Relevant Product Market Is Dental Products And Services Sold Through Full-Service Distributors To Independent Dentists.....</i>	<i>1520</i>
1. Qualitative Evidence Demonstrates That No Reasonable Substitute Exists For Products and Services Offered By Full-Service Distributors To Independent Dentists.....	1524
2. The Hypothetical Monopolist Test Further Confirms That The Relevant Product Market Is Dental Products And Services Sold Through National Full-Service Distributors To Independent Dentists.....	1552
<i>C. The Relevant Geographic Markets Are No Larger Than the United States and Local in Nature.</i>	<i>1564</i>
1. Respondents' Experts Do Not Dispute That The Relevant Geographic Markets Are No Larger Than The United States And Local In Nature.....	1565
2. Qualitative Evidence Supports That The Relevant Geographic Markets Are Local In Nature.....	1568
3. The Hypothetical Monopolist Test Further Confirms That The Relevant Geographic Markets Are Local In Nature.	1575
4. Price Comparisons Also Confirm That The Relevant Geographic Markets Are Local In Nature.....	1592
XX. DR. MARSHALL DETERMINED THAT RESPONDENTS COLLECTIVELY HAVE MARKET POWER IN THE RELEVANT MARKETS.....	1593
XXI. DR. MARSHALL OBSERVED MARKET STRUCTURE CONDUCTIVE TO COLLUSION AGAINST BUYING GROUPS.....	1609
<i>A. Bargaining Power of Buyers.....</i>	<i>1614</i>
<i>B. Low Price Elasticity Of Independent Dentists' Demand.</i>	<i>1621</i>
<i>C. High Collective Share Of Schein, Patterson, and Benco.....</i>	<i>1626</i>
<i>D. Barriers To Entry In Full-Service Distribution.</i>	<i>1629</i>
<i>E. Manufacturers Have Little To No Bargaining Power Against Distributors.....</i>	<i>1637</i>
XXII. DR. MARSHALL OBSERVED CHANGES IN THE BIG THREE'S CONDUCT INDICATIVE OF COLLUSIVE BEHAVIOR.	1639
XXIII. DR. MARSHALL OBSERVED CONDUCT INCONSISTENT WITH THE BIG THREE'S UNILATERAL INTERESTS AND CONSISTENT WITH COORDINATED ACTION.....	1656
<i>A. Dr. Marshall's Kois-Burkhart 2014 Profitability Study.....</i>	<i>1674</i>
<i>B. Dr. Marshall's Burkhart-Smile Source 2012 Profitability Study.</i>	<i>1705</i>
<i>C. Dr. Marshall's Atlanta Dental-Smile Source 2013 Profitability Study.....</i>	<i>1717</i>
<i>D. Dr. Marshall's Schein-Smile Source 2012 Profitability Study.....</i>	<i>1726</i>
<i>E. Dr. Marshall's Schein-Smile Source 2017 Profitability Study.....</i>	<i>1734</i>

XXIV.	RESPONDENTS HAVE FAILED TO REBUT COMPLAINT COUNSEL’S EVIDENCE OF AN UNLAWFUL AGREEMENT.....	1744
<i>A.</i>	<i>Respondents’ Purported Independent Business Justifications are Contradicted by the Evidence.....</i>	<i>1744</i>
1.	Respondents’ Claim that Buying Groups Cannot Drive New Business is Contradicted by the Evidence.....	1744
2.	Respondents’ Concerns about their Competitors Dealing with Buying Groups Undermines Claims of an Independent Business Interest.....	1800
<i>B.</i>	<i>Schein’s Arguments Concerning the Alleged Agreement are Contradicted by the Evidence.....</i>	<i>1807</i>
1.	Schein Enforced a Policy against Buying Groups during the Conspiracy Period.	1807
2.	Schein’s Asserted “Buying Groups” Do Not Disprove its Participation in the Conspiracy.	1811
3.	Imperfect Compliance with an Agreement Does Not Disprove the Existence of an Agreement.....	1869
XXV.	WITNESS BACKGROUND	1894
<i>A.</i>	<i>Lay Witnesses Who Testified At Trial</i>	<i>1894</i>
1.	Third Party Witnesses	1894
2.	Respondents’ Executives and Former Executives	1910
<i>B.</i>	<i>Expert Witnesses Who Testified at Trial.....</i>	<i>1935</i>
1.	Complaint Counsel’s Expert Witness (Marshall, Tr. 2855-3417)	1935
2.	Respondents’ Expert Witnesses.....	1938
<i>C.</i>	<i>Witnesses Who Testified by Deposition and/or Investigational Hearing Only.....</i>	<i>2003</i>
1.	Respondents’ Employees and Former Employees.....	2003
2.	Third Party Witnesses	2018

I. JURISDICTION

1. The Federal Trade Commission (“FTC”) is an administrative agency of the United States government established, organized, and existing pursuant to the Federal Trade Commission Act, 15 U.S.C. § 41 et seq. (JX0001 at 001 (Joint Stipulations of Law and Facts)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco Dental Supply Co. (“Benco”) has no specific response to the proposed finding.

2. Henry Schein, Inc. sells, or offers for sale, its products and services throughout the United States. (JX0001 at 001 (Joint Stipulations of Jurisdiction, Law, and Fact)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

3. Patterson Companies, Inc. sells, or offers for sale, its products and services throughout the United States. (JX0001 at 001 (Joint Stipulations of Law and Facts)).

Schein’s Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

4. Benco Dental Supply Co. sells, or offers for sale, its products and services throughout the United States. (JX0001 at 001 (Joint Stipulations of Law and Facts)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

II. THE BIG THREE

A. Benco

5. Benco Dental Supply Co. (or "Benco") is a family-owned dental distribution company based in Pittston, Pennsylvania. (Cohen, Tr. 399, 633, 617; JX0003 at 002 (Joint Stipulation of Fact No. 9)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

6. Benco is a private, for-profit corporation duly formed and organized under the law of the State of Delaware. (CX1112 at 010 (Answer of Benco ¶13)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

7. Benco is a full-service, national distributor that sells dental supplies, equipment, and services to dental practitioners throughout the United States. Benco is the third largest distributor of dental supplies and equipment in the United States. (CX1112 at 011 (Answer of Benco ¶13); JX0003 at 002 (Joint Stipulation of Fact Nos. 6, 9)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco admits that it currently is a full-service, national distributor that sells dental supplies, equipment, and services to dental practitioners throughout the United States. It further admits that it is now the third largest distributor of dental supplies and equipment throughout the United States after its rapid expansion from a “mom-and-pop” business based in a small office in Wilkes-Barre, Pennsylvania. (RX1099-003; Cohen, Tr. 618-19). When Chuck and Rick Cohen took over Benco in 1996, Benco’s territory stretched from Boston to Cleveland to Richmond, with its base located in Wilkes-Barre, Pennsylvania. (RX1127-473; RX1099-005). Benco has grown into a national, full service dental

distributor as a result of the ambitious and deliberate expansion plan put in place by Chuck Cohen and Rick Cohen. (RX1127-473; Cohen, Tr. 628).

8. Benco is incorporated and sells dental products and services in interstate commerce in the United States. (CX1112 at 010 (Answer of Benco ¶17)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

9. Benco is the largest privately owned dental distributor in the U.S. (Cohen, Tr. 409; JX0003 at 002 (Joint Stipulation of Fact Nos. 9)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco admits that it is the largest privately owned dental distributor in the United States. By way of further response, Benco avers that becoming the first independent dental distributor to have nationwide coverage was part of Benco's ambitious and meticulously planned expansion strategy. (Cohen, Tr. 628). Benco expanded market-by-market and region-by-region across the country by hiring new sales employees, building a national distribution infrastructure, and scaling up its business operations. (Cohen, Tr. 629). As

Chuck Cohen testified, Benco's "strategy was to seek to become a national distributor" by providing "a better customer experience, a passion for innovation, and a caring family culture." (Cohen, Tr. 628).

10. In 2016, Benco supplied dental practices across the nation. (Cohen, Tr. 409-410).

Schein's Response:

Benco currently sells dental supplies in many regions of the United States. But during the relevant period, there were many areas where Benco did not have a significant presence. (See, e.g., Cohen, Tr. 646 ("Benco entered the Pacific Northwest in 2015")). According to Figure 16 of Dr. Marshall's Rebuttal Report, [REDACTED]

[REDACTED]. (CX 7101-142-43 (Fig. 16)).

Patterson's Response:

No specific response.

Benco's Response:

Benco admits that in 2016 it supplied dental practices across the country. This expansion of its distribution network was part of Benco's deliberate and carefully-planned business strategy. In 1996, Benco had only one distribution center in Wilkes-Barre, Pennsylvania. (Cohen, Tr. 629). At the beginning of Benco's rapid national expansion, Benco was a regional distributor, and delivered products within approximately a 150-mile radius of its warehouse in Northeastern Pennsylvania. Benco had only one warehouse at the time and grew as much as it could before it had to open another warehouse. (RX1127-479). Benco proceeded to add four additional distribution centers in the next fifteen years:

Jacksonville, Florida (1998); Ft. Wayne, Indiana (2003); Dallas, Texas (2004); and Reno, Nevada (2011). (Cohen, Tr. 630-31).

11. The vast majority of dentists to whom Benco sells products are independent dentists rather than dentists in corporate practices. (Cohen, Tr. 410).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

12. Benco carries a full line of products, offering thirty to forty thousand different products. (Cohen, Tr. 604).

Schein's Response:

Benco carries many products. While there is a substantial overlap in products sold by full-service distributors, including Benco, the exact mixes of products and services are not identical. (Cohen, Tr. 602, 947).

Patterson's Response:

No specific response.

Benco's Response:

Respondent has no specific response to the proposed finding.

13. Today, the company operates five distribution centers with distribution operations capable of prompt and reliable delivery across the country. (Cohen, Tr. 404, 408).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco admits that it operates five distribution centers with distribution operations capable of prompt and reliable delivery across the country. Benco started out as a regional distributor with one warehouse. (RX1127-479). As it grew, Benco added four additional distribution centers in the next fifteen years: Jacksonville, Florida (1998); Ft. Wayne, Indiana (2003); Dallas, Texas (2004); and Reno, Nevada (2011). (Cohen, Tr. 630-31). The opening of each distribution center was part of Benco's overall strategy to expand its geographic coverage from the east coast to the rest of the country. (RX1127-479). These distribution centers are part of Benco's strategy of succeeding by providing the best customer experience possible. "Providing the infrastructure for a terrific customer experience" involves opening distribution centers and establishing reliable supply lines. (RX1127-629.) Such expansion was also necessary, in part, because Benco sells many products that are heavy and therefore have high shipping costs and times relative to the price of the product. (RX1127-479-80). Benco, like any dental distributor, cannot ship heavy boxes at a reasonable price from one central location around the country. ((RX1127-479-80). Benco needed to establish a distribution network with warehouses in different regions across the country to serve customers quickly, cheaply, and efficiently. ((RX1127-479-80). Each distribution center allowed Benco to ship products overnight or via or 2-day shipping to dentists within the surrounding states. ((RX1127-479-80). Quick shipping

times are a critical component of providing a premium, full-service experience to a dentist.
((RX1127-479-80).

14. For the majority of Benco's existence, it operated as a regional distributor, with its principal customer base in Pennsylvania, New York, Ohio, and Virginia. (Cohen, Tr. 619-621, 628-629).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding. By way of further response, Benco refers the Court to its responses to ¶¶ 7, 9, 10 and 13.

15. Benco became a national full-service distributor in 2011. (Cohen, Tr. 410, 631-632; CX8015 (Cohen, Dep. at 47-48)).

Schein's Response:

The use of the term "national" is inaccurate and confusing, as there are areas where Benco does not have a significant field sales consultant presence, and therefore, would not be considered "full-service" in those regions. Benco, however, did embark on an expansion strategy in 2011. (Cohen, Tr. 632-33; RX 1099-008 (Service to Pacific Northwest not available until 2016)).

Patterson's Response:

No specific response.

Benco's Response:

Benco's rapid national expansion was also aided by Benco's unique and successful value proposition. Benco's value proposition is the same today as it was when Ben Cohen started the business. Benco offers a measurably better customer experience than Schein, Patterson, Burkhart or any other dental distributor. (RX1127-481). Benco's value proposition means that it takes care of dentists and other customers better than anybody. Benco both gains new customers and retains existing customers by offering, day in and day out, better service and higher value than its competitors. (RX1127-481).

16. Benco's gross margins are approximately [REDACTED] (Cohen, Tr. 410; [REDACTED]).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the exhibit and testimony. The testimony of Chuck Cohen to which the proposed finding cites states that Benco's gross margins are approximately [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

17. Benco has received, since 2011, requests for bids or proposals from buying groups for or relating to the sale of dental products. (CX1328 at 016 (Benco's Response to RFA ¶ 38).

Schein's Response:

This is a vague assertion. One or more buying groups have had discussions with Benco about the possibility of contracting with the buying group. But not all buying groups have approached Benco. Of the ones that have approached Benco, the record is not clear how many made actual "requests for bids or proposals."

Patterson's Response:

No specific response.

Benco's Response:

Benco admits that, since 2011, it has received requests for bids or proposals from buying groups for or relating to the sale of dental products. However, since the mid-1990's, Benco has had a policy that, in order to best serve its customers, Benco it does not recognize or work with middlemen that come between it and its customers. (Cohen Tr. 445, 693, 714). The policy was based upon Benco Managing Director Chuck Cohen's personal experience as a territory representative and his vision of the kind of customer-focused, high-touch company that he wanted Benco to be. (Cohen Tr. 694). Because the policy is customer-focused, it is important for Benco to determine who precisely the "customer" is that Benco is serving. Benco uses the policy to determine what Benco considers a "customer" and which entities Benco will sell to as a single customer. (Cohen Tr. 679.) Even before groups of independent dentists started to approach Benco, other companies, such as dental insurance companies and dental laboratories, would try to get Benco to offer discounts on supplies to dental practices that accepted their insurance or used their laboratory services. Benco would decline, because it did not want to put anyone between Benco and its customers. (Cohen Tr. 693-94; RX1127-486).

18. Chuck Cohen is the Managing Director of Benco, a title he shares with his brother. That position is akin to a CEO. He has been in that position since 1998. He is also a co-owner of Benco. (Cohen, Tr. 399-401).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

B. Patterson

19. Patterson Companies, Inc. (or "Patterson") is a publicly traded corporation, organized, existing and doing business under the laws of the state of Minnesota, based in St. Paul, Minnesota. Patterson Dental is a business unit of Patterson Companies. (CX3113 at 002-003 (Answer of Patterson ¶15); CX5035 at 014 (Patterson Companies 2017 Annual Report and 10-K); JX0003 at 002 (Joint Stipulation of Fact No. 8)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

20. Patterson is a full-service, national distributor that sells dental supplies, equipment and services to dental practitioners in the United States. (Guggenheim Tr. 1532; CX3113 at 002-003 (Answer of Patterson ¶15)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

21. Patterson engages in commerce in the United States as defined in 15 U.S.C. §44. (CX3113 at 003 (Answer of Patterson ¶17)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

22. Patterson Dental has approximately 33% of the market for distribution of dental products in North America. (Misiak, Tr. 1327).

Schein's Response:

Schein does not dispute that Patterson was once the largest distributor, and is now the second-largest dental distributor. (Sullivan, Tr. 4027). The proposed finding is not based on reliable evidence for ascertaining market share. It is also vague and ill-defined. As for Complaint Counsel's citation to David Misiak's testimony, Complaint Counsel failed to lay proper foundation to establish that Mr. Misiak had sufficient knowledge to opine about Patterson's market share, or that his testimony is anything more than a guesstimate.

The proposed finding does not define the relevant market or identify the relevant period. To the extent the proposed finding is meant to literally encompass the entire

“market for distribution of dental products,” Complaint Counsel has failed to introduce any quantitative evidence concerning Patterson’s share in that market.

To the extent Complaint Counsel seeks to implicitly limit the market definition to “full-service distribution,” the quantitative evidence submitted was set forth in Dr. Marshall’s Rebuttal Report, which purports to show that Patterson had a [REDACTED] share among full-service distributors. (CX 7101-142-43). It should be noted, however, that this market definition is highly contested, as it excludes non-full-service distributors, such as Darby, that competed successfully against Respondents, both for buying group contracts and for the business of independent dentists. (*See, e.g.*, Marshall, Tr. 3370 (“you don’t know how many relevant markets there are in the United States; is that correct? ... A. I don’t know how many there are exactly.”), 3337-38). It also excludes direct distribution by manufacturers. (*See, e.g.*, Marshall, Tr. 3337-38). Finally, the market share statistic Dr. Marshall uses does not identify the relevant time period, so it is not reliable evidence of Patterson’s market share during the entire period.

Patterson’s Response:

Determination of Patterson’s market share depends upon what products are included (supplies, equipment, service, software, etc.) and what point in time is measured. (CX0314 (Guggenheim, IHT at 44 (“Q. What is Paterson’s national market share today? A. I don’t really have a type of mind about – this dental market can be broken down in many, many different ways and I couldn’t give you a guess on that.”))). Guggenheim estimated Patterson’s market shared ranged between 20 to 30 percent, depending upon how the market was defined. (CX0314 (Guggenheim, IHT at 45 (“[T]his market has lots of different segments . . . there’s wide variances in that based on how you interpret the market, even in each category.”))).

Benco's Response:

Benco has no specific response to the proposed finding.

23. Patterson is the second largest distributor of dental supplies and equipment in the United States. (Guggenheim, Tr. 1543).

Schein's Response:

Schein does not dispute that Patterson was once the largest distributor, and is now the second-largest dental distributor. (Sullivan, Tr. 4027).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

24. Patterson sells and distributes a full range of dental products, carrying over 89,000 SKUs. (CX5035 at 015 (Patterson Companies 2017 Annual Report and 10-K); *see also* Guggenheim, Tr. 1532; [REDACTED]).

Schein's Response:

Patterson carries many products. While there is a substantial overlap in products sold by full-service distributors, including Patterson, the exact mixes of products and services are not identical. (McFadden, Tr. 2753 (“Schein had their choices, Benco had their choices and Patterson had their choices.”)).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

25. Patterson Dental operates approximately 75 sales locations in 40 states. (CX5035 at 033 (Patterson Companies 2017 Annual Report and 10-K)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

26. Patterson distributes dental products from nine fulfillment centers, located in California, Florida, Hawaii, Indiana, Iowa, Pennsylvania, South Carolina, Texas, and Washington. (CX5035 at 033 (Patterson Companies 2017 Annual Report and 10-K)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

27. Patterson buys dental products from manufacturers and sells those products to dentists with a mark-up. (Rogan, Tr. 3426).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

28. Patterson's gross margins are approximately 34% to 35%. (Guggenheim, Tr. 1538; Rogan, Tr. 3426).

Schein's Response:

No response, other than to note that gross margins are not an appropriate metric to measure profitability since they exclude, among other things, the costs of maintaining a full-service distribution network, including FSC salaries, commissions, and benefits.

Patterson's Response:

The testimony cited by Complaint Counsel applied only to consumables, did not specify a timeframe, and was qualified with a “My recollection is something in there” by Guggenheim (Guggenheim, Tr. 1537–38), and with a “[r]oughly, yes. On a good day” by Rogan (Rogan, Tr. 3426). Guggenheim TR 1538:6. This proposed finding has no time frame and or specified product segment. Patterson’s gross margins have been declining over time. (CX0314 (Guggenheim IHT at 209:12-13 (“My recollection was that we were seeing margins decline throughout the sundries business.”); [REDACTED])

© 2006 The Authors
Journal compilation © 2006 Blackwell Publishing Ltd

© 2006 The Authors
Journal compilation © 2006 Blackwell Publishing Ltd

); CX3241 at 2 (“Lack of control in approval processes and systems combined with price pressure in the market is driving the year over year downtrend in gross margin.”). Patterson’s margins vary by area of the country, by product, and by product segment (equipment and consumable margins are different), and vary widely from sale to sale. (CX0314 (Guggenheim, IHT at 45)). Patterson further joins Schein’s

response and notes that gross margins are not an appropriate metric to measure profitability.

Benco's Response:

Benco has no specific response to the proposed finding.

29. The vast majority of dentists to whom Patterson sells products are independent dentists rather than dentists in corporate practices. (Rogan, Tr. 3427; McFadden Tr. 2748; Misiak, Tr. 1425-1426).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

30. At present, Patterson Companies operates in the dental products distribution market and the animal health products distribution market. (Guggenheim, Tr. 1531). From 2004 until 2015, Patterson also operated a medical products distribution business. (Guggenheim, Tr. 1531-1532; CX5034 at 012 (Patterson Companies 2016 Annual Report)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

31. During the time period 2009 to 2017, Patterson's largest suppliers were 3M, Dentsply, KaVo-Kerr, Ivoclar, GC America and Hu-Friedy. (Rogan, Tr. 3425-3426).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

32. Patterson promotes its ability to offer a full line of dental products to customers. (CX3365 at 006 (Patterson's Response to RFA ¶ 14)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

33. Patterson provides installation, maintenance, and repair services for dental products to its customers. (CX3365 at 006 (Patterson's Response to RFA ¶ 16)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

34. Buying Groups sought bids or proposals from Patterson for or relating to the sale of dental products during the period January 1, 2009 to the present. (CX3365 at 008 (Patterson's Response to ¶ 28)).

Schein's Response:

This is a vague assertion. One or more buying groups have had discussions with Patterson about the possibility of contracting with the buying group. But not all buying groups have approached Patterson. Of the ones that did approach Patterson, the record is not clear how many made actual requests for "bids or proposals."

Patterson's Response:

Some buying groups did reach out to Patterson, and when they did, Patterson evaluated them on their merits and decided independently whether to do business with them. PF ¶¶ 167-73.

Benco's Response:

Benco has no specific response to the proposed finding.

35. Paul Guggenheim was the President of Patterson from May 2010 to May 2016. (Guggenheim, Tr. 1526-1527).

Schein's Response:

No response.

Patterson's Response:

Paul Guggenheim was the President of Patterson Dental from May 2010 to May 2015 and was CEO of Patterson Dental from May 2015 to May 2016. (Guggenheim, Tr. 1527).

Benco's Response:

Benco has no specific response to the proposed finding.

C. Schein

36. Henry Schein, Inc. (or “Schein”) is a public company headquartered in Melville, New York. (Sullivan, Tr. 3875; CX5021 at 012 (Henry Schein, Inc. 2017 Annual Report); JX0003 at 002 (Joint Stipulation of Fact No. 10)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

37. Schein is a corporation, as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44. (CX2801 at 008 (Schein’s Response to RFA ¶ 1)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

38. Schein is the largest dental distributor in the United States. (Sullivan, Tr. 3876).

Schein’s Response:

Schein is currently the largest dental distributor in the United States. It was the second-largest distributor, behind Patterson, for many years. (Sullivan, Tr. 4027).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

39. The company is the “world’s largest provider of health care products and services primarily to office-based dental, animal health and medical practitioners” serving “more than 1 million customers worldwide.” (Sullivan, Tr. 3873; CX5021 at 012 (Henry Schein, Inc. 2017 Annual Report)).

Schein's Response:

Schein is currently the largest dental distributor in the United States. It was the second-largest distributor, behind Patterson, for many years. (Sullivan, Tr. 4027). Schein no longer distributes animal health products.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

40. Schein is a full-service, national distributor of dental products. (JX0003 at 002 (Joint Stipulation of Fact Nos. 6 and 10). Schein sells and distributes a full range of dental products, carrying over 200,000 SKUs. (Sullivan, Tr. 4035; Meadows, Tr. 2474; CX5021 at 014 (Henry Schein, Inc. 2017 Annual Report)).

Schein's Response:

As a full-service distributor, Schein carries many products. While there is a substantial overlap in products sold by full-service distributors, the exact mix of products and services that each offers is not identical. (McFadden, Tr. 2753 (“Schein had their

choices, Benco had their choices and Patterson had their choices.); CX 0311 (Sullivan, IHT at 77-78)).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

41. Schein operates five distribution centers in North America, enabling delivery across the country. (Sullivan, Tr. 4040). In addition, Schein maintains four in-house equipment repair facilities. (RX2951 (Steck, Class 30b6 Dep. at 14)). Schein employs between 800-825 Field Sales Consultants that specialize in merchandise, 160 sales representatives for equipment, and 80 for technology. (Sullivan, Tr. 4036; RX2951 (Steck, Class 30b6 Dep. at 37-38)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

42. Schein's dental division is the largest part of the company, employing roughly 3,000 employees. Between 1,000 and 1,200 of these employees are sales representatives. (Sullivan, Tr. 3874).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

43. Schein's gross margins are approximately 32% to 34%. (Sullivan, Tr. 3876; *see also* Meadows, Tr. 2520-2523 (30% gross profit on merchandise sold to independent dentists, 28% gross profit on DSOs, and 20% gross profit for mid-market customers); Foley, Tr. 4533 (28%-29% is reasonable gross profit for Special Markets)).

Schein's Response:

The asserted fact is not supported by sufficient evidence. Complaint Counsel fails to establish that gross profit is the same as gross margins, or that either Mr. Meadows or Mr. Foley have sufficient expertise and basis to estimate gross margins. Schein employees lack the ability to reliably estimate gross margins for "individual dentists" due to the fact that Henry Schein does not maintain separate accounting for independent dentists such that "gross profit" for independent dentists can be identified. (CX 8012 (Breslawski, Dep. at 8)). Complaint Counsel also fails to identify any time period for this fact, thereby assuming, without evidence, that Schein's purported gross margins have remained unchanged over time.

The cited testimony from Mr. Sullivan was based on Schein's 2017 annual report which reported *net sales* and asked Mr. Sullivan to extrapolate gross margins from those net sales. (Sullivan, Tr. 3875-86). Complaint Counsel's reliance on this report at trial ignored testimony given by Mr. Breslawski, former CEO and current Vice Chairman of Henry Schein, that, "[p]rofitability at the pretax level is for our Henry Schein Dental business. It would include all of the costs of all of our direct operating costs of our U.S. dental business, plus all of the infrastructure that actually services not only the dental

business, but also services our medical business as well as our animal health business.”
(CX 8012 (Breslawski, Dep. at 11-12)).

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

44. Schein’s gross margins for private practices are higher than for larger customers. (Meadows, Tr. 2520-2523; Foley Tr. 5433; CX0310 (Steck, IHT at 90)).

Schein’s Response:

This is a misleading assertion. Gross margins are sales price minus manufacturer’s cost. Gross margins, therefore, exclude sales costs, including all costs associated with maintaining a field sales force (including Fields Sales Consultant (“FSC”) commissions), which are *marginal* or *variable* costs. Net margins, which account for such costs as well as manufacturer chargebacks, are *lower* for private practice dentists than for larger customers, such as DSOs. (See CX 0301 (Cohen, IHT at 25-26); CX 0314 (Guggenheim, IHT at 110-11); CX 0311 (Sullivan, IHT at 50); *see also* Marshall, Tr. 3115 [REDACTED]; [REDACTED]; Meadows, Tr. 2523). Thus, while gross margins may technically be higher for private practice dentists than for larger customers, the statistic is irrelevant, as the reverse is true for net margins.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

45. Schein's largest customer segment is private practices rather than corporate practices. (Sullivan, Tr. 4035).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

46. Schein has several divisions, including dental, medical, and animal health divisions. (Sullivan, Tr. 3873-3874).

Schein's Response:

Schein has two dental divisions, Special Markets and Henry Schein Dental. (Foley, Tr. 4513). In addition, Schein also has a medical division. (Sullivan, Tr. 3873-74). During most of the relevant period, Schein also had an animal health business. (Sullivan, Tr. 3873-74).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

47. Tim Sullivan was the President of Schein's U.S. dental division from 2004 through the end of 2018. (Sullivan, Tr. 3871).

Schein's Response:

Schein operates in the U.S. dental distribution market through two separate divisions, each with its own president. From 1997 to 2018, Tim Sullivan was Vice President (1999-2004) or President (1997-1999, 2004-2018) of the U.S. business of Henry Schein Dental ("HSD"). (CX 0311 (Sullivan, IHT at 11-12); Sullivan, Tr. 3867). From 2008 to 2018, Hal Muller was President of Special Markets. (CX 0309 (Muller, IHT at 8); CX 8005 (Muller, Dep. at 8)).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

D. Competition Among the Big Three

48. Benco identifies Schein and Patterson as its primary or largest competitors. (Cohen, Tr. 425; Ryan, Tr. 1019; CX0301 (Cohen, IHT at 42)).

Schein's Response:

No response.

Patterson's Response:

Both Cohen and Ryan testified that Schein and Patterson are Benco's "largest" competitors, but Cohen did not agree that Patterson and Schein were Benco's most "significant" or "dominant" competitors, explaining "I see every competitor as significant, and in different markets there are smaller players that are very aggressive and are always trying to steal customers from us and we're trying to get their customers from them." (Cohen, Tr. 425).

Benco's Response:

Complaint Counsel's proposed finding is incomplete and mischaracterizes the prior testimony. Benco's competitors include any entity that sells products or supplies to dental practices. (CX0301 (Cohen, IHT at 42)). These include not only Schein and Patterson, who are the largest companies in the industry, but also independent dealers similar to Benco, such as Atlanta Dental and Burkhart Dental. (CX0301 (Cohen, IHT at 42)). Benco also faces competition from lower price, lower margin competitors such as Safco or Darby, and from independent service technicians who repair equipment. (CX0301 (Cohen, IHT at 42)). Benco views every competitor as significant, and recognizes that smaller competitors are aggressive in trying to take market share from Benco. (Cohen, Tr. 425). Full service competitors, in addition to Schein and Patterson, exist in individual markets. (Cohen, Tr. 430).

49. Schein identifies Benco and Patterson as its primary or largest competitors. (Sullivan, Tr. 3877, 4065; Steck, Tr. 3804; Cavaretta, Tr. 5536, 5540; CX5021 at 013 (Henry Schein, Inc. 2017 Annual Report)).

Schein's Response:

Schein has many competitors. Schein does not consider any single competitor to be "primary." (CX 0311 (Sullivan, IHT at 54-55 ("It varies by market even within the U.S. dental business.... [E]very market is unique."))). Rather, for a given customer, any distributor that the customer would consider using as his or her distributor would be a primary competitor of Schein's. (CX 0311 (Sullivan, IHT at 54 ("[I]n Memphis or in Knoxville, you know, Nashville Dental, they might be a bigger player than Patterson or Benco in that market."))). Schein does not contest, however, that Patterson is its largest

competitor (by revenue), and that Benco is likely the third or perhaps fourth largest (by revenue).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

50. Patterson identifies Schein and Benco as its primary or largest competitors. (Guggenheim, Tr. 1543, 1756; Rogan, Tr. 3511, 3602; McFadden, Tr. 2689, 2748; Titus, Tr. 5286-5287; Cavaretta, Tr. 5536-5537, 5540; CX0314 (Guggenheim, IHT at 48-51)).

Schein's Response:

No response.

Patterson's Response:

The cited testimony supports the fact that Schein and Benco are Patterson's largest competitors, but it does not support the statement that "Patterson identifies Schein and Benco as its primary . . . competitors." Patterson competes with a large number of dental competitors across the country, and these competitors were identified by Guggenheim and Rogan in the cited testimony. Both Guggenheim and Rogan put the number of these competitors in the "hundreds." (Guggenheim, Tr. 1736; Rogan, Tr. 3601). When asked who he viewed as Patterson's competitors, Guggenheim responded: "obviously, Henry Schein would be the largest, and then we had Benco Dental and then the regional distributors . . . those are Burkhart and the Goetzes and the Nashvilles and Atlanta Dental. And then there's a lot of—unknown numbers of small, independent . . . distributors of dental products in every market." (Guggenheim, Tr. 1756). Similarly, Tim Rogan testified that there were "hundreds" of distributor competitors. (Rogan, Tr. 3601). Burkhart's Jeff

Reece listed Darby, Amazon, Scott’s Dental, Midway and Midwest as other competitors, and concluded by explaining “I mean, they are all over the place,” (Reece, Tr. 4455). In the cited testimony of Mr McFadden, he characterized Schein as Patterson’s “fiercest competitor” and that Patterson “competed hardcore against schein and Benco on a daily basis.” (McFadden, Tr. 2689, 2748). Curiously, Complaint counsel cites the testimony of two Schein employees, Joe Cavaretta and Kathleen Titus, in support of the statement that “*Patterson* identifies Schein and Benco as its primary . . . competitors.” (emphasis added).

Benco’s Response:

Benco has no specific response to the proposed finding.

51. Schein, Patterson, and Benco compete against each other on price. (Cohen, Tr. 662, 936-937; Sullivan, Tr. 3932; Ryan, Tr. 1241, 1266-1267; Misiak, Tr. 1371, 1450; McFadden, Tr. 2748, 2758-2759, 2780-2781; Rogan, Tr. 3615, 3620; Steck, Tr. 3800-3801; Titus, Tr. 5286-5287; Cavaretta, Tr. 5536-5537, 5540, 5548; Baytosh, Tr. 1905).

Schein’s Response:

Schein competes against all distributors across a wide variety of competitive dimensions, which may include price, depending on the customer or situation. (Cavaretta, Tr. 5548; Sullivan, Tr. 4058-60).

Patterson’s Response:

Patterson competes against Schein, Benco, and all of its other competitors in a number of ways, including on price. *See* PF ¶¶ 10–64.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the prior testimony. Benco prices its supplies and equipment similar to Schein and Patterson, and competes by offering a better value-added service. (Cohen, Tr.

431-32). Benco's caring family culture is reflected in its pricing. (Cohen Tr. 671-73). Benco's prices are based on the overall value and service that it offers its customers. (Cohen Tr. 414, 671). Benco's goal is to justify the payment of its catalogue prices for dental supplies by providing an exceptional customer experience. (Id.) Benco delivers on this value proposition through its "Hug Pricing" by providing to its customers concierge free goods, Elite Dental Alliance, 5% Solution, Painless® value shopper, customer reviews, and Bluchips. (RX1113)

52. Schein, Patterson, and Benco offer discounts and lower price programs to attract new customers. [REDACTED]; Cohen, Tr. 465, 471-472 (EDA), 645, 936-937; [REDACTED]; Steck, Tr. 3806-3807; Guggenheim, Tr. 1751-1752; Misiak, Tr. 1450, 1489-1490; McFadden, Tr. 2760, 2765, 2846; Rogan, Tr. 3615-3617; CX8025 (Sullivan, Class 30b6 Dep. at 44-46)).

Schein's Response:

There are many reasons Schein might offer a discount. Schein offers discounts to, for example, attract new customers, retain existing customers, or encourage additional sales from existing customers. (Steck, Tr. 3615-16; CX 8033 (Cavaretta, Dep. at 248-50); CX 8000 (Porro, Dep. at 109-11)).

Patterson's Response:

Patterson offers discounts for a variety of reasons, including attracting new customers and stealing customers from its competitors—including from Schein and Benco. See PF ¶¶ 10–64.

Benco's Response:

While Benco will, on occasion, offer discounts or lower prices to attract new customers, this is only one part of Benco's pricing strategy. For further discussion of Benco's pricing strategy, Benco refers the Court to its response to ¶ 51.

53. Dentists are willing to switch between the Big Three to take advantage of lower prices. (Cohen, Tr. 668, 938-941; Sullivan, Tr. 3932; McFadden, Tr. 2846; Ryan, Tr. 1129-1130; Mason, Tr. 2405-2406; [REDACTED]; CX0149 at 001).

Schein's Response:

While a few dentists may be willing to switch from one distributor to a different distributor (any distributor, not just Schein, Patterson, or Benco), many dentists are reluctant to switch their primary distributor. (Kois Sr., Tr. 226-27 (loyal to Burkhardt for his "entire career"); Meadows, Tr. 2508-09 (customer switching distributors would "have to gather up invoices ... or pull down report[s]" to set up new account and the "customer would have to educate their team on how to use the new website")); Many dentists, for example, have established long-term relationships with their FSCs, have developed preferences for their existing supplier's selection of products and services, or are otherwise resistant to change in response to a price discount. (Sullivan, Tr. 4086 (confirming, based on 30 years in the dental industry, that customers often value their relationship with their FSC more than a discount on supplies); Meadows, Tr. 2509 (FSC relationships "are very longstanding"); Steck, Tr. 3802 (customers stay with FSCs even when they switch companies); Kois Sr., Tr. 175 ("[W]e have brand loyalty"); Reece, Tr. 4406 ("Each dentist tends to like their own products and their own brands, and so they become loyal to those.")). Complaint Counsel has introduced no evidence of the cross-elasticity of demand among distributors, and therefore, there is no reliable evidence concerning the relationship between pricing and switching distributors.

The evidence in the record also shows that, in response to lower prices, the most likely result is that existing customers will take advantage of the price decrease with their

existing distributor, resulting in high levels of cannibalization and limited incremental volume. (Steck, Tr. 3757-59).

Patterson's Response:

Dentists switch between distributors, including but not limited to Patterson, Benco and Schein, for a number of reasons, with price only being one of the reasons for switching.

(CX8013 (Fruehauf, Dep. at 43 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED])).

Benco's Response:

The proposed finding improperly lumps together all three Respondents, and, in doing so, seeks to use facts pertaining to one or more other Respondents to extend to Benco. The cited testimony does not establish that dentists are willing to switch to or from Benco based on price. Since the proposed finding is wholly without any factual basis as to Benco, the court should disregard the proposed finding as to Benco.

54. Respondents have taken market share from each other by offering lower prices. (Cohen, Tr. 645; Guggenheim, Tr. 1728-1729; Misiak, Tr. 1448-1450, 1452-1453; Steck, Tr. 3800-3891).

Schein's Response:

Schein has grown its market share by competing across a wide variety of competitive dimensions, which may include price, depending on the customer or circumstance. Schein believes that its market share growth is primarily attributable to its emphasis on providing a full range of dental products and services, including (i) high-touch

customer service, which provides dentists with the tools needed to run their businesses and grow their practices, (ii) a wide selection of branded and private label supplies, (iii) a wide selection of equipment, (iv) superior technical service, (v) business solutions, (vi) practice management software and I.T. solutions, and (vii) a host of other products and services. (Cavaretta, Tr. 5541-42; Sullivan, Tr. 4058-60; CX 0311 (Sullivan, IHT at 61); SF 8-19).

Patterson's Response:

Patterson competed “tooth-and-nail” “every day”—in a variety of ways including offering lower prices—in order to take market share from its competitors throughout Complaint Counsel’s alleged conspiracy period. *See* PF ¶¶ 10–64.

Benco's Response:

While Benco will, on occasion, offer discounts or lower prices to gain market share, this is only one part of Benco’s pricing strategy. For further discussion of Benco’s pricing strategy, Benco refers the Court to its response to ¶ 51.

55. Distributors can steer customers to different manufacturers, meaning dentists are willing to switch brands. (CX8017 (Rogan, Dep. at 83-84); CX0310 (Steck, IHT at 253-254)).

Schein's Response:

Schein does not have the ability to “steer customers to different manufacturers”. It can recommend products or services, which it does based on the needs of the dentist.

Patterson's Response:

This is a very broad, vague statement that is not supported by the cited testimony. Tim Rogan’s cited testimony pertained to Patterson territory reps’ autonomy to carry different manufacturers as they see fit, not their ability to steer dentists’ brand or product preferences as a general matter. (CX8017 (Rogan, Dep. at 83–84 (“Q. Under circumstances when a manufacturer such as Dentsply starts selling products that -- selling

products directly that Patterson had distributed for them, have there been times when Patterson's territory reps acted to move customers to -- from the manufacturer, such as Dentsply, to a different manufacturer? A. Absolutely. They -- territory reps run their own territory. They can decide to sell whoever's product they want to. If they had a bad experience like Shaun Cobb did in this, he could start selling 3M stuff the next day and decide he's not happy with Dentsply or somebody -- some other company that sells similar products. We sell almost a hundred thousand different SKUs, probably 400, 500 different vendors. So, yeah, they have lots of choices.”))). And Dave Steck testified that a Schein sales representative might be able to steer a customer away from a particular product by promoting a competing product, but he did not know of a specific instance of it happening but thought it does happen. (CX0310 (Steck, IHT at 253–54)).

Numerous witnesses testified that dentists sometimes have strong product preferences. Dr. John Kois Sr. explained that he only works with the products he thinks are best. (Kois, Tr. 175–76). John Kois Jr. explained, “Some people have personal preferences, some people don't. Some people like a particular glove brand, some people don't. . . . Some people have a certain type of composite that they like. It's really dependent on what the dentist likes.” (CX0321 (Kois Jr., IHT at 71)). Justin Puckett of MB2 was asked whether “dentists have individual preferences on something that laypeople might think are as simple as gloves” and responded “Yes. They have opinions on which cotton rolls are better.” (CX8006 (Puckett, Dep. at 195)).

Benco's Response:

The proposed finding does not relate to Benco. The testimony cited refers to a Patterson witness discussing Paterson business and a Schein witness discussing Schein business. The proposed finding improperly lumps Benco in with the other two Respondents

when, in fact, Complaint Counsel has cited no evidence that the proposed finding is true with respect to Benco. Moreover, the testimony cited does not support the proposed finding. The most charitable interpretation of the testimony cited by Complaint Counsel is that individual sales representatives for Patterson and Schein—not the corporate entities themselves—may attempt to steer customers to certain products as a result of certain external factors. The testimony does not support in any respect Complaint Counsel’s extrapolation that dentists are willing to switch brands.

56. Benco identifies Schein as its top competitor for corporate dental practices. (Cohen, Tr. 806; *see also*, Cohen, Tr. 426-428).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding mischaracterizes the testimony of Mr. Cohen. The cited testimony indicates that Mr. Cohen is unaware of Schein’s share of the DSO market, but “imagine[s]” it is “north of 50 percent.” (Cohen, Tr. 428). This is down from the 85 to 90 percent of the DSO market that Mr. Cohen believed Schein possessed in 2008-2009. As no time does Mr. Cohen characterize Schein as Benco’s “top competitor for corporate dental practices.”

III. DENTAL INDUSTRY BACKGROUND

A. Industry Definitions

1. Independent Dentist

57. The vast majority of dentists are independent dentists. (Misiak, Tr. 1425-1426 (private practice today represents 70% of the total market and represented 75-80% of the market in 2013); Rogan, Tr. 3427, 3449 (historically, more than 90% of the dental business was private practice dentists; now about 75% are private practice); CX0303 (McElaney, IHT at 40) (“majority of all dentistry is solo practitioner”); CX3105 at 042; RX0043 at 006)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

The only evidence cited by Complaint Counsel in its proposed finding of fact that relates in any way to Benco is the testimony of Michael McElaney that the majority of all dentistry is solo practitioner. This out-of-context statement does not support Complaint Counsel’s assertion that the *vast* majority of dentists are independent. Moreover, Mr. McElaney is a Benco employee, not a member of Benco’s senior leadership team. Moreover, at the time of Mr. McElaney’s testimony, he was only the *acting* director of northeast sales. (CX0303 (McElaney, IHT at 40)). Accordingly, the cited testimony contains only the statements and impressions of Mr. McElaney, not of Benco as a whole.

58. Independent dentists are solo practitioners who own their dental practices or small group dental practices with one or a few locations. (Steck, Tr. 3676-3678; Mason, Tr. 2324 (“a dentist who owns less than five practices”); Reece, Tr. 4364-4365; CX0322 (Maurer, IHT at 11-12) (“a dentist that owns the practice”)).

Schein’s Response:

There are multiple definitions of independent dentists. Schein agrees that sole practitioners who own their dental practices are independent dentists. Schein generally

considers single-location practices with a small group of dentists to be independent dentists. Multi-location practices are considered “group practices,” which may be distinct from independent dentists.

Patterson’s Response:

No specific response.

Benco’s Response:

Since the proposed finding is wholly without any factual basis as to Benco, the court should disregard the proposed finding as to Benco.

59. Independent dentists are often referred to as “private practices.” (Sullivan, Tr. 3904) (private practice dentists are sometimes referred to as independent dentists); Rogan, Tr. 3427; CX8012 (Breslawski, Dep. at 20); CX0314 (Guggenheim, IHT at 59-60) (a private practice is a privately owned dental practice with generally one or two locations); CX8031 (Steck, Dep. at 22) (a private practice is where dentist owns sole equity in the practice)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Since the proposed finding is wholly without any factual basis as to Benco, the court should disregard the proposed finding as to Benco.

2. Corporate Dentistry

60. Dental Service Organizations (“DSOs”) consist of large group practices that have multiple locations combined under a single ownership structure and are part of a corporation. (Cohen, Tr. 808, 411-412; Foley, Tr. 4512; CX0310 (Steck, IHT at 126); CX0301 (Cohen, IHT at 39); Guggenheim, Tr. 1539, 1687-1688; Misiak, Tr. 1310, 1313-1314; CX8021 (Reece, Dep. at 24); [REDACTED]).

Schein's Response:

DSOs take many different organizational forms. In most cases, DSOs consist of multiple locations. DSOs provide administrative support services to those locations, and typically have (all or partial) ownership and/or contractual control over the non-clinical aspects of the location. (Puckett, Tr. 2203; Mason, Tr. 2326 (“Q. And do the DSOs own all of these practices? A. It depends on the way they’re structured.”); SF 20-26, 57-58).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel’s proposed finding is incomplete and ignores the key feature of DSOs that separates them from buying groups—that the single ownership structure of DSO’s can require compliance with purchasing decisions. “Compliance” means that someone can make a commitment for purchasing and then actually deliver on that commitment. For example, if a group has 100 locations, and the group says that all 100 are going to buy their products from Benco, the group can “flip a switch” and all 100 do in fact buy their products from Benco. (Cohen, Tr. 684-685; RX1127-487-88). Where Benco can be assured that compliance will happen, Benco can lower its costs to serve and lower pricing to the customer without anyone coming between Benco and the customer. (Cohen, Tr. 692; Ryan, Tr. 1166-67). Accordingly, Benco sells to DSOs with common ownership because such common ownership can compel compliance. (Ryan, Tr. 1166-67).

61. Large DSOs can have upwards of 20-25 offices. (CX0314 (Guggenheim, IHT at 61); CX0306 (Foley, IHT at 15)).

Schein's Response:

Some DSOs have more than 20 offices. Some DSOs have fewer. (CX 0305 (Cavaretta, IHT at 25-26)).

Patterson's Response:

As far as Patterson is aware, this is true for at least some DSO. For example, Heartland has over 800 locations. (Misiak, Tr. 1428).

Benco's Response:

Since the proposed finding is wholly without any factual basis as to Benco, the court should disregard the proposed finding as to Benco. From Benco's perspective, the size of a DSO is not a key consideration when determining whether, consistent with Benco's policy, it will sell to the DSO. (RX1143-047). Rather, if a DSO has common ownership and can enforce compliance with purchasing decisions, Benco will sell to the DSO. (Cohen, Tr. 684). Consistent with Benco's "No Middleman Policy," buying groups do not put anyone between Benco and its customer. (Cohen, Tr. 445.)

62. Smaller DSOs (sometimes called "mid-market" customers) can range from 3-20 locations. (CX0310 (Steck, IHT at 26); Sullivan, Tr. 3901-3902 (a DSO is essentially a corporate dental chain)).

Schein's Response:

Some DSOs have fewer than 20 locations. They are not "called 'mid-market' customers." In 2014, Schein created its Mid-Market group within HSD to serve a variety of customers, including community health centers ("CHCs"), buying groups consisting of community health centers, group practices (private practice dentists with more than three locations), certain (typically smaller) DSOs, and buying groups consisting of independent

dentists. The distinction between group practices and small DSOs is not always clear. (Sullivan, Tr. 4112; Steck, Tr. 3690; Cavaretta, Tr. 5587-88; Meadows, Tr. 2481).

Patterson's Response:

No specific response.

Benco's Response:

Since the proposed finding is wholly without any factual basis as to Benco, the court should disregard the proposed finding as to Benco. By way of further response, Benco refers the Court to its responses to ¶ 61.

63. DSOs are sometimes referred to as Management Service Organizations ("MSOs"). (Foley, Tr. 4510 (DSO and MSO are "identical but used interchangeably."), [REDACTED]; Titus, Tr. 5291-5292 (MSO and DSO are interchangeable); CX8025 (Sullivan, Dep. at 236-237) (sometimes no difference between an MSO and a DSO, a DSO may be more likely to own a practice while an MSO provides management services); CX8010 (Titus, Dep. at 60-61) (MSO and DSO are interchangeable words); CX8003 (Foley, Dep. at 106-107) (MSO and DSO terminology is interchangeable); CX0304 (Ryan, IHT at 48-49); CX8005 (Muller, Dep. at 244); CX0309 (Muller, IHT at 143); CX8006 (Puckett, Dep. at 109-110); CX0307 (Kyle, IHT at 146)).

Schein's Response:

The term MSO is not always used consistently, and can refer to entities that some might consider a DSO, to entities that some might consider a buying group of independent dentists, or to some other organization types. (Meadows, Tr. 2419-20 ("Managed service organization. It's just another term that a buying group would like to refer themselves as..."); CX 0305 (Cavaretta, IHT at 18); CX 8033 (Cavaretta, Dep. at 50-51)). Some DSOs may be referred to as MSOs, especially where there is limited or no equity ownership by the DSO in the individual locations. In such cases, control is exerted through a management services contract, hence the term MSO. (CX 0311 (Sullivan, IHT at 209); CX 0309 (Muller, IHT at 141)). Many buying groups of independent dentists, however, are

also called MSOs because they too provide some (usually limited) set of services, including management services, to their members. (Steck, Tr. 3721, 4093; CX 0311 (Sullivan, IHT at 209); CX 0305 (Cavaretta, IHT at 18)). Thus, in the absence of ownership, the extent of the management services and control exerted by the entity is a matter of business strategy for the entity and negotiation/selection by the dentist.

Patterson's Response:

No Patterson witness was asked about the term “MSO” at trial or in any deposition or investigational hearing.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited evidence. Complaint Counsel's quotation of Mr. Foley's testimony is inaccurate. Mr. Foley, in fact, stated “We rarely referred to MSOs. They in my—my thought pattern would be a DSO, a dental service organization, so they're identical but *sometimes* used interchangeably.” (Foley, Tr. 4510 (emphasis added)). Furthermore, as the testimony cited by Complaint Counsel indicates, MSOs and DSOs are simply not the same. As Mr. Sullivan testified, “*Sometimes* there is no difference” between an MSO and a DSO. (CX8025 (Sullivan, Dep. at 236-237)). It is typically not the case that MSOs actually own the practice groups. ((CX8025 (Sullivan, Dep. at 237))).

Benco's policy determines who Benco considers its customer and which entities Benco will sell to as a single customer, not the terminology the entity uses to describe itself. It is important for Benco to determine who the customer is because Benco's belief is that no one should come between Benco and its customers. (Cohen, Tr. 679). Whether a single-ownership organization is styled as a DSO or an MSO is not relevant to Benco's inquiry. (Ryan, Tr. 1168-69). In terms of Benco's policy, the customer is the person who makes

the purchasing decisions and then pays the bills at the end of the transaction. (Cohen, Tr. 679-80).

64. DSOs and MSOs make the purchasing decisions for dental practices. (Sullivan, Tr. 3902 (DSOs and MSOs control their members and contractually drive volume); Foley, Tr. 4513; Misiak, Tr. 1310-1311; Guggenheim, Tr. 1767-1768; Ryan, Tr. 1166; CX8033 (Cavaretta, Dep. at 52-53) (some MSOs have the ability to control purchasing decisions)).

Schein's Response:

DSOs make the purchasing decisions of their dental practices. Some MSOs also make purchasing decisions for dental practices. Other MSOs do not make purchasing decisions for dental practices. (CX 8033 (Cavaretta, Dep. at 52-53 ("Some MSOs have the ability to drive the compliance, and it usually happens when they have equity in the practices. There's other MSOs that are just providing the services, and they let the independent -- they let the doctor run the practice however they want without the procurement component of it."))).

Patterson's Response:

No specific response. *See also* JFOF ¶¶ 42–45 (explaining DSOs' centralized ordering process and ability to commit to volume purchases).

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited evidence. The evidence adduced in this case is clear that many MSOs do not make enforceable purchasing decisions for their independent member practices. It is typically not the case that MSOs actually own the practice groups. (CX8025 (Sullivan, Dep. at 237)). Groups that lack common ownership cannot compel compliance at all. (Ryan, Tr. 1166-67).

Benco considers DSOs single customers that can enforce purchasing compliance. (Ryan, Tr. 1166). Where Benco can be assured of such compliance, Benco can lower its costs to serve and lower pricing to the customer without anyone coming between Benco and the customer. (Cohen, Tr. 692; Ryan, Tr. 1166-67). In the past, part of Pat Ryan's duties at Benco was to discern whether a group that approached Benco had common ownership or not. (Cohen, Tr. 681). In order to determine whether the group had common ownership—and therefore complied with Benco's No Middlemen Policy—Mr. Ryan would discuss with the group its ownership structure, look at the group's website, talk to other Benco sales employees, and conduct other independent research on the group's ownership structure. (Ryan, Tr. 1167). Benco would sometimes visit the organizations locations or ask for documentation to verify the information provided and the ensure Benco was entering into a relationship with an organization that could enforce compliance. (Cohen, Tr. 681-82). What the group calls itself (whether a DSO, buying group, MSO, or something else) does not impact Benco's evaluation of the ownership structure and application of its policy. (Ryan Tr. 1168-69).

65. Like DSOs, MSOs own or manage dentist practices. (Foley, Tr. 4512; CX8009 (Wingard, Dep. at 25-26) (most of the time MSOs have a common ownership structure); CX8033 (Cavaretta, Dep. at 50) (MSOs manage the front end of a dentist's office, some for a fee and some in exchange for equity in a practice); CX0305 (Cavaretta, IHT at 18); CX0309 (Muller, IHT at 141); CX8020 (Brady, Dep. at 251-252) (an MSO provides bookkeeping services, HR management, or a multitude of management-related services)).

Schein's Response:

MSOs typically do not have ownership in their dental practices. Some MSOs manage dental practices; other MSOs do not have complete managerial control over the dental practices. (CX 8033 (Cavaretta, Dep. at 52-53)).

Patterson's Response:

No specific response.

Benco's Response:

As Benco noted in its responses to ¶¶ 63 and 64, while MSOs provide certain management services to independent dental practices, it is not the case that MSOs typically have common ownership.

66. Examples of DSOs include Heartland Dental, Pacific Dental, Aspen Dental, Great Expressions, and MB2 Dental Solutions. (Misiak, Tr. 1310 (Heartland); Foley, Tr. 4645 (Pacific); Sullivan, Tr. 3903 (Aspen); Foley, Tr. 4543 (Great Expressions was one of Schein's largest customers and received DSO pricing); Puckett, Tr. 2201-2202 (MB2)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

3. Buying Group

67. Dental buying groups are organizations of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately-managed dental practices in exchange for lower prices on dental products. (Kois, Jr., Tr. 348-349; Sullivan, Tr. 3899 (buying group “mean[s] a group of customers that get together and form a group to negotiate with their larger volume”), 3941; Guggenheim, Tr. 1566 (a buying group is a collection of customers that work together to leverage buying power to secure pricing); Meadows, Tr. 2418-2419; Steck, Tr. 3681-3683; Goldsmith, Tr. 1936, [REDACTED]; Cohen, Tr. 432-433; Reece, Tr. 4365; CX0301 (Cohen, IHT at 106); CX8004 (McFadden, Dep. at 19-20 (“[A] buying group is a group of independent dentists that get together to form a group in order to get discounted dental supplies.”); CX2020 at 004 (draft proposal to Atlantic Dental Care by Schein's Michael Porro stated, “This agreement can be terminated with 30 days notice if any of the following occur: If this turns out to be a purely a buying group, defined as ‘pooling individual volume purely to

obtain lower prices from suppliers of goods and services.”); CX2487 at 002 (as recognized by Schein, buying groups “seek to leverage their purchasing power” to extract lower prices); CX1156 at 001 (Benco’s Patrick Ryan wrote: “Group Purchasing Organizations. They aggregate the purchase volume of unrelated entities in order to leverage price.”)).

Schein’s Response:

Buying groups come in a variety of different forms. (*See* SF 35-76). For example, some buying groups do not have any independent dentists as members, but rather have CHCs as members. (Ryan, Tr. 1134; CX 8005 (Muller, Dep. at 27); CX 8020 (Brady, Dep. at 206)). Some buying groups do have independent dentists as members. (*See* SF 35-76). Of those buying groups, many *claim* to aggregate and leverage the purchasing volume of their members in order to obtain lower prices. (Baytosh, Tr. 1883; Mason, Tr. 2326). In fact, very few, if any, buying groups actually aggregate or leverage the purchasing volume of their members, since they lack any control over, or the ability to make any commitments concerning, their members’ purchases. (Cavaretta, Tr. 5568-69; Baytosh, Tr. 1907; Mason, Tr. 2394; Goldsmith, Tr. 1970; Maurer, Tr. 4964; Puckett, Tr. 2240).

Patterson’s Response:

Entities called “buying groups” take many forms, and there is no one-size-fits-all definition. Patterson’s Neal McFadden testified that “buying groups were not all created equally. And they were like a jar of jellybeans. They each tasted differently.” (CX8004 (McFadden, Dep. at 119–20)). Thus, there is confusion in the record over what qualifies as a “buying group.” Three of the most critical entities in this case alleged to be “buying groups,” for instance—the Kois Buyers’ Group, Smile Source, and NMDC—all stated that they were not buying groups. PF ¶¶ 106–09, 282, 608. Additionally, it is unclear that a group like the Kois Buyers Group, as it existed in late 2014, would be properly characterized as an “organization[] of independent dentists,” in that it was formed not by

its individual dentist members but by Qadeer Ahmed and his companies along with Dr. John Kois. [REDACTED]). It is also unclear whether Smile Source would be considered an “organization[] of independent dentists,” in that it was formed by a group of corporate executives. CCFF ¶ 153.

Benco’s Response:

Complaint Counsel’s proposed definition of buying groups lacks a key element—that buying groups do not have common control of purchasing decisions and therefore cannot drive compliance. Only those groups that have common ownership or control can compel compliance in purchasing decisions. (Cohen, Tr. 684). In order for Benco to sell to an entity as a single customer, there must be common ownership of separate dental practices. (RX1127-486; Ryan, Tr. 1165-66). Leveraging of collective purchasing power can only result in lower prices if the seller is able to rely on the buyer’s volume commitments. (Cohen, Tr. 692; Ryan, Tr. 1166-67). Where Benco can be assured that compliance will happen, Benco can lower its costs to serve and lower pricing to the customer without anyone coming between Benco and the customer. (Cohen, Tr. 692; Ryan, Tr. 1166-67).

68. Buying groups are also referred to as buying clubs or buying cooperatives (or co-ops). (Foley, Tr. 4551 (Buying co-op is a buying group); Misiak, Tr. 1366-1367 (use of the terms coop, buying group and GPO were used interchangeably); Ryan, Tr. 1022 (Buying cooperative interchangeable with buying group)).

Schein’s Response:

The terms buying group, buying club, and buying co-operative are often used interchangeably, though there may be non-salient differences in their organizational structures. (See Mason, Tr. 2327-28). The term GPO is sometimes used interchangeably

with the term buying group, but can also refer to something entirely different, namely an organization typically found in the medical industry that negotiates directly with manufacturers to obtain lower costs of products sold either directly or through distribution. (Rogan, Tr. 3428-31; CX 0311 (Sullivan, IHT at 114); CX 0318 (Smurr, IHT at 28)).

Patterson's Response:

Some may refer to buying groups by other terms like “co-ops,” but others, like Dr. Brenton Mason of New Mexico Dental Cooperative, testified that a buying group is different from a co-op, and that NMDC was a co-op, not a buying group. (Mason, Tr. 2327-2 (“Q. Can you explain the difference then between a dental co-op and a buying group? A. The buying group deals with mostly the insurance -- or I'm sorry -- mostly the dental supplies and the dental equipment. The cooperative deals with the entire business.”); Mason, Tr. 2364-65 (“I take it that you have a view that a dental cooperative is a very different animal from a buying group, so am I correct? A. I do believe that. Q. Now, what you've been talking about is a dental cooperative, not a buying group. A. Correct.”)).

Benco's Response:

The testimony of Pat Ryan, the only Benco employee whose testimony is cited in Complaint Counsel's proposed finding of fact, makes clear that Mr. Ryan was speaking for himself, not on behalf of Benco. (Ryan, Tr. 1022). The court asks of Mr. Ryan's statement that buying cooperatives are interchangeable with buying groups, “When you're giving us these definitions, sir, is this your personal definition or is this the official definition? Are you speaking for the company or for yourself here?” (*Id.*). Mr. Ryan responds, “I'm speaking for myself.” (*Id.*).

69. During the conspiracy period, buying groups were also referred to as group purchasing organizations (“GPOs”). (Cohen, Tr. 437-438 (testifying that he thought buying group and GPO meant the same thing, and used the terms interchangeably, before his investigational hearing); Guggenheim, Tr. 1566-1567 (in the dental industry, the terms GPO and buying groups are used synonymously); Steck, Tr. 3685; CX8031 (Reece, Dep. at 26); CX0301 (Cohen, IHT at 106-107); Meadows, Tr. 2419; Foley, Tr. 4510-4511; CX0311 (Sullivan, IHT at 115); CX8004 (McFadden, Dep. at 22); CX1156 at 001 (Benco’s Director of Sales stating GPOs are “exactly the same” as buying groups); CX0301 (Cohen, IHT at 106-107); CX0314 (Guggenheim, IHT at 163-164); CX1084 at 001 (“Group Purchasing Organization (GPO): A group of independent offices that join together to leverage their purchasing power for a bigger discount.”)).

Schein’s Response:

The proposed fact improperly assumes there is a conspiracy period. In many cases, individuals used the terms GPO and buying group interchangeably. In a number of instances, they did not. (*E.g.*, CX 8012 (Breslawski, Dep. at 29 (“I believe that they’re actually quite different.”)); CX 0308 (Mlotek, IHT at 87-88); CX 8001 (Foster, Dep. at 61 (“I know a GPO is a completely separate animal...”)); McFadden, Tr. 2675-76 (“I wouldn’t say they were used interchangeably. We came to learn that they were indeed two separate things.”); CX 0322 (Maurer, IHT at 88)).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony. While Mr. Cohen testified that he previously thought that “buying group” and “GPO” were synonymous, he never testified that he *used* those terms interchangeably, stating, in response to Complaint Counsel’s questioning, that he would have to look at prior documents to see whether the terms were used interchangeably. (Cohen, Tr. 437-38). No such documents were produced to Mr. Cohen for his review.

Moreover, Complaint Counsel's use of the term "conspiracy period" is inaccurate and mischaracterizes the evidence in this matter. As was made clear throughout trial, Complaint Counsel have failed to establish parallel conduct by Respondents, and failed to establish that Respondents entered into a conspiracy. Before, during and after¹ the alleged conspiracy period, Benco followed its longstanding no-middleman policy and simply did not do business with buying groups. (Cohen, Tr. 445-46). Not only did Complaint Counsel fail to establish the existence of a conspiracy during the trial, but Complaint Counsel did not even consistently allege when it believed such a conspiracy began. In the Complaint, Complaint Counsel alleged that the conspiracy began as one between Benco and Schein "no later than July 2012." (Complaint ¶ 32). At trial, Complaint Counsel changed tracks, and claimed that the alleged conspiracy between Benco and Schein began at some time in 2011. (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 also* Opening, Tr. 33).

70. While many witnesses testified that they now understand GPO to refer to groups that function like medical GPOs, witnesses admitted that during the 2011-2015 period, they used "buying group" and "GPO" interchangeably. (Cohen, Tr. 433-434; Misiak, Tr. 1308; Rogan, Tr. 3432; Foley, Tr. 4511).

Schein's Response:

While some witnesses sometimes used the terms GPO and buying group interchangeably, in many cases witnesses drew a meaningful distinction between the two,

¹ The only possible exception to Benco's uniform application of its no-middleman policy was when, in 2015, Benco negotiated to form Elite Dental Alliance ("EDA") joint venture between Benco and Cain Watters. As discussed below, EDA was not simply a buying group, and many of the unique attributes of EDA's structure addressed the concerns that underlie Benco's no-middleman policy.

including in their contemporaneous written documents. (SF 624 n.8; CX 2211; CX 2227; CX 2456; CX 8012 (Breslawski, Dep. at 29 (“I believe that they’re actually quite different.”)); CX 0308 (Mlotek, IHT at 87-88); CX 8001 (Foster, Dep. at 61 (“I know a GPO is a separate animal...”)); McFadden, Tr. 2675-76 (“I wouldn’t say they were used interchangeably. We came to learn that they were indeed two separate things.”); CX 0322 (Maurer, IHT at 88)).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony. While Mr. Cohen testified that he previously thought that “buying group” and “GPO” were synonymous, he never testified that he *used* those terms interchangeably, stating, in response to Complaint Counsel’s questioning, that he would have to look at prior documents to see whether the terms were used interchangeably. (Cohen, Tr. 437-38). No such documents were produced to Mr. Cohen for his review.

71. The terms “buying group” and “GPO” are used interchangeably in the dental industry. (Steck, Tr. 3685-3686; CX8004 (McFadden, Dep. at 22); Guggenheim, Tr. 1566 (in the dental industry, the terms “GPO” and “buying groups” are used synonymously); *see also* Guggenheim, Tr. 1567 (within Patterson Dental, there was no distinction between the terms “GPO” and “buying group”); Misiak, Tr. 1366-1367 (terms “co-op,” “buying group” and “GPO” were used interchangeably); Rogan, Tr. 3429 (terms “buying groups” and “GPOs” used interchangeably in the dental business), 3428 (Patterson’s VP for Marketing referred to buying groups as GPOs), 3430 (in Rogan’s 25 years of experience at Patterson, people at Patterson used the term GPO to refer to buying groups); Sullivan, Tr. 3901 (“Q. And you’ve used the term ‘GPO’ to refer to buying groups of dentists? A. Yes. Q. And you’ve used the term ‘GPO’ interchangeably with ‘buying groups.’ A. That is correct. Q. You have heard others at Schein use the terms interchangeably as well? A. Correct.”); Foley, Tr. 4510-4511; Reece, Tr. 4367-4368 (terms used interchangeably at Burkhardt); Meadows, Tr. 2216 (“Q. Have you heard of the term ‘group purchasing organization’ or ‘GPO’ for short? A. I have. Q. And what to you understand a group purchasing organization to be? A. I would – I would I guess analogize it very similar to a buying club or a buying group, just a

different term.”); Meadows, Tr. 2426 (“Q. In this e-mail you referred to buying groups as GPOs; correct? A. I used the term twice -- or excuse me -- yes, I used both terms in this e-mail. Q. You used the words interchangeably. A. Correct.”); Titus, Tr. 5291 (“Q. You use the terms ‘buying group’ and ‘GPO’ interchangeably, don’t you? A. Yes.”); CX8010 (Titus, Dep. at 186 (“Buying groups and GPOs, I consider that an interchangeable term.”); CX0304 (Ryan, IHT at 108) (“Q. Are you familiar with the term ‘buying group’? A. Yes. Q. What does that term mean to you? A. It’s just another word to me for ‘GPOs.’ Q. Are the two terms interchangeable, then? A. To me, they are.”); CX8005 (Muller, Dep. at 28-29) (“Q. You distinguish between GPOs that exist in medical and groups that pool volume for lower prices in dental. A. They’re two different terms and structures for buying groups. You could easily say a GPO is a buying group. . . . Q. Although GPRs and buying groups in dental refer to different entities, sometimes you refer to buying groups as GPOs? A. I think Schein as an organization it is, yes the terms are interchangeable.”)).

Schein’s Response:

While some witnesses sometimes used the terms GPO and buying group interchangeably, in many cases witnesses drew a meaningful distinction between the two, including in their contemporaneous written documents. (SF 624 n.8; CX 2211; CX 2227; CX 2456; CX 8012 (Breslawski, Dep. at 29 (“I believe that they’re actually quite different.”)); CX 0308 (Mlotek, IHT at 87-88); CX 8001 (Foster, Dep. at 61 (“I know a GPO is a completely separate animal...”)); McFadden, Tr. 2675-76 (“I wouldn’t say they were used interchangeably. We came to learn that they were indeed two separate things.”); CX 0322 (Maurer, IHT at 88)).

Patterson’s Response:

Patterson learned over time that GPOs are not buying groups. (CX8017 (Rogan Dep., at 18 (“I try to correct people, because people that aren’t from the dental industry understand what a group purchasing organization is much better than people in the dental industry, and group purchasing organizations in medical has lots of different definitions, meaning they aggregate the spend, they actually are the organization that buys the product, they warehouse the product, they sell the product to the end user.”)); McFadden, Tr. 2675 (“I wouldn’t say they were used interchangeably. We came to learn that they were indeed

two separate things.”); CX8004 (McFadden, Dep. at 20–21 (“Does buying group, in your mind, differ at all from the term GPO or group purchasing organization in the dental products context? A. It does differ today versus my definition and my knowledge of it several years ago. . . . Before I moved up to the corporate office and took the role of president of Special Markets, I really had never heard of a GPO in the dental industry. We did hear about buying groups that were starting to form. And primarily, those were made up of study clubs, a group of independent dentists banding together to form a consortium whereby they would like to have discounted dental supplies. And later, I learned that that was a little different than a group purchase organization.”)).

Benco’s Response:

Benco has no specific response to the proposed finding.

4. Buying Groups Are Distinguished from DSOs and MSOs.

72. Buying groups are distinguishable from dental support (or service) organizations (“DSOs”) and managed service organizations (“MSOs”). (Sullivan, Tr. 3902 (defining DSO and MSO); Steck, Tr. 3689; Foley, Tr. 4512-4513; CX8021 (Reece, Dep. at 63); CCFF ¶¶ 73, 76).

Schein’s Response:

Buying groups are distinguishable from DSOs and some MSOs. Some MSOs, however, are buying groups. (Meadows, Tr. 2419-20 (“Managed service organization. It’s just another term that a buying group would like to refer themselves as...”); CX 0305 (Cavaretta, IHT at 18); CX 8033 (Cavaretta, Dep. at 50-51)).

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

73. A dental practice that joins a DSO or MSO sells its entire practice to another entity or turns over business management and non-clinical operations to another entity. (Meadows, Tr. 2491-2492; Foley, Tr. 4512-4513; CX2835 at 002-010).

Schein's Response:

A dental practice that joins a DSO, or certain types of MSOs, may sell some or all of its equity to the organization, or may enter into a management services contract that gives the organization effective control over the business management and non-clinical operations of the practice. (Steck, Tr. 3687-88; CX 8033 (Cavaretta, Dep. at 52-53); CX 8020 (Brady, Dep. at 252)). A dental practice that joins other types of MSOs, however, receives some (usually limited) set of management services from the MSO, and does not necessarily “turn[] over business management and non-clinical operations to another entity.” (See RX 2962 (Wingard Dep. at 58-59); Steck, Tr. 3687-88; CX 8033 (Cavaretta, Dep. at 50-51)).

Patterson's Response:

This proposed finding describes the most prevalent form of DSO, but DSOs have various forms along a spectrum of what is generally considered a DSO. (CX8006 (Puckett, Dep. at 20 (“[W]e are something unique among the various DSOs, which on the spectrum, you know, you have some that are 100 percent corporately owned and, they employ an associate model. We’re just kind of somewhere on the other end of the spectrum as far as DSOs go.”))). For instance, MB2, which is described as a DSO at Complaint Counsel’s Proposed Finding Number 66, is labelled a “hybrid” DSO because MB2 does not own all of the clinical assets of the dental practices under the MB2 organization. (CX 8006 (Puckett, Dep at 15–16, 19). MB2 is a joint venture with the individual dentists, who retain an ownership interest in their practices ranging from 20 to 50%. (CX8006 (Puckett, Dep.

at 16-17)). MSOs often do not own the dental practice but contract to provide services. (CX8033 (Cavaretta, Dep. at 50 (cited at CCF ¶ 65))).

Benco's Response:

Complaint Counsel's proposed finding is incomplete. Mr. Sullivan testified, "*Sometimes* there is no difference" between an MSO and a DSO. CX8025 (Sullivan, Dep. at 236-237). He further testified that it is typically not the case that MSOs actually own the practice groups. (Sullivan, Dep. at 237). Accordingly, it is incorrect to paint with such a broad brush when defining MSOs.

74. In contrast to DSOs or MSOs, a dental practice that joins a buying group simply pays a fee to gain benefits (such as discount dental products), and continues to exist as an independent business owned by the dentist. (Kois, Sr., Tr. 180-181 (independent dentists pay fee to join Kois Buyers Group); Kois, Jr., Tr. 308, 312-313 (Kois Buyers club negotiates prices for member dentists but has "no role as the manager between the relationship between the vendor and the member of the group other than helping to establish the discount."); Reece, Tr. 4367 (buying groups are generally "group of independent practices that kind of band together, ideally for a common cause or theme, and it's individual ownership."); *see also* [REDACTED]).

Schein's Response:

There are many different types of buying groups. (See SF 35-76). Some require the dental practice to pay a fee to become a member or gain its benefits; others do not. (R. Johnson, Tr. 5488-89 (Klear Impakt does not have a membership fee); CX 8029 (R. Johnson, Dep. at 48 (same))). Some MSOs also require the dental practice to pay a fee to become a member or gain its benefits. (Steck, Tr. 3687-88; CX 8033 (Cavaretta, Dep. at 50-51)). DSOs typically have an ownership interest in the practice, or receive a percentage of the revenues, though this can be true of buying groups as well, such as Smile Source. (Goldsmith, Tr. 1970-71, 2125; RX 2952 (Maurer, Dep. at 42-43); CX 0305 (Cavaretta, IHT at 17-19)).

Patterson's Response:

Some dental practices that join what Complaint Counsel alleges are “buying groups” may pay fees, such as with the Kois Buyers Group. CCF ¶ 74. But others sought a fee (or “vig” or “kickback”) from a distributor like Patterson, and it is unclear whether they also required fees from members. PF ¶¶ 123, 490. For most alleged “buying groups” in the record, there is no evidence as to their structure or whether they charged members a fee. Otherwise, Patterson has no specific response.

Benco's Response:

While certain buying groups may offer discounts to their members, sellers can offer steeper discounts to entities with a common ownership because those entities can drive compliance. (Cohen, Tr. 684; RX1127-486; Ryan, Tr. 1165-66). Without volume commitments, which can only be achieved through compliance, the discount that a buying group can achieve is limited. (Cohen, Tr. 692; Ryan, Tr. 1166-67).

75. With DSOs and MSOs, the dentists lose control of purchasing, company financials, and other business decisions. (Cohen, Tr. 412-413; Meadows, Tr. 2491-2492; Foley, Tr. 4512-4513; Sullivan, Tr. 3903; CX2482 at 001 (“Breakaway is a DSO/MSO combo with complete control of the check book.”); (Steck, Tr. 3774) (Sunrise Dental was not a buying group, rather an MSO or managed franchise)).

Schein's Response:

With DSOs, the individual location does not make the purchasing decisions. For some MSOs, purchasing decisions are made centrally; in others, they are not. (Steck, Tr. 3687-88; CX 8033 (Cavaretta, Dep. at 50-51)). The cited testimony from Mr. Foley also noted that some buying groups had similar, centralized purchasing, within buying groups. (Foley, Tr. 4512 (“I had certain management teams at buying groups or purchasing teams that were centralized, but their members were all very -- all independent dentists.”)).

To the extent that Complaint Counsel is using the cited evidence to suggest that Breakaway and Sunrise Dental are not buying groups, Complaint Counsel's characterizations of the evidence are misleading and incorrect. Mr. Steck did *not* testify that Sunrise was not a buying group, but rather was an MSO. He testified to the *opposite*. (Steck, Tr. 3773-74 ("Q. Did Mr. Meadows approach you about a buying group named Sunrise Dental in 2012? A. Yes... I told him to pursue it."); *see also* Meadows, Tr. 2500-01). Moreover, the email about which he is testifying calls Sunrise Dental a GPO or managed franchise, consisting of offices that are "independently owned" and are only "loosely tied together as a group at this point" and thus, would not "qualify as a Special Markets account." (CX 2955-002). Contrary to Complaint Counsel's inaccurate representation, neither the email nor Mr. Steck's testimony calls Sunrise an MSO. While the email calls Sunrise a "managed franchise," that is no different than Smile Source, which Complaint Counsel contends is a buying group. (CX 2955-001). More importantly, there is no evidence that Sunrise Dental controls the purchasing decisions of its members.

Similarly, Complaint Counsel's claim that Breakaway is a not a buying group mischaracterizes the evidence. Breakaway is not a DSO, does not have equity ownership in all practices, and is a buying group. (Cavaretta, Tr. 5598-99 ("I'd classify Breakaway as a buying group. Q. And how do you know that? A. Because I'm the president of the company [that owns Breakaway]."); *see also* SF 402-45). As Mr. Foley, who also had responsibility for Breakaway testified, Breakaway is the antithesis of a DSO. (Foley, Tr. 4634-35 ("Breakaway is the "anti-DSO" because its "whole premise ... is that they assist dentists ... on how to ... go into practice by themselves."); CX 2190-003 (describing

varying levels of service plans, and programs for “practices [that only] sign up for discounted services such as supplies [that] ... will be handled much like a buying group.”)).

Patterson’s Response:

Patterson joins Benco’s response.

Benco’s Response:

Complaint Counsel’s proposed finding mischaracterizes the advantages to both buyers and sellers of dental equipment and supplies when a single owner of a group can enforce compliance. Where single ownership allows the owner to enforce purchasing compliance, a buyer can provide predictable purchase volume which allows a seller to lower prices. (Cohen, Tr. 692; Ryan, Tr. 1166-67). Where members of a buying group make independent purchasing decisions, that group provides no economic value to a seller because it cannot drive compliance and deliver volume commitments. (Cohen, Tr. 445; 451; 816-24; 863).

76. Buying groups do not make purchasing decisions for their members. (Kois, Jr., Tr. 312-313; Puckett, Tr. 2287; Foley, Tr. 4512-4513; Cohen, Tr. 691).

Schein’s Response:

Most buying groups do not make purchasing decisions for their members. Some buying groups, however, have incentives to exert some level of control. For example,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX 2952 (Maurer, Dep. at 88-89); Goldsmith, Tr. 2074-76).

Patterson's Response:

There is no “one size fits all” definition of a “buying group,” so Complaint Counsel’s overly broad statement—while likely true for most “buying groups”—is not fully supported by the record evidence.

Benco's Response:

By way of response, Benco refers the Court to its responses to ¶¶ 74-75.

5. Buying Groups Are Also Distinguished from Medical or Healthcare GPOs.

77. Dental buying groups are also distinguished from medical or healthcare GPOs because the members of dental buying groups are dental practices, while the members of medical or healthcare GPOs are hospitals or healthcare facilities. (Rogan, Tr. 3430-3431; CX8017 (Rogan, Dep. at 68-69); CX8012 (Breslawski, Dep. at 232); CX8037 (Ryan, Dep. at 172); CX0309 (Muller, IHT at 208-209); CX0319 (Reece, IHT. at 72-73); CX0318 (Smurr, IHT at 27-28)).

Schein's Response:

The asserted fact identifies a tautology – medical GPOs serve medical doctors and dental buying groups serve dentists – but that is hardly the most salient distinction between the two.

Importantly, Complaint Counsel did not introduce any expert testimony establishing any relevance of medical GPOs to dental buying groups. Nor did Complaint Counsel call any witness with personal knowledge of medical GPOs. Moreover, discovery in this case has been limited to the dental distribution business, not the medical market. As such, none of the evidentiary snippets Complaint Counsel cites should be relied on for the truth of the matter asserted.

Substantively, while dental buying groups are different from medical or healthcare GPOs primarily because medical GPOs negotiate with manufacturers (giving rise to a

chargeback system, in which the manufacturer has established healthcare-provider-specific pricing), dental buying groups seek to obtain discounts primarily from the distributor, which is generally responsible for negotiating with manufacturers. (Rogan, Tr. 3431; CX 0311 (Sullivan, IHT at 114); CX 0318 (Smurr, IHT at 28); CX 8031 (Steck, Dep. at 16-17); CX 0319 (Reece, IHT at 72-76 (comparing Amerinet medical GPO to Kois Buyers Group))). In addition, medical GPOs are different in that their membership largely consists of large hospitals or health systems. (Rogan, Tr. 3431; CX 0308 (Mlotek, IHT at 84-85)). Medical GPOs are also different in that many have specific purchasing requirements. (Rogan, Tr. 3433 (“the medical provider doesn’t get to decide what the product is, they’re just told”); CX 0308 (Mlotek, IHT at 86-87)).

In addition, medical GPOs are common throughout the medical market because medical markets are substantially different from dental markets. The evidence at trial established that medical GPOs functioned very differently than dental buying groups. (Rogan, Tr. 3429, 3431-33). Moreover, Schein submitted a declaration in the *In re Dental Supplies Antitrust Litigation*, No. 1:16-cv-696 (E.D.N.Y. 2016), from Schein President Jim Breslawski – which has been admitted into evidence in this matter – explaining the differences between the two markets. (RX 2933). As Mr. Breslawski, who had responsibility for both Schein’s dental and medical distribution businesses, stated under oath:

I understand that class counsel has suggested that juxtaposing Schein’s prices or margins in the dental distribution business against the prices or margins in the medical business would be a relevant comparison in this case. While I do not offer any opinions concerning what may be legally relevant, in my view the differences between the two businesses would make any comparison essentially meaningless. As described below, the many differences include:

- Customer size. Our medical customers are generally in the business of providing healthcare to the public. In today's market, healthcare is typically delivered via a formal or informal interconnected network of healthcare providers and facilities, with most procedures (generating the most significant need for supplies) taking place at large facilities (*e.g.*, large, centrally controlled health systems, surgery centers, and hospitals). In contrast, most dental procedures take place at small dental offices. The larger medical facilities can generally be supplied at lower gross margin *percentages* because they generate higher gross margin *dollars* (*i.e.*, gross profit dollars) and cost less to serve on a per unit basis. The size of medical facilities also gives them greater ability to switch significant sales from one manufacturer to another, which has implications for medical pricing. This dynamic is absent from the dental business.
- Nature and mix of services. There are significant differences in the nature of the services provided by, and to, physician offices and dental offices. For example, unlike physician offices, dental practices tend to use mechanical equipment with virtually every patient visit, resulting in significant wear and tear to such equipment. Accordingly, one of the many reasons why dentists use Schein as a “primary” dental distributor is because it services equipment. Schein's dental business has built an entire infrastructure devoted to dental equipment sales and service that does not exist in medical because there is not the same demand for it there. Schein's costs in the dental business include tens of millions of dollars to provide equipment and other services, including specially trained personnel, delivery and service vans, showrooms, and branch support facilities. Schein, however, does not generally provide equipment services to its medical customers.
- Nature and mix of products. There is also little overlap in the products purchased by dental and medical practices, and to the extent there are “cross-over” products, they are not representative of the overall needs of the respective practices.

(RX 2933-002).

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

78. Medical GPOs are not dental buying groups. (Foley, Tr. 4511; Rogan, Tr. 3429 (“GPOs as they’re known in the medical business . . . do not exist in the dental business.”), 3432 (“I think the GPO on the medical side serves a purpose that doesn’t really work in the dental business.”), 3432-3433 (medical GPOs offer services that dental buying groups do not offer and in medical GPOs, the medical provider does not get to choose what product they use; they’re told and the GPO provides)).

Schein’s Response:

No response.

Patterson’s Response:

Medical GPOs are very different from dental buying groups. (Rogan, Tr. 3431 (“[A] GPO on the medical side, they buy the product and they have the relationship with the manufacturer. They aggregate the spend. They warehouse the product. They ship the product to the end user, which are normally hospital facilities, VAs, et cetera. That description does not show up on the dental world. . . .”)); CX8017 (Rogan, Dep. at 18 (“[G]roup purchasing organizations in medical has lots of different definitions, meaning they aggregate the spend, they actually are the organization that buys the product, they ware house the product, they sell the product to the end user.”); Misiak, Tr. 1308 (Medical GPOs “were clearly defined. They made volume commitments and delivered.”); CX0316 (Misiak, IHT at 71 (Medical GPOs “consolidated business, brought the business over, for that, provided some services and took a percentage of that business as they worked with . . . the customers.”))).

Benco’s Response:

Benco has no specific response to the proposed finding.

B. Practice of Dentistry

79. As of 2017 there are approximately over 196,000 dentists practicing in the United States. (CX5005 at 006).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

80. Dentists require a broad range of products in the course of treating patients and operating a dental practice. (Cohen, Tr. 403-404 (Benco provides range of products and equipment a dentist uses in office)). A general practitioner can purchase hundreds of distinct products or stock keeping units ("SKUs") in a single month. (CX3113 at 003 (Answer of Patterson ¶18)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

81. Dental products include dental supplies, dental equipment, technology, and other items used in the provision of dental services by a dentist or dental practice. Dental supplies are sometimes referred to as sundries or merchandise, and include items such as gloves, hand instruments, face masks, toothbrushes, anesthetic solutions, composites, amalgams, bonding agents, and bibs. Dental equipment includes imaging devices, compressors, dental chairs, stools, lights, microscopes, hand-pieces, lasers, delivery systems, monitor mounts, workstations, cabinetry, CAD/CAM systems, film or X-ray processors, cameras, sterilizers, autoclaves, and sensors. (JX0003 at 001 (Joint Stipulations of Fact, Nos. 1-3); see also Kois, Sr., Tr. 167-168; CX1112 at 011-012 (Benco Answer ¶19); CX3113 at 003 (Patterson Answer ¶19)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

82. The market for all dental products sold nationwide is roughly \$10 billion annually. (CX3105 at 004).

Schein's Response:

Irrelevant and unreliable. Complaint Counsel does not allege the relevant market is "all dental products sold nationwide" but rather multiple local or regional markets. Moreover, CX 3105 is [REDACTED] that does not indicate what data was used, or the methodologies employed, to reach its estimates. Finally, the cited evidence does not support the asserted fact. The document indicates, for the year 2015, the dental supplies market included approximately [REDACTED]
[REDACTED]
[REDACTED] (CX 3105-004). Buying groups typically focus on supplies, which is substantially less than the cited \$10 billion.

Patterson's Response:

No specific response.

Benco's Response:

While Complaint Counsel's assertion has some support in the record, evidence adduced at trial also indicates that only \$7.5 billion is distributor-addressable. (CX3105 at

004). Still other evidence states that “the North American dental supply market registers roughly \$7 billion in annual sales.” (CX3288 at 004; *see also* CX5005 at 006).

83. Dental consumables are roughly 70% of the dental supply business in North America, while dental equipment is roughly 30%. (CX3288 at 004).

Schein’s Response:

No response, other than to note that the February 11, 2014 Northcoast Research report (CX 3288) has not been shown to be reliable for the purpose of estimating the split between equipment and supplies in the dental supply market, and thus, constitutes inadmissible hearsay.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

84. Because dental offices typically cannot store and manage large quantities of supplies in-house, they rely on frequent, small quantity orders, and rapid and complete order fulfillment. (CX8031 (Steck, Dep. at 143); *see also* CX5019 at 004; CX5035 at 011; CX1112 at 015-016 (Answer of Benco ¶28); CX3113 at 004 (Answer of Patterson ¶28)).

Schein’s Response:

The asserted fact is overbroad and without foundation.

Complaint Counsel asserts that all dental offices “typically cannot store and manage large quantities of supplies.” But there are a wide variety of dental offices – solo offices, corporate dental networks, community health networks, military, and school offices – and the evidence does not support an assertion that all dental offices have the

same ordering habits and storage limitations. Moreover, none of the cited evidence is from a dentist or dental practice with personal knowledge of their ordering needs or habits.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

85. Some dental supplies have expiration dates, a date beyond which the product should not be used in a patient's mouth. (Kois Sr., Tr. 179-180).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

86. Small practices may not find it feasible to buy in volume to obtain a discount on products that have expiration dates because a small practice may not be able to utilize the product before it would expire. (Kois Sr., Tr. 179-180).

Schein's Response:

Vague and lacks foundation. Dr. Kois refers to "the bulk of his students" in making his observation on the supply volumes that small practices order, but Complaint Counsel did not establish that Dr. Kois had the requisite foundation to speak with personal knowledge about his students' practices. (Kois Sr., Tr. 179-80). The asserted fact is phrased as a hypothetical statement that "may" be the case, but does not provide any evidence or explanation of when, if at all, it might be true.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

87. Prompt and reliable equipment maintenance is also crucial for dental practices. (CX1112 at 015-016 (Answer of Benco ¶28)).

Schein's Response:

Complaint Counsel's use of this proposed finding to infer that prompt and reliable equipment maintenance is only available through a full-service distributor is misleading and unsupported. (*See* CC Br. 87 & n.668-69). While equipment maintenance and service might be important, it is available outside of full-service distributors. (CX 8011 (Capaldo, Dep. at 33); CX 8030 (Baytosh, Dep. at 63)). For example, Darby Dental has a partnership with Dental Fix Rx, "the fastest growing service franchise in the country, to bring dental equipment service and repair to their customers." (CX 2593-002). Indeed, Dr. Marshall cited Darby's relationship with Dental Fix Rx when noting, "While many dentists rely on full-service distributors for their repair and maintenance needs, dentists can also utilize independent service technicians." (CX 7100-056).

Dr. Baytosh testified that he doesn't rely only on full-service distributors for his repair needs. At his deposition, Dr. Baytosh noted, "I usually deal with three different entities to repair work. Henry Schein. There's a new company called Dental Fix. And there is a gentleman who is basically, I guess, an independent. And then I had another person who was like an independent repair – dental repair service." (CX 8030 (Baytosh, Dep. at 63)). Of these options, he testified he "probably use[d] this Dental Fix more than

the others.” (CX 8030 (Baytosh, Dep. at 63)). Complaint Counsel made no effort to show that independent dentists like Dr. Baytosh do not have options outside of full-service distributors when they need equipment fixed.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

88. An out-of-service compressor or chair can instantly shut down a practice and prevent a dentist from seeing patients (and in turn, generating revenue). (Steck, Tr. 3789-3790 (testifying that technical service emergency response time is one of the most popular offerings from Schein); CX8030 (Baytosh, Dep. at 63-64) (testifying that when his equipment breaks down, he needs it serviced right away because he cannot operate without some of the pieces of equipment)).

Schein’s Response:

Complaint Counsel’s use of this proposed finding to infer that prompt and reliable equipment maintenance is only available through a full-service distributor is misleading and unsupported. (*See* CC Br. 87 & n 668-69). While equipment maintenance and service might be important, it is available outside of full-service distributors. (CX 8011 (Capaldo, Dep. at 33)). For example, Darby Dental has a partnership with Dental Fix Rx, “the fastest growing service franchise in the country, to bring dental equipment service and repair to their customers.” (CX 2593-002). Indeed, Dr. Marshall cited Darby’s relationship with Dental Fix Rx when noting, “While many dentists rely on full-service distributors for their repair and maintenance needs, dentists can also utilize independent service technicians.” (CX 7100-056).

Dr. Baytosh testified that he doesn’t rely on full-service distributors for his repair needs. At his deposition, Dr. Baytosh noted, “I usually deal with three different entities to

repair work. Henry Schein. There's a new company called Dental Fix. And there is a gentleman who is basically, I guess, an independent. And then I had another person who was like an independent repair – dental repair service.” (CX 8030 (Baytosh, Dep. at 63)). Of these options, he testified he “probably use[d] this Dental Fix more than the others.” (CX 8030 (Baytosh, Dep. at 63)). Complaint Counsel made no effort to show that independent dentists like Dr. Baytosh do not have options outside of full-service distributors when they need equipment fixed.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

C. Respondents' Customer Segments

89. There are several customer segments within the dental products industry including independent dentists, corporate dental practices or dental service organizations (“DSOs”), buying groups, and institutional dental customers. (CCFF ¶¶ 90-100 (independent dentists), 101-106 (corporate dentistry), 107-113 (institutional customers)).

Schein's Response:

“Buying groups” are not a customer segment within the dental industry. Buying groups are not customers and do not purchase any dental products. (See JF 59-60).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1. Independent Dentists Make Up the Vast Majority of Respondents' Revenues.

90. Independent dentists make up the vast majority of Respondents' revenues. (Sullivan, Tr. 3904; CX2585 at 074; Steck, Tr. 3677; Cohen, Tr. 410-411 (80 percent of Benco's revenues come from independent dentists); CX8015 (Cohen, Dep. at 77); CX8028 (Lepley, Dep. at 34); *see also* CCF 92-95, 97-99).

Schein's Response:

Independent dentists make up the majority of HSD's revenues. DSOs make up the majority of Special Markets' revenues.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

91. Generally private practice dentists are the most profitable in terms of gross margin. (Steck, Tr. 3680).

Schein's Response:

Gross margins are not an appropriate metric to measure profitability since they exclude, among other things, the costs of maintaining a full-service distribution network, including FSC salaries, commissions, and benefits. Net margins, which account for such costs as well as manufacturer chargebacks, are *lower* for private practice dentists than for larger customers, such as DSOs. (See CX 0301 (Cohen, IHT at 25-26); CX 0314 (Guggenheim, IHT at 110-11); CX 0311 (Sullivan, IHT at 50); *see also* Marshall, Tr. 3115 [REDACTED]; Meadows, Tr. 2523). Thus, while gross margins may technically be higher for private practice dentists than for larger customers, the statistic is irrelevant, as the reverse is true for net margins.

Complaint Counsel fails to establish that gross profit is the same as gross margins, or that Mr. Steck has sufficient expertise and basis to compare gross margins across Schein's various divisions and businesses. Mr. Steck's testimony does not support the fact:

Q. Mr. Steck, do you know if HSD's gross margins for private practices are higher than for larger customers?

A. Private practice dentists can vary dramatically based on the size of the practice. So the margins can vary, too.

(Steck, Tr. 3680-81).

Schein employees lack the ability to reliably estimate gross margins for "individual dentists" due to the fact that Henry Schein does not maintain separate accounting for independent dentists such that "gross profit" for independent dentists can be identified. (CX 8012 (Breslawski, Dep. at 8)).

Patterson's Response:

The cited testimony of is contrary to the proposition. (Steck, Tr. 3680-3681 ("Q. Mr. Steck, do you know if HSD's gross margins for private practices are higher than for larger customers? A. Private practice dentists can vary dramatically based on the size of the practice. So the margins can vary, too.")). This proposed finding also contains no timeframe and is vague in that it does not specify among whom private practice dentists are the most profitable.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness discussing Schein's business. The finding also refers to the profitability of private practice dentists themselves, while the cited testimony refers to whether Schein's dealing with private practice dentists are profitable.

92. Independent dentists make up the majority of Benco's customer base. (Cohen, Tr. 410).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

93. Independent dentists make up the vast majority of Patterson's customer base. (Rogan, Tr. 3427).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

94. Sales to independent dentists have accounted for the majority of Patterson's sales of dental products from January 1, 2009 to the present. (CX3365 at 007 (Patterson's Response to RFA ¶21)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

95. Independent dentists make up the majority of Schein's customer base. (Steck, Tr. 3677, 2679; Foley, Tr. 4513 (Henry Schein Dental is four times the size of Schein Special Markets)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

96. Independent dentists make up the majority of Burkhardt Dental Supply ("Burkhardt")'s customer base. (Reece, Tr. 4364-4365; [REDACTED]).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

97. Eighty percent of Benco's sales are to independent dentists. (Cohen, Tr. 410-411).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

98. Independent dentists make up about 90% of Patterson's business today. (Rogan, Tr. 3427-3428). Historically, private practice dentists made up more than 90% of its business. (Rogan, Tr. 3428).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

99. Independent dentists make up 70-80 percent of Henry Schein Dental's customer base today, down from potentially 80-90 percent ten years ago. (Steck, Tr. 3678). Independent dentists provide the majority of Schein's revenues. (Sullivan, Tr. 3903-3904).

Schein's Response:

The cited evidence does not support the asserted fact. Mr. Steck testified that "the estimate I've heard" is that private practices were 80 to 90 percent of HSD's customer base ten years ago, but "I don't know that to be ... accurate[.]" (Steck, Tr. 3677).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

100. Independent dentists make up approximately [REDACTED] of Burkhart's revenues. [REDACTED]).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2. Corporate Dentistry

101. A characteristic of dental service organizations or DSOs is that the dental practices have common ownership and are part of a corporation. (Cohen, Tr. 412; Misiak, Tr. 1310, 1313, 1314).

Schein's Response:

Common ownership may be a characteristic of some DSOs, but DSOs have a variety of structures. Not all DSOs are under "common ownership." (CX 8005 (Muller, Dep. at 14 ("[A]s the old expression[,] if you have seen one DSO, you have seen one. There's probably ten or fifteen different structures.")); Ryan, Tr. 1179 ("[B]oth DSOs and GPOs can vary in their structure."); Cohen, Tr. 877 ("DSO models have different ownership structures."); Mason, Tr. 2326 ("Q. And do the DSOs own all of these practices? A. It depends on the way they're structured."); Puckett, Tr. 2201-02 ("We are a DSO, which is a dental support organization, so -- for affiliated dental offices."); Goldsmith, Tr. 2046 (Smile Source is a [REDACTED]); SF 26, 47-58).

Patterson's Response:

This proposed finding describes the most prevalent form of DSO, but DSOs have various forms along a spectrum of what is generally considered a DSO. (CX8006 (Puckett, Dep. at 20 ("[W]e are something unique among the various DSOs, which on the spectrum,

you know, you have some that are 100 percent corporately owned and, they employ an associate model. We're just kind of somewhere on the other end of the spectrum as far as DSOs go.''')). For instance, MB2, which is described as a DSO at Complaint Counsel's Proposed Finding Number 66, is labelled a "hybrid" DSO because MB2 does not own all of the clinical assets of the dental practices under the MB2 organization. (CX 8006 (Puckett, Dep at 15-16, 19). MB2 is a joint venture with the individual dentists, who retain an ownership interest in their practices ranging from 20 to 50%. (CX8006 (Puckett, Dep. at 16-17)).

Benco's Response:

Benco has no specific response to the proposed finding.

102. Respondents also sell dental products to corporate dental practices known as DSOs. (Meadows, Tr. 2460; McFadden, Tr. 2689-2690, 2785 (Schein and Benco were in special markets space when Patterson entered); Cohen, Tr. 411-412; [REDACTED]; CX0314 (Guggenheim, IHT at 61); CX0310 (Steck, IHT at 26); CX0306 (Foley, IHT at 15)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

103. DSOs are a growing segment in dentistry and consist of large group practices that have multiple locations combined under a single ownership structure. (Cohen, Tr. 808, 411-412; CX0310 (Steck, IHT at 126); CX0301 (Cohen, IHT at 39); CX3105 at 004 (McKinsey Report); Guggenheim, Tr. 1687-1688; CX8031 (Steck, Dep. at 19); CX1112 at 007 (Answer of Benco ¶3)

(DSOs have grown in recent years; “DSOs are characterized by common ownership, as opposed to buying groups, which are not.”)).

Schein’s Response:

Overbroad. DSOs have a variety of structures; not all DSOs are “under a single ownership structure.” (CX 8005 (Muller, Dep. at 14 (“[A]s the old expression[,] if you have seen one DSO, you have seen one. There’s probably ten or fifteen different structures.”)); Ryan, Tr. 1179 (“[B]oth DSOs and GPOs can vary in their structure.”); Cohen, Tr. 877 (“DSO models have different ownership structures.”); Mason, Tr. 2326 (“Q. And do the DSOs own all of these practices? A. It depends on the way they’re structured.”); Puckett, Tr. 2201-02 (“We are a DSO, which is a dental support organization, so -- for affiliated dental offices.”); Goldsmith, Tr. 2046 (Smile Source is a [REDACTED]); [REDACTED]; SF 26, 47-58).

Patterson’s Response:

DSOs are a growing segment of the industry, but do not always have completely common ownership. For instance, MB2, which is described as a DSO at Complaint Counsel’s Proposed Finding Number 66, is labelled a “hybrid” DSO because MB2 does not own all of the clinical assets of the dental practices under the MB2 organization. (CX 8006 (Puckett, Dep at 15–16, 19). MB2 is a joint venture with the individual dentists, who retain an ownership interest in their practices ranging from 20 to 50%. (CX8006 (Puckett, Dep. at 16-17)).

Benco’s Response:

Benco has no specific response to the proposed finding.

104. Schein serves its DSO customers through its Special Markets divisions. (Foley, Tr. 4509-4510 (Schein’s Special Markets Division sells to non-private dental practices such as DSOs,

MSOs, federal government, institutional accounts and the dental schools); Steck, Tr. 3734; CX0306 (Foley, IHT at 12)).

Schein's Response:

Overbroad. Schein's Mid-Market division, within Henry Schein Dental, also works with some DSOs. (Steck, Tr. 3690, 3855; SF 20-34, 237-268).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

105. Benco serves its DSO customers through its "Strategic Markets" division. (Ryan, Tr. 1014; CX0304 (Ryan, IHT at 57-58)). Benco routinely sells supplies and equipment to DSOs. (CX1112 at 007 (Answer of Benco ¶3)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

106. Patterson serves its DSO customers through a division that was originally called "Special Markets" and later called Strategic Accounts. (McFadden, Tr. 2670; CX0315 (McFadden, IHT at 80, 96-97)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

3. Other Institutional Customers

107. Respondents also sell dental products to healthcare clinics for indigent populations known as Community Health Centers ("CHCs"). (Steck, Tr. 3691; McFadden, Tr. 2697; Foley, Tr. 4509; CX0306 (Foley, IHT at 14, 49); CX8021 (Reece, Dep. at 25)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of Schein and Patterson witnesses discussing Schein and Patterson business. Moreover, the cited testimony of Mr. Steck and Mr. Foley do not relate to the proposed finding.

108. CHCs are federally recognized not-for-profit community institutions that provide health services to indigent patients in communities across the country. (JX0003 at 001-002 (Joint Stipulation of Fact No. 4); Mason, Tr. 2322-2323; CX8021 (Reece, Dep. at 25); CX8020 (Brady, Dep. at 32); CX8033 (Cavaretta, Dep. at 47)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

109. CHCs are not comprised of independent dentists. (Ryan, Tr. 1017-1018, 1136-1137; CX8021 (Reece, Dep. at 25); CX8003 (Foley, Dep. at 31); CX8033 (Cavaretta, Dep. at 48)).

Schein's Response:

As Ms. Titus testified, "private practice dentists are employed within ... community health centers." (Titus, Tr. 5294-95).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit. Mr. Ryan's testimony actually says, of dentists in CHC buying groups, "there's nothing that ties them together. They – each one is independent of the others." (Ryan, Tr. 1136-37). The remaining testimony cited by Complaint Counsel in support of its finding is testimony by Schein and Burkhardt witnesses as to the business of those entities. Because the proposed finding is wholly without any factual basis as to Benco, the court should disregard the proposed finding as to Benco.

110. Some CHCs belong to buying groups. (Ryan, Tr. 1135-1137; Titus, Tr. 5209; CX8020 (Brady, Dep. at 33); CX8005 (Muller, Dep. at 229); CX8033 (Cavaretta, Dep. at 48)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

111. Independent dentists are not eligible to join CHC buying groups and CHC buying groups do not provide discounts for independent dentists. (CX8031 (Steck, Dep. at 19-20); CX8020 (Brady, Dep. at 33-34); CX8003 (Foley, Dep. at 31); CX8037 (Ryan, Dep. at 211)).

Schein's Response:

No response, except to note that at least some CHCs employ private practice dentists. (Titus, Tr. 5294-95).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading. While witnesses at trial testified that they were not aware of CHC buying groups that included independent dentists, none of the testimony cited by Complaint Counsel in support of tis proposed finding states that independent dentists are "not eligible" to join CHC buying groups.

112. Other dental products customers include large institutions such as hospitals, correctional facilities, public health departments, and other federal or state government customers. (Guggenheim, Tr. 1583; Reece, Tr. 4364-4365; Steck, Tr. 3746).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

113. Institutional customers are not owned by dentists. (CX8021 (Reece, Dep. at 26)).

Schein's Response:

Mr. Reece's cited testimony was limited to military and US government clients. (CX 8021 (Reece, Dep. at 26 ("A. All kinds of government opportunities through the military, through the US government. Q. And I take it you'd agree with me that in any of those government clients there's no ownership by any of the dentists at those entities; is that correct? A. That's correct."))). Mr. Reece is not an expert in institutional dentistry, nor is there any evidence that no dental institution is owned by a dentist.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

IV. INDEPENDENT DENTISTS JOIN BUYING GROUPS TO SAVE MONEY ON DENTAL PRODUCTS.

A. Changes in the Dental Industry Gave Rise to Buying Groups.

114. Independent dentists have faced challenges over the past decade due to decreasing insurance reimbursements, increased student debt, and the growth of corporate dentistry or DSOs. (CCFF ¶¶ 115-124).

Schein's Response:

There is insufficient evidence to make comparisons concerning levels of reimbursement, dental practice financials, student debt levels, or the impact of DSOs on independent dentists over time. To the extent lay witnesses have expressed opinions on any of these topics, such opinions lack foundation.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding.

115. Insurance companies have reduced reimbursement rates for dental procedures, further adding to independent dentists' economic pressures. (Sullivan, Tr. 3905-3907; CX3105 at 014; Goldsmith, Tr. 1931; [REDACTED]).

Schein's Response:

There has been no study of reimbursement rates, or the impact of such rates on dental practices' financials. For example, there has been no study showing that dentists' profits have declined over time. The cited testimony lacks adequate foundation, and thus, is not reliable evidence to establish the asserted fact.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

116. Lower insurance reimbursement rates for dental procedures have led to loss of patients, increased necessity to advertise to acquire new patients, and fewer procedures. (Sullivan, Tr. 3905-3907).

Schein's Response:

Lacks foundation. Mr. Sullivan is not and has never been a practicing dentist. Mr. Sullivan's extrapolations from unspecified journal articles about insurance reimbursements and comments by sales persons at meetings do not establish that lower insurance

reimbursement rates have *caused* a loss of patients, fewer procedures, or a need to advertise.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

117. Dental school student debt has been increasing. (CX3105 at 063 (average dental student debt as increased approximately 66 percent in the last decade); CX0319 (Reece, IHT at 46-47); RX2952 (Maurer, Dep. at 106-107); [REDACTED]; CX0303 (McElaney, IHT at 75); RX0043 at -00006, -00023, -00024, -00034 (Dental Practice Management Segment Project Report by Michele D. Perpich, Oct. 23, 2012)).

Schein's Response:

There is insufficient reliable evidence to establish changes in student debt. None of the cited witnesses are competent to testify as to student debt financing, or whether such debt as a percentage of expected revenues/income has been increasing.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

118. The number of independent dentists has been shrinking and larger group practices and corporate dentistry has been on the rise. (Sullivan, Tr. 3904; [REDACTED]; CX3105 at 042, 044, 049 (McKinsey & Company, Dental business growth strategy project: U.S. market overview, December 2015)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

119. In recent years, the industry has seen a dramatic increase in the number of corporate dental chains. (CX1346 at 003-005; Goldsmith, Tr. 1929-1930). In 2000, corporate practices accounted for only 5% of the market, but by 2013, that number rose to 11%. (CX3105 at 004 (McKinsey & Company, Dental business growth strategy project: U.S. market overview, December 2015); *see also* CX2314 at 005 (Treacy & Company market analysis)).

Schein's Response:

No response, other than to note there is no support for Complaint Counsel's characterization of the increase as "dramatic."

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

120. DSOs leverage their purchasing power and realize economies of scale, leading to a competitive advantage over independent practices. (CX2314 at 005 (Treacy & Company market analysis); Goldsmith, Tr. 1929-1930; CX8021 (Reece, Dep. at 66); CX0319 (Reece, IHT at 46)).

Schein's Response:

While purchasing power and economies of scale might be competitive advantages, the evidence does not support the conclusion that DSOs have an overall competitive advantage over independent practices. Independent dentists enjoy their own competitive advantages. Their control over all aspects of the practice, greater flexibility, individualized

approach, closer patient relationships, and greater motivation to grow and maintain their customer base may be competitive advantages as well.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

121. For a number of years, dental distribution companies have provided discounts on dental supplies and equipment to DSOs. (Cohen, Tr. 423-424 (at Benco, corporate and DSO customers pay lower prices than do independent dentists); Foley, Tr. 4566 (DSO pricing includes rebates and manufacturer discounts); CX0305 (Cavaretta, IHT at 152) (DSO formulary pricing is at a deeper discount); Misiak, Tr. 1425 (DSO business includes formulary pricing); CX8021 (Reece, Dep. at 020) (Burkhart was doing business with special market customer types before 2012)).

Schein's Response:

The asserted fact is irrelevant, as Schein has “provided discounts on dental supplies and equipment” to all kinds of customers. It is unclear why the asserted fact singles out DSOs.

To the extent Complaint Counsel seeks to imply that DSOs have received greater discounts than independent dentists, Complaint Counsel has not introduced any evidence of the magnitude of the difference. To the extent there is a difference, the asserted fact ignores the primary differences in the underlying cost to service a DSO versus an independent practice. Unlike independent dentists, DSOs require little to no FSC support, which translates to significantly lower operational costs to Schein. (Sullivan, Tr. 4093-94; CX 8016 (Meadows, Dep. at 271-72); CX 0309 (Muller, IHT at 20, 59-60)). DSOs' centralized formulary purchasing and volume commitments enable Schein to obtain chargebacks from manufacturers that agree to lower their price in exchange for volume

commitments. (CX 2062-001 (“That plan is based on \$5M+ of business with negotiated pricing from our vendor/suppliers based on [the DSO’s] proven volume.”); Foley, Tr. 4543-46, 4688, 4701); CX 8003 (Foley, Dep. at 246)).

Patterson’s Response:

The cited authorities do not apply to Patterson, which first attempted to enter the DSO market with its Special Markets division in 2013. FOF ¶ 83.

Benco’s Response:

Benco has no specific response to the proposed finding.

122. Dental distributors historically provided discounts on dental supplies and equipment to DSOs in the 18-20% range. (CX8005 (Muller, Dep. at 79) (confirming a 18-20% discount as typical for special markets customers); CX0309 (Muller, IHT at 60, 67) (stating that 18-20% is the default range of discounts to special market customers, it can go much higher for individual items)).

Schein’s Response:

While Mr. Muller’s testimony may be accurate as to Schein’s Special Markets pricing, he lacks foundation and personal knowledge as to what other distributors have “historically” offered to DSOs on supplies and equipment.

Patterson’s Response:

The citations are for Schein Special Markets customers. There is no support for this statement with respect to Patterson’s sales to DSOs. This proposed finding also lacks a timeframe and ignores wide variations in margins. *See* Patterson’s Reply to CCFF 28, *supra*.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness discussing Schein’s business.

123. As the number of chain practices increased, independent dentists found it harder to compete. (Sullivan, Tr. 3907 (increased pressure from corporate dentistry and general economic decline); CX3418 at 016 (Patterson presentation to sales team stating “[p]rivate practices are seeing increased pressure from Group Practice”); Goldsmith, Tr. 1929-1931, 1938-1939; Reece, Tr. 4368-4369; CX0320 (Capaldo, IHT at 128-130, 133)).

Schein’s Response:

Lacks foundation. Mr. Sullivan, Dr. Goldsmith, Mr. Capaldo, and Mr. Reece all offered anecdotal opinions, but three of the four are not dentists, and none conducted any kind of systemic study that could support the asserted fact. Similarly, Patterson’s presentation indicates that the information presented “came from field data” and not any formal research or expert opinion. (CX 3418-016). In fact, there is no evidence that private practices are less profitable today than in prior years, or that any change in total profitability is related to increased pressure, if any, from so-called corporate dentistry.

Patterson’s Response:

The proposed finding lacks a timeframe. And the term “chain practices” appears nowhere in the record. Otherwise, Patterson has no specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

124. Dental school debt has increased pressure on independent dentists. (CCFF ¶ 117; RX2952 (Maurer, Dep. at 106-107); CX0303 (McElaney, IHT at 75) CX0319 (Reece, IHT at 46-47)).

Schein’s Response:

There is insufficient reliable evidence to establish changes in student debt. None of the witnesses are competent to testify as to student debt financing, or whether such debt as a percentage of expected revenues/income has been increasing. Likewise, none of the

witnesses cited are dentists, and none are experts who have studied the effects (if any) of student debt on independent dentists.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

B. Buying Groups Cropped Up As a Means for Independent Dentists to Compete with Corporate Dentistry.

125. Economic challenges caused private practice dentists to seek ways to reduce overhead costs, including cost of dental products. (Sullivan, Tr. 3907-3908; CX0305 (Cavaretta, IHT at 100-101); CX0320 (Capaldo, IHT at 129-131)).

Schein's Response:

Lacks foundation. Mr. Sullivan, Mr. Cavaretta, and Mr. Capaldo are not dentists, and Complaint Counsel does not cite any studies on private dentistry that could support the asserted fact. To the extent dentists are looking to reduce overhead, dental supplies would likely be last on their list, as supplies comprise a mere 6% of their overhead. (*See, e.g.*, Cavaretta, Tr. 5544-45 (explaining that savings on dental supplies do not make a meaningful impact on a dentist's overhead)).

Patterson's Response:

This proposed finding has no time frame. Further, the cited testimony of Joe Cavaretta and Frank Capaldo is not relevant to the proposed finding. (CX0305 (Cavaretta, IHT at 100-101 (discussing factors Schein considers in determining whether to work with a buying group)); CX0320 (Capaldo, IHT at 129-131 (discussing advantages to dentists

from joining DSOs and that the Integrity Dental Buyers Group is attempting to replicate those advantages))). Otherwise, Patterson has no response.

Benco's Response:

Benco has no specific response to the proposed finding.

126. One way dentists try to increase profitability is by joining a buying group to try to get savings on supplies. (Sullivan, Tr. 3907-3908; Mason, Tr. 2332-2333 (Dr. Mason tried to start a buying group because corporations were starting to come into New Mexico at that time, and he wanted to leave the independent dentists in a better place to compete with corporate practices); CX0321 (Kois Jr., IHT at 19-22); [REDACTED]; [REDACTED]; R. Johnson, Tr. 5479 (purpose of buying group KlearImpakt is to keep dentists strong and independent); CX0320 (Capaldo, IHT at 34) (GDA formed a buying group to save money on supplies for its members); Puckett, Tr. 2220 (Dental Gator buying group sought to secure greater discounts for independent dentists than the dentists could secure on their own))).

Schein's Response:

The asserted fact is not supported by the evidence and lacks foundation. Complaint Counsel does not cite to any study or poll of dentists that have joined buying groups as evidence.

Some buying groups may market themselves as a means of helping dentists save on the costs of dental supplies. (CX 2246-002 (“the plan is to focus on supplies and insurance”)). Other buying groups market themselves as assisting dentists through various other services, advice, or other benefits. (Goldsmith, Tr. 1934-36 (Smile Source tries to “level the playing field for independent practice dentists to give them the opportunity to be competitive with large corporate group practices and give them access to resources that they wouldn’t otherwise have access to as a solo independent practice owner. ... Through a combination of factors. We provided education. We provided marketing services. We provided access to decreased or discounted cost of goods.”)).

There is no evidence that buying groups actually do help dentists “increase profitability,” particularly when the buying group charges a middleman tax, like Smile Source’s royalty on members’ net receipts or the Kois Buyers Group’s annual fees. (SF 115-19, 854). A dentist still “need[s] to be a good dentist ... still need[s] to be able to market ... [and] able to run the business.” (CX 0322 (Maurer, IHT at 89-90 (“[Y]ou can’t save your way to prosperity. ... Even if I got my supplies for free, I am not going to have a better dental practice.”); *see also* Reece, Tr. 4457).

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

127. Buying groups cropped up as a means for independent dentists to combat these challenges by leveraging purchasing power of a group while at the same time remaining independent. (Reece, Tr. 4415-4416; [REDACTED]

(Goldsmith, Tr. 1934-1936; [REDACTED];

CX0322 (Maurer, IHT at 19-20) (Smile Source promotes independent dentistry by obtaining discounts on dental supplies and equipment for its members); CX8029 (R. Johnson, Dep. at 117 (KlearImpakt wants to grow to help independent dentists get discounts on supplies)).

Schein’s Response:

The cited evidence does not support the asserted fact.

The evidence is consistent with the notion that buying groups cropped up as a means for buying groups to earn money from members, distributors, or manufacturers.

While some buying groups may *claim* to try to aggregate and leverage the purchasing volume of their members in order to obtain lower prices, there is no evidence that buying groups actually do this.

In fact, very few, if any, buying groups actually aggregate or leverage the purchasing volume of their members, since they lack any control over, or the ability to make any commitments concerning, their members' purchases. (Cavaretta, Tr. 5568-69; Baytosh, Tr. 1907-08; Mason, Tr. 2394; Goldsmith, Tr. 1970-71; Maurer, Tr. 4964; Puckett, Tr. 2240). For this reason, Dr. Kois and Mr. Kois Jr. agreed that the Kois Buyers Group does not actually have any purchasing power. (Kois Sr., Tr. 249-50; Kois Jr., Tr. 337, 366-67). In fact, the evidence shows that many independent dentists receive discounts greater than those negotiated by buying groups. (CX 7101-067 (showing large distribution of discounts)).

Patterson's Response:

This proposed finding has no timeframe. It is also vague in referencing "these challenges," without saying what challenges it is referring to. Further, the testimony of [REDACTED] cited in support of the alleged testimony says nothing about [REDACTED] being the [REDACTED] of private dentistry. [REDACTED] discusses how *Smile Source*, specifically, benefits its members. [REDACTED] testified that *Smile Source* is not a buying group. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] So did Trevor Maurer. (CX0322 (Maurer, IHT at 86 ("Q. Do you consider Smile Source to be a buying group? A. No. [REDACTED]

[REDACTED] Q. Is that -- A. But I wouldn't call it a buying group.”))). Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

128. In a January 8, 2014 strategic report, Benco noted that by joining a buying group, dentists will enjoy lower prices through leveraged buying without having to sell their practices and join a DSO. [REDACTED]

Schein's Response:

The document merely notes that one [REDACTED] [REDACTED] at some undefined point in the future. (CX 1061-004). The reference to an [REDACTED] [REDACTED] (CX 1061-004). Likewise, the document just states [REDACTED] [REDACTED]; it does not speak to what these entities are capable of doing or whether their efforts would be successful.

The reality is that very few, if any, buying groups actually do aggregate or leverage the purchasing volume of their members, since they lack any control over, or the ability to make any commitments concerning, their members' purchases. (Cavaretta, Tr. 5568-69; Baytosh, Tr. 1907-08; Mason, Tr. 2394; Goldsmith, Tr. 1970-71; Maurer, Tr. 4964; Puckett, Tr. 2240). For this reason, Dr. Kois and Mr. Kois Jr. agreed that the Kois Buyers Group does not actually have any purchasing power. (Kois Sr., Tr. 249-50; Kois Jr., Tr. 337, 366-67). In fact, the evidence shows that many independent dentists receive discounts

greater than those negotiated by buying groups. (CX 7101-067 (showing large distribution of discounts)).

Patterson's Response:

The quotations are correctly stated but the proposed finding is misleading, in that the quotations accompany what Benco listed not as a threat but as an "Opportunity" in the area of "Dental Practice Consolidation." [REDACTED] Further, on the page that follows, Benco lists as another "Opportunity" that Patterson was "A Wounded Competitor." [REDACTED] January 8, 2014, in the middle of Patterson's alleged collusion with Benco. (Kahn, Tr.19).

Benco's Response:

Benco has no specific response to the proposed finding.

129. A Schein document, prepared for a October 2016 workshop to analyze buying groups, described Schein's concern with buying groups as follows: "We also expect that buying groups will expand as independent dentists look for alternatives to organized dentistry. We believe our margins will come under pressure as group practices and buying groups seek to leverage their purchasing power." (CX2487 at 002).

Schein's Response:

The cited document is not reliable evidence of anything.

It is a *hypothetical* used as the basis for engaging in a workshop focusing on the use of "game theory" in predicting behavior. Based on this hypothetical, participants were supposed to brainstorm about the actions of Schein and other competitors. Complaint Counsel fails to note that the document expressly states that the "[e]xpected [o]utcome" is that buying groups (and other organizations) "gain no more than roughly 10% market share only replacing that of the current 'Mail Order' segment of the industry today." (CX 2487-003).

Moreover, the document is from *after* the alleged conspiracy period, showing the consistency of Schein's legitimate concerns about buying groups. As such, Complaint Counsel's use of this alleged fact in its Post-Trial Brief as evidence for why Schein would be motivated to join a conspiracy to boycott buying groups is plainly wrong. (*See* CC Br. 10 & n.69).

Nor is the document evidence that buying groups actually do have the ability to leverage purchasing power. As the document notes, many buying groups may "seek" to do so, but the reality is that very few, if any, actually do aggregate or leverage the purchasing volume of their members, since they lack any control over, or the ability to make any commitments concerning, their members' purchases. (CX 2487; Cavaretta, Tr. 5568-69; Baytosh, Tr. 1907-08; Mason, Tr. 2394; Goldsmith, Tr. 1970-71; Maurer, Tr. 4964; Puckett, Tr. 2240). For this reason, Dr. Kojs and Mr. Kojs Jr. agreed that the Kojs Buyers Group does not actually have any purchasing power. (Kojs Sr., Tr. 249-50; Kojs Jr., Tr. 337, 366-67). In fact, the evidence shows that many independent dentists receive discounts greater than those negotiated by buying groups. (CX 7101-067 (showing large distribution of discounts)).

Patterson's Response:

The Schein document cited is from October 2016, more than a year after the end of the alleged conspiracy. (Kahn, Tr.19). At this time, Schein had allegedly changed its conduct to work with buying groups. (Kahn, Tr.54-55). Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Schein document.

130. In an August 27, 2013 email, Benco's Patrick Ryan wrote: "Group Purchasing Organizations. They aggregate the purchase volume of unrelated entities in order to leverage price. We do not recognize them. GPOs are why medical works at the margins they do." (CX1156 at 001).

Schein's Response:

The cited email relates to Premier GPO, a major medical GPO that also serves certain dentists. (CX 1156). The email further notes that the member dentists are able to purchase dental supplies through Schein's partnership with Premier, establishing that Schein does business with this GPO. (CX 1156-001-02) Since Benco "does not do anything with GPO's," this email also establishes non-parallel conduct. (CX 1156-003).

With respect to Mr. Ryan's statement, it simply reiterates Benco's "no buying group policy." It is not reliable evidence concerning whether buying groups actually "aggregate" purchase volume, as opposed to seeking to do so. As noted, while many buying groups may *seek* to aggregate and leverage purchase volume of their members, the reality is that very few, if any, actually do so, since they lack any control over, or the ability to make any commitments concerning, their members' purchases. (Cavaretta, Tr. 5568-69; Baytosh, Tr. 1907-08; Mason, Tr. 2394; Goldsmith, Tr. 1970-71; Maurer, Tr. 4964; Puckett, Tr. 2240). For this reason, Dr. Kois and Mr. Kois Jr. agreed that the Kois Buyers Group does not actually have any purchasing power. (Kois Sr., Tr. 249-50; Kois Jr., Tr. 337, 366-67). In fact, the evidence shows that many independent dentists receive discounts greater than those negotiated by buying groups. (CX 7101-067 (showing large distribution of discounts)).

Patterson's Response:

No specific response.

Benco's Response:

The document cited by Complaint Counsel demonstrates that Benco's decision not to sell to GPOs is in Benco's independent self-interest. As Mr. Ryan wrote in the e-mail Complaint Counsel reference, the decision of medical supply companies to work with GPOs has led to lower margins for those companies.

131. Guggenheim testified that buying groups are "a collection of customers that work together to leverage buying power to secure pricing and service incentives" and clarified that secure pricing meant "potentially lower pricing." (Guggenheim, Tr. 1566; *see also* CX0314 (Guggenheim, IHT at 163)).

Schein's Response:

As noted, while many buying groups may *seek* to aggregate and leverage purchase volume of their members, the reality is that very few, if any, actually do aggregate or leverage the purchasing volume of their members, since they lack any control over, or the ability to make any commitments concerning, their members' purchases. (Cavaretta, Tr. 5568-69; Baytosh, Tr. 1907-08; Mason, Tr. 2394; Goldsmith, Tr. 1970-71; Maurer, Tr. 4964; Puckett, Tr. 2240). For this reason, Dr. Kois agreed that the Kois Buyers Group does not actually have any purchasing power. (Kois Sr., Tr. 249-50; Kois Jr., Tr. 337, 366-67). In fact, the evidence shows that many independent dentists receive discounts greater than those negotiated by buying groups. (CX 7101-067 (showing large distribution of discounts)).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

132. The Big Three observed that more and more buying groups were forming and attempting to form in the last decade. (CX2634 at 002; CX0004 at 001; CX0084 at 001; McFadden, Tr. 2683-2684; CCF ¶¶ 1281, 1289).

Schein's Response:

The cited evidence is insufficient to support the asserted fact. There is no study concerning the frequency of buying group formation or attempted formation. General opinions about the frequency of an event occurring tend not to be reliable due to recency bias. *See, e.g., Recency Effect*, IResearchNet, <https://psychology.iresearchnet.com/social-psychology/decision-making/recency-effect/> (last visited Mar. 30, 2019) (“The recency effect is an order of presentation effect that occurs when more recent information is better remembered and receives greater weight in forming a judgment than does earlier-presented information. Recency effects in social psychology have been most thoroughly studied in impression formation research.”). Even aside from recency bias, there is no evidence that the witnesses or authors of the cited documents have sufficient foundation and personal knowledge to speak to changes in the frequency of buying group formation, especially since many changed positions and responsibility over time. Moreover, the discovery record in this case does not go back decades, precluding any reliable conclusions about the frequency of buying group formation. Finally, Complaint Counsel did not introduce any expert analysis of the frequency of buying group formation.

Patterson's Response:

Neal McFadden testified based on a *March 2012* document that he was hearing increasing inquiries from buying groups. (McFadden, Tr. 2682–84 (discussing CX0084 at 1)). March 2012 is almost a year before Patterson allegedly joined the alleged conspiracy. (Kahn, Tr.19). Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

**C. Buying Groups Have Grown in the Dental Industry in Past Decade
Coinciding with the Increasing Pressures on Independent Dentistry.**

133. The concept of buying groups in the dental industry dates back several decades. (CX2287 at 001 (Schein May 2016 email, referring to four existing buying groups dating back to 2004 as “inherited messes”); Cohen, Tr. 445, 877, 998-999 (Benco’s no buying group policy dates to 1996); Sullivan, Tr. 3912-3913 (the earliest buying group that Sullivan remembers Schein doing business with is Alpha Omega and Sullivan believes Schein was doing business with them by at least 1997); Guggenheim, Tr. 1601-1602 (discussing guidance of not doing business with buying groups going back to 2000)).

Schein's Response:

No response, other than to note Complaint Counsel’s concession that Alpha Omega is a buying group that Schein continued to do business with throughout the alleged conspiracy period. (SF 397).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

134. The number of buying groups in the dental industry has increased over the last decade. (Sullivan, Tr. 3907-3910; Cohen, Tr. 811-812; CX8025 (Sullivan, Dep. at 66-67); CX0106 at 001 (Patterson’s Neal McFadden wrote: “I used to get 1 [request to do business with a GPO] per month”)).

Schein's Response:

The evidence is insufficient to support the asserted fact. There is no study concerning the frequency of buying group formation or attempted formation. General opinions about the frequency of an event occurring tend not to be reliable due to recency

bias. *See, e.g., Recency Effect*, IResearchNet, <https://psychology.iresearchnet.com/social-psychology/decision-making/recency-effect/> (last visited Mar. 30, 2019) (“The recency effect is an order of presentation effect that occurs when more recent information is better remembered and receives greater weight in forming a judgment than does earlier-presented information. Recency effects in social psychology have been most thoroughly studied in impression formation research.”). Even aside from recency bias, there is no evidence that the witnesses or authors of the cited documents have sufficient foundation and personal knowledge to speak to changes in the frequency of buying group formation, especially since many changed positions and responsibility over time. Moreover, the discovery record in this case does not go back decades, precluding any reliable conclusions about the frequency of buying group formation. Finally, Complaint Counsel did not introduce any expert analysis of the frequency of buying group formation.

Patterson’s Response:

No specific response.

Benco’s Response:

Chuck Cohen’s actual testimony differs substantially from Complaint Counsel’s fictional paraphrase in the proposed finding. What Cohen actually said was that the number of buying groups that approached Benco spiked when Benco “became a national player.” (Cohen, Tr. 811-12). He continued, “I’m not sure if there were more or fewer buying groups, but prior to 2007-2008, we did not have the national infrastructure to service a national organizations or national group.” (Id.). “[O]nce we opened on the West Coast,” Mr. Cohen continued, “we really got on the radar screen.” (Id.).

The remaining evidence cited by Complaint Counsel does not pertain to Benco, and contains only the testimony or evidence from Patterson and Schein witnesses pertaining to

the business of Patterson or Schein. Since the proposed finding is wholly without any factual basis as to Benco, the court should disregard the proposed finding as to Benco.

135. The membership count of existing buying groups, has increased over the last decade. (CCFF ¶¶ 137, 167-168, 183).

Schein's Response:

Complaint Counsel does not cite any record evidence in support of CCFF 135, but instead cites only to its own proposed findings. Schein incorporates its responses to those specific proposed findings here. (SRF 137, 167-68, 183).

Substantively, Complaint Counsel relies on assertions supported by only anecdotal evidence of an increasing number of buying groups and the growth that two buying groups – the Kois Buyers Group and Smile Source – experienced over the relevant period. This does not support the broad assertion made in CCFF 135, that the membership count of existing buying groups has generally increased. The record does not contain any study or analysis of buying group membership over time that could support the asserted fact.

Patterson's Response:

This proposed finding is vague as it purports to speak to “existing buying groups” without saying which buying groups are included. It is also misleading in citing as an example the Kois Buyers Group’s growth between September 2015 (after the conspiracy (Kahn, Tr., 19) and October 2018, because the Kois Buyers Group slashed its prices in 2015, and Dr. John Kois testified that previously the group had not recruited enough members because it was “way too expensive.” (Kois Sr., Tr. 238–39). It is likewise misleading in citing Smile Source as an example, because Smile Source maintains it is not a buying group. (Goldsmith, Tr. 1949 (“Judge Chappell: Did you consider Smile Source

or do you consider Smile Source to be a buying group or a -- what is it, GPO? . . . A: I do not consider it to be that. Judge Chappell: Either of those. A: Correct.”); Maurer, Tr. 4969 (“Mr. Maurer, if I heard your testimony right, Smile Source is not a buying group. Is that right? A. Correct.”). Otherwise, Patterson has no specific response.

Benco’s Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding.

136. The number of buying groups approaching Schein has increased in the last 5 to 10 years. (Sullivan, Tr. 3911).

Schein’s Response:

The evidence is insufficient to support the asserted fact. There is no study concerning the frequency of buying group formation or attempted formation. General opinions about the frequency of an event occurring tend not to be reliable due to recency bias. *See, e.g., Recency Effect*, IResearchNet, <https://psychology.iresearchnet.com/social-psychology/decision-making/recency-effect/> (last visited Mar. 30, 2019) (“The recency effect is an order of presentation effect that occurs when more recent information is better remembered and receives greater weight in forming a judgment than does earlier-presented information. Recency effects in social psychology have been most thoroughly studied in impression formation research.”). Even aside from recency bias, there is no evidence that the witnesses or authors of the cited documents have sufficient foundation and personal knowledge to speak to changes in the frequency of buying group formation, especially since many changed positions and responsibility over time. Moreover, the discovery

record in this case does not go back decades, precluding any reliable conclusions about the frequency of buying group formation. Finally, Complaint Counsel did not introduce any expert analysis of the frequency of buying group formation.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

137. In or around 2011, an increasing number of buying groups attempted to form, existing buying groups began growing in membership, and Schein, Patterson, and Benco were seeing more buying groups looking for discounts. (CX0304 (Ryan, IHT at 111, 114) (has seen an increase in number of GPOs in the dental industry in the last five or ten years); McFadden, Tr. 2683-2684 (hearing more and more from reps in field about buying groups); CX2634 at 002 (“[T]his is another buying group in the making...it is becoming more prevalent as these Pied Pipers find lost souls who buy into their concepts.”); CX2635 at 001 (buying group model “is becoming more popular”); CX0165 at 001-002; CX2879 at 088; Foley, Tr. 4542 (Buying groups were popping up in May of 2011); CX2060 at 001 (“A lot of activity concerning buying groups, lately.”); CX2636 at 002 (“Buying group opportunities continue to arise at a seemingly increasing rate.”); CX2843 at 001; CX0226 at 001-002; CX0009 at 001; CX0166 at 001-002; CX0004 at 001 (buying groups “are coming fast and furious”); CX2389 at 001; CX2837; CX0070; CX0146; CX0201; CX2742 at 008 (Situational Analysis: Competitors, Henry Schein, Inc. 2011-2013 Strategic Plan); CX0311 (Sullivan, IHT at 126-127); CX0301 (Cohen, IHT at 182); CX0314 (Guggenheim, IHT at 170, 172-173); CX0084 at 001-002).

Schein's Response:

Complaint Counsel cites to anecdotal evidence regarding the increase in the number of buying groups and buying group requests, but the record does not include any kind of study or analysis of buying groups that could support the fact asserted.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit as to Benco. Mr. Ryan's investigational hearing transcript is clear, and states that while there was "a period of time when [he] was getting approached by a lot of GPOs, . . . it ebbed and flowed." (CX0304 (Ryan, IHT at 114). Moreover, as Mr. Cohen's testimony demonstrated, Benco was more frequently approached by GPOs as a result of Benco's growth, not necessarily as a result of any uptick in the number of GPOs. (*See* Response to Proposed Finding of Fact 134).

D. Buying Groups Save Dentists Money and Help Preserve Independent Dentistry.

138. Buying groups save dentists money. [REDACTED]
[REDACTED]; *see also* CCFF ¶¶ 139-145, 181, 1391-1398, 1401-1402, 1404-1411, 1728, 1730-1731).

Schein's Response:

There is no evidence that buying groups actually save dentists money. Dentists who are not part of buying groups often receive substantial discounts, without having to pay fees associated with buying group membership. According to Dr. Marshall's own analysis, [REDACTED] of independent dentists who are *not* part of a buying group receive discounts greater than [REDACTED] off of catalog, more than [REDACTED] receive discounts greater than [REDACTED], and [REDACTED] receive discounts greater than [REDACTED]. (CX 7101-067 (Fig. 7)). Buying group members, in contrast, typically receive between a 7% and 20% discount. (*See, e.g.*, SF 832, 1314, 1316; Steck, Tr. 3771-72 (Dental Alliance at 7%); RX 2162 (Klear Impact at [REDACTED]); RX 2393-005 (MeritDent at 15-20%); RX 2612 (UDA at 7-14%); RX 2348 (Breakaway at [REDACTED])). Notably, Dr. Marshall did not compare the average discounts that

buying group members receive to the average discounts that non-buying group members receive. To the extent Dr. Marshall looked at the margins or discounts on some Burkhardt or Atlanta Dental customers, the analysis is flawed because Dr. Marshall failed to account for the fees that members must pay to the buying group. (*See* SF 1732; Marshall, Tr. 3121-22). [REDACTED]

[REDACTED] (SF 51, 117-19; Goldsmith, Tr. 1971-72, 2055-56, 2126, 2073). As Dr. Kois testified, for the first year of the Kois Buyers Group, members had to pay up to \$6,000 per year. (CX 0290; Kois Sr., Tr. 238-42).

Further, the record evidence Complaint Counsel cites does not support the asserted fact. CX 4219 does not purport to be a comprehensive study, and in fact, the email notes

[REDACTED] Instead, it reflects [REDACTED]

[REDACTED] None of the underlying data used in preparing this estimate was produced; nor did Complaint Counsel call the author of the email to testify as to his methodology. Indeed, as Mr. Kois Jr. testified regarding a similar savings estimate, relying on such an estimate “can create credibility concerns” because it does not allow for comparison to the savings dentists can realize outside of the Kois Buyers Group. (Kois Jr., Tr. 360-61; CX 4051). Mr. Reece’s testimony similarly does not speak to the difference in actual prices that buying group members pay versus non-members. It simply notes [REDACTED] without any comparison to the net prices paid by non-members. (Reece, Tr. 4430-31).

Patterson's Response:

The cited testimony only addresses rebates and discounts Burkhart paid to members of Smile Source, it does not address prices charged by Burkhart to individual dentists in contrast to Smile Source members, nor does it in anyway compare prices charged by Patterson, Schein or Benco to individual practices with these prices. (Reece, Tr. 4430–31). Also, Smile Source is not a buying group. (Goldsmith, Tr. 1949 (“Judge Chappell: Did you consider Smile Source or do you consider Smile Source to be a buying group or a -- what is it, GPO? . . . A: I do not consider it to be that. Judge Chappell: Either of those. A: Correct.”); Maurer, Tr. 4969 (“Mr. Maurer, if I heard your testimony right, Smile Source is not a buying group. Is that right? A. Correct.”).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. This proposed finding, ironically, violates this guidance. Finally, it is unclear whether the 18% savings Burkhart allegedly calculated for this doctor would have netted *any* savings for the doctor over the \$199 to \$499 a Kois Buyers Group member had to pay in annual fees at the time. (Kois Sr., Tr. 239).]

Benco's Response:

[REDACTED]

[REDACTED]

[REDACTED]

Complaint Counsel's economic analysis is based on their studies of their expert Dr. Marshall, on only two buying groups: Smile Source and Kois. (Marshall, Tr. 3373). 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). In fact, Kois and Smile Source were highly unusual, and were not representative of buying groups in general. (Wu, Tr. 5039; Wu, Tr. 5040-5041; Wu, Tr. 5044; Benco FF ¶¶ 1042 – 1062)).

139. Buying groups market themselves as a means of helping independent dentists survive. (Goldsmith, Tr. 1934-1935; Reece, Tr. 4415-4416 (Burkhart seeks to work with buying groups to support independent dentists who want to stay independent); [REDACTED]

[REDACTED] CX2246 at 001-002 (Georgia Dental Association attempted to put together a buying group to be “a DSO for the small dentist” and to “help the members of the dental community given the adversity in the marketplace”)).

Schein's Response:

Many buying groups market themselves as a means of helping dentists save on the costs of dental supplies. (CX 2246 (“Early the plan is focus on supplies and insurance”)). Other buying groups market themselves as a means of obtaining various services, advice, or other benefits. (E.g., Goldsmith, Tr. 1934-36 (Smile Source tries to “level the playing field for independent practice dentists to give them the opportunity to be competitive with large corporate group practices and give them access to resources that they wouldn’t otherwise have access to as a solo independent practice owner. ... Through a combination of factors. We provided education. We provided marketing services. We provided access to decreased or discounted cost of goods.”)). There is no evidence that buying groups help dentists “survive,” or even that they claim to help dentists “survive.” A dentist still “need[s] to be a good dentist ... still need[s] to be able to market and ... able to run the business.”

(CX 0322 (Maurer, IHT at 89-90 (“[Y]ou can’t save your way to prosperity. ... Even if I got my supplies for free, I am not going to have a better dental practice.”)); Sullivan, Tr. 4061; Cavaretta, Tr. 5544-45; Reece, Tr. 4457).

Patterson’s Response:

This proposed finding assumes Smile Source is a buying group, when its witnesses testified it is not. Smile Source is not a buying group. (Goldsmith, Tr. 1949 (“Judge Chappell: Did you consider Smile Source or do you consider Smile Source to be a buying group or a -- what is it, GPO? . . . A: I do not consider it to be that. Judge Chappell: Either of those. A: Correct.”); Maurer, Tr. 4969 (“Mr. Maurer, if I heard your testimony right, Smile Source is not a buying group. Is that right? A. Correct.”). Otherwise, Patterson has no specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

140. For example, the president of Kois Buyers Group testified that the company was created “to allow the smaller dentists an option to compete with the larger companies, by reducing some of their overhead.” (CX0321 (Kois Jr., IHT at 35)).

Schein’s Response:

Mr. Kois Jr. is not a dentist, does not have personal knowledge of dental practice finances, and was not involved in the formation of the Kois Buyers Group. (Kois Jr., Tr. 307-08 (“I have a bachelor’s of science in information systems from American University and also a master’s in business administration from the University of Washington.”); CX 8008 (Kois Jr., Dep. at 10 (“Q. And why did you start working with the Kois Buyers Group in July of 2015? A. I wanted more information about the buying group in general....”))). Mr. Kois Jr. lacks the foundation to testify as to the truth of the matter concerning the

creation of the Kois Buyers Group or its effect on the actual ability of independent dentists to compete with larger companies.

Patterson's Response:

The Kois Buyers Group is not a “company” but is instead “a name that was part of what [they] did at the Kois Center. (Kois Sr., 203). John Kois Jr. did state the quoted words but immediately followed them with an explanation that “The overall goal is to save the dentists enough money that it can *pay for their education at the Kois Center.*” (CX0321 (Kois Jr., IHT at 35–36)). Thus, this proposed finding is also inaccurate in that the Kois Buyers Group was created allow dentists to take more classes at the Kois Center. (CX0321 (Kois Jr., IHT at 35–36)).

Benco's Response:

Benco has no specific response to the proposed finding.

141. The founder of the Kois Buyers Group testified that “[t]he Kois Buyers Group is an opportunity for smaller practitioners to buy items at a sale price all year long.” (Kois Sr., Tr. 179).

Schein's Response:

Dr. Kois lacks personal knowledge of the discounts available to “smaller practitioners.”² Nor is there any evidence that the Kois Buyers Group allows dentists to purchase at prices lower than are otherwise available from other distributors, with or without factoring in the fees that the Kois Buyers Group charges.

² Dr. Kois was not allowed as to testify to the success of the Kois Buyers Group. (See Kojs Sr., Tr. 197-99 (“JUDGE CHAPPELL: Right. You’re going to need a better source than this. What somebody told him during an educational setting, that’s not going to cut it.”); see also CX 0321 (Kois Jr., IHT at 118-19 (describing availability of similar pricing from other distributors)); Kojs Jr., Tr. 387 (“Q. Do dentists report saving money once they join the Kois Buyers Group? Do they report to you? A. It’s anecdotally. There’s no official report process.”)).

Patterson's Response:

Dr. John Kois Sr. did state the quoted words, but there is no evidence that the Kois Buyers Club, as it existed *in 2014*, at the time of its interaction with Patterson and when it was run by Qadeer Ahmed, was an opportunity for smaller practitioners to save money. (Kois Sr., Tr. 219 (“Q. I understand that you tasked Mr. Ahmed to reach out to the distributors, my client, Patterson Companies; is that fair? A. Yes. Q. You were not firsthand involved in those reach-out efforts; he did that on his own. Fair? A. Fair. Q. You don’t know what he said to Patterson Companies; is that fair? A. Fair.”); CX8007 (Kois Sr., Dep. at 35 (“[H]e did all the initiation of the contact and all the negotiation. I had nothing to do with any of that, so I don’t actually know what the conversations were that he had with any of the companies.”)); CX0116 at 2; RX0377 at 1). Rather, at that time and for its first year of existence (i.e., past the April 2015 alleged end of the alleged conspiracy (Kahn, Tr. 19)), the Kois Buyers Group’s membership fee was “way too expensive,” to the point where Kois refunded all members’ fees after terminating Qadeer Ahmed. (Kois Sr., Tr. 238–242). Thus, whether or not this proposed finding is accurate today, there is no evidence it is accurate as to the time period relevant to this case.

Benco's Response:

Benco has no specific response to the proposed finding.

142. The buying group helps independent dentists compete by giving them “more reasonable prices” on equipment and dental supplies. (Kois Sr., Tr. 196-197).

Schein's Response:

Dr. Kois lacks foundation to compare prices available to independent dentists within and outside the Kois Buyers Group. Dr. Kois has not been a full-time dentist for

more than 15 years. (Kois Sr., Tr. 167 (“I treat dentists 65 days a year”); CX 8007 (Kois Sr., Dep. at 18)). Importantly, Dr. Kois’s statement is demonstrably false given the fact that the Kois Buyers Group was not successful at first because the membership fees were too high. (Kois Sr., Tr. 238-39).

Patterson’s Response:

This proposed finding is vague in its reference to “[t]he buying group,” as it is unclear whether it is referring to the Kois Buyers Group, or to buying groups in general. Assuming the latter based on the cited testimony, it is unclear whether the Kois Buyers Group *as it existed in 2014*, when it approached Patterson, helped independent dentists compete by saving them money, because the group charged members \$199 to \$499 monthly, which Dr. Kois testified was “way too expensive.” (Kois Sr., Tr. 238–39).

Benco’s Response:

Benco has no specific response to the proposed finding.

143. Another buying group, Smile Source, advertises itself as providing “group practice resources for the independent dentist” by negotiating lower prices on behalf of independent dentists. (Goldsmith, Tr., 1934-1936; CX0322 (Maurer, IHT at 13); CX0146 at 001-002; [REDACTED]).

Schein’s Response:

Smile Source markets itself as providing group practice resources for the independent dentist. Smile Source, however, is a franchisor, providing a multitude of services, along with an optional buying group offering. (SF 43-53). It seeks to justify its high royalty rates in part based on its optional buying group offering. There has been no showing that the buying group’s savings exceed membership fees or exceed what non-member dentists receive.

Patterson's Response:

This proposed finding assumes Smile Source is a buying group, when its witnesses testified it is not. Smile Source is not a buying group. (Goldsmith, Tr. 1949 (“Judge Chappell: Did you consider Smile Source or do you consider Smile Source to be a buying group or a -- what is it, GPO? . . . A: I do not consider it to be that. Judge Chappell: Either of those. A: Correct.”); Maurer, Tr. 4969 (“Mr. Maurer, if I heard your testimony right, Smile Source is not a buying group. Is that right? A. Correct.”). Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

144. A Smile Source marketing flyer advertised “Smile Source Preserving Independent Dentistry” and described the “vision” as empowering independent practitioner “dentists with the collective buying and practice enhancement power of corporate chains” with an invitation on how to become a member. (CX4232 at 004).

Schein's Response:

Smile Source markets itself as providing group practice resources for the independent dentist. CX 4232 also heralds Smile Source’s “Practice Enhancement Support” which includes being listed on the national website, clinical training, and monthly marketing packages. (CX 4232-004).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

145. Patrick Ryan’s analysis of a Kois/Burkhart invoice showed that for commonly purchased dental products, [REDACTED]).

Schein’s Response:

CCFF 145 is overbroad and cannot be asserted for the truth of the matter because neither the cited testimony nor the document is based on a systematic study. Rather, Mr. Ryan’s analysis is self-described as “[f]or what it’s worth, ... a quick analysis....” (CX 0051-001 (“Data point of one, I get it....”). Mr. Ryan reiterated the limited nature of his email at trial, noting it was [REDACTED] (Ryan, Tr. 1145-46). Nor is it a comparison of apples to apples, since it does not compare Benco’s actual net prices to dentists with Kois Buyers Group/Burkhart’s actual net prices to dentists. Rather, it compares Benco’s catalog prices to Burkhart’s net prices with no consideration of the fees members pay to the Kois Buyers Group.

Patterson’s Response:

This proposed finding relates to review of [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Finally, it is unclear whether Kois members would have netted any savings at this point, when the group charged members \$199 to \$499 monthly, which Dr. Kois testified was “way too expensive.” (Kois Sr., Tr. 238–39).

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. Complaint Counsel ignores that, due to a multi-factor pricing and discounting strategy, the large majority of Benco's customers pay less than catalog price for dental supplies. (Cohen, Tr. 414; 671). Benco's pricing includes several categories or "Price Tiers" available to independent dentists. These include Tier 1, Tier 2, Tier 4 and Tier 6. (CX1100-001). Benco's pricing philosophy takes into consideration the level of discount and amount of BluChips at each Price Tier. As independent dentists pay less in price on dental supplies, via a larger percentage discount off of Benco's catalog price, the amount of BluChips awarded goes down. (Cohen, Tr. 655-56; CX1100-001). The BluChip program is Benco's frequent buyer program. BluChips are points that are awarded to Benco's loyal customers that are earned when customers purchase products, services and other activities from Benco. Customers that purchase through Painless®, Benco's internet and mobile ordering system, receive a 100% BluChip bonus. (Cohen, Tr. 654-55; CX1100). In addition to the discount level and BluChips, independent dentists also receive a discount from Benco in the form of free goods. Dental manufacturers often offer free goods or specials that result in free goods depending on purchase volumes or other criteria. Benco has the best computerized tracking system in dentistry to ensure that every customer receives all of the free goods that they are entitled to, based on their purchase history and purchase volumes. (Cohen, Tr. 657). These variables call into question any analysis done to compare the prices paid by Benco customers and Kois members, including one done by Mr. Ryan, who is a Benco employee, not a Benco executive and not a member of Benco's Senior Leadership Team. (CX8015 (Cohen, Dep. at 347); CX0304 (Ryan, IHT at 11)).

E. Respondents Had a Common Understanding of the Term Buying Group.

146. Executives of Schein had a common understanding that a buying group is a collection of independent dentists banding together to negotiate lower prices. (Sullivan, Tr. 3899-3900; Meadows, Tr. 2418-2419; Steck, Tr. 3681-3682).

Schein's Response:

False. Schein executives had a common understanding that a buying group of independent dentists is an entity that *seeks* to negotiate prices for its members. Schein did not have a common understanding that buying groups actually achieve lower pricing, or that the members of the group have “band[ed] together” in the sense that they have committed to do anything. (Steck, Tr. 3681-82 (“I think [lower prices are] the goal of the buying groups. I’m not sure it’s successful.”); Cavaretta, Tr. 5555-56; Meadows, Tr. 2559).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

147. Executives of Patterson had a common understanding that a buying group is a collection of independent dentists banding together to negotiate lower prices. (Guggenheim, Tr. 1566; CX0314 (Guggenheim, IHT at 163); Misiak, Tr. 1306-1307; Rogan, Tr. 3428).

Schein's Response:

False. Patterson executives had a common understanding that a buying group of independent dentists is an entity that *seeks* to negotiate prices for its members. Patterson did not have a common understanding that buying groups actually achieve lower pricing, or that the members of the group have “band[ed] together” in the sense that they have committed to do anything. (McFadden, Tr. 2673; Misiak, Tr. 1307 (“I think there’s an intent to leverage volume.”)).

Patterson's Response:

While entities Complaint Counsel identifies as buying groups may share some characteristics, such as seeking a discount in exchange for no commitment to purchase, Patterson did not see all buying groups as the same. (CX8004 (McFadden, Dep. at 119–20 (“[B]uying groups were not all created equally. And they were like a jar of jellybeans. They each tasted differently.”))).

Benco's Response:

Benco has no specific response to the proposed finding.

148. Executives of Benco had a common understanding that a buying group is a collection of independent dentists banding together to negotiate lower prices. (Cohen, Tr. 432-433; Ryan, Tr. 1036-1037; CX0301 (Cohen, IHT at 106); CX1084 at 001).

Schein's Response:

False. Benco executives had a common understanding that a buying group of independent dentists is an entity that *seeks* to negotiate prices for its members. Benco did not have a common understanding that buying groups actually achieve lower pricing, or that the members of the group have “banded” together in the sense that they have committed to do anything. (CX 0304 (Ryan, IHT at 107 (“unaffiliated customers *trying* to purchase together.”)); Ryan, Tr. 1231 (“they do not deliver compliance”)).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

149. Importantly, Schein, Patterson, and Benco also understood the distinction between buying groups of independent dentists and other forms of dental entities that aggregated purchasing power, such as CHCs and DSOs. (CX8005 (Muller, Dep. at 278) (Schein contract clause that prohibits CHC buying groups from extending their negotiated pricing to private practice dentists); Foley, Tr. 4566-4568 (Advantage Dental Primary Vendor Agreement with Schein prohibits sharing DSO pricing with buying group component); CX2081 at 002 (“Similar PVA as with MB2, Advantage adheres to it by not bringing in the BG component.”); Foley, Tr. 4573-4574; CX4001 at 002 (MB2 Primary Vendor Agreement with Schein prohibits growing GPO type relationships); RX2276 at 002 (Orthosynetics Primary Vender Agreement covers offices under the control of Orthosynetics); CX0158 at 002 (Patterson Special Markets “definition will not include group purchasing organizations (GPOs).”); Cohen, Tr. 548-550 (Benco decided to bid for the business of Atlantic Dental Care (“ADC”) when it learned that ADC was a DSO and not a buying group)).

Schein’s Response:

The proposed finding is vague, as it is not clear what Complaint Counsel thinks the “distinction” Respondents supposedly “understood” was. Regardless, the cited evidence does not support the proposed finding. There are many differences between buying groups and other types of organizations.

Schein, for example, recognized a difference between entities like DSOs, which can control their purchases and commit volume, and entities like buying groups, which cannot. A DSO’s ability to guarantee purchase volume enables Schein to obtain lower prices from manufacturers and offer better discounts. (Meadows, Tr. 2558-59 (“That volume that the customer would buy from that particular manufacturer is what we use to go talk with that manufacturer about their cost.”); CX 0311 (Sullivan, IHT at 110 (“But it’s not necessarily every customer will qualify for it. So 3M has to agree, oh, yes, this customer will qualify for it....”))).

Schein also included provisions in certain contracts with DSOs and others that prevented the pricing offered to such entities from being arbitrated to third parties, such as private practice customers, over whom the DSOs lacked such control. (Foley, Tr. 4566-69 (contract clause is important to ensure “that they adhere to the pricing on this agreement

and does not cover the buying group offices for the pricing that we're offering here... [i]n order to give DSO pricing, based on our manufacturer partners' rules, they have to be DSOs.”)). Offering the negotiated manufacturer discount to a group without a volume commitment “creates a great conflict with [Schein’s] manufacturers.” (Meadows, Tr. 2557-58). Importantly, nothing prevented Schein from providing discounts to buying groups or private practice customers outside of DSO or other contracts. (Foley, Tr. 4699-700 (noting that Henry Schein Dental provided discounts to the Advantage Dental buying group separate from the discounts provided to Advantage Dental DSO)).

Schein negotiated with DSOs, CHCs, buying groups, and others based on a variety of factors, including their ability to control the purchasing decision and deliver incremental volume.

Patterson’s Response:

Complaint Counsel’s cited evidence does not support the finding.

Benco’s Response:

Benco has no specific response to the proposed finding.

F. Buying Groups Successfully Entered Other Industries As a Means For Practitioners to Save Money.

150. Buying groups have successfully entered other industries as a means for practitioners to save money on supplies. (CCFF ¶¶ 151-157, 158-160, 162).

Schein’s Response:

Complaint Counsel fails to introduce reliable evidence to support this proposed finding or establish its relevance. There is no evidence or expert testimony that buying groups in some other undefined industries have any relevance to dental buying groups. Indeed, as Complaint Counsel concedes, “Dental buying groups are ... distinguished from

medical and healthcare GPOs...,” and “Medical GPOs are not dental buying groups.” (CCFF 77-78).

Moreover, according to the Government Accountability Office, GPOs often broker terms that harm their members’ interests. The GAO found that “GPOs’ prices were not always lower and were often higher than prices paid by hospitals negotiating with vendors directly.” U.S. Gov’t Accountability Office, GAO-02-690T, Group Purchasing Organizations: Pilot Study Suggests Large Buying Groups Do Not Always Offer Hospitals Lower Prices, pgs. 3, 11-13, 18-19 (2002) (analyzing the extent to which hospitals buying pace makers and safety needles saved money by using a GPO contract).

Patterson’s Response:

There is no record support for this generalized statement. Complaint Counsel point to GPOs in medical, (CCFF 151), but acknowledge elsewhere that medical GPOs are very different from dental buying groups. CCFF Section III(A)(5) (entitled “Buying Groups Are Also Distinguished from Medical or Healthcare GPOs”). Complaint counsel cites Vision Source in Optometry, AudConnex for audiology and ENT, and NDC and ADC. But Vision Source is a franchisor, there is no evidence it is a buying group. (CX0322 (Maurer, IHT at 170 (“Q. What is Vision Source? A. Vision Source is the franchisor that promotes independent optometry.”)); CX8019 (Moody, Dep. at 16 (“Q. 1991. What is Vision Source? A. It’s an optometric network, franchise.”))). Likewise, no witnesses testified AudConnex was a buying group. Finally, NDC and ADC are not buying groups as defined by Complaint Counsel. See CCFF Reply 155, 158.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding.

151. For example, GPOs are prevalent in the medical industry. (CX8029 (R. Johnson, Dep. at 18-22); Misiak, Tr. 1308 (Patterson's medical division does day-to-day business with GPOs); Rogan, Tr. 3432-3433; CX8033 (Cavaretta, Dep. at 49) (GPOs more prominent and prevalent in medical); CX8037 (Ryan, Dep. at 169-173)).

Schein's Response:

There has been no reliable evidence presented concerning the formation or prevalence of buying groups in other industries, including the medical industry. Complaint Counsel introduced no expert testimony concerning medical markets or medical GPOs, and discovery in the case did not encompass medical markets. Neither Mr. Rogan, Mr. Cavaretta, nor Mr. Misiak have the foundation necessary to competently testify about medical markets, as none were involved in that market. While Dr. Richard Johnson is an audiologist, Complaint Counsel did not lay the foundation necessary to establish that he has personal knowledge about the prevalence or nature of medical buying groups.

Nor has Complaint Counsel established any relevance of medical GPOs to this case. Indeed, as Complaint Counsel concedes, "Dental buying groups are ... distinguished from medical and healthcare GPOs..." and "Medical GPOs are not dental buying groups." (CCFF 77-78). Medical GPOs are very different from dental buying groups for a number of reasons, including but not limited to the fact that (i) medical GPO membership generally consists of large hospitals making large purchases; (ii) medical GPO members make actual

commitments to purchase products through the GPO; (iii) medical GPOs negotiate directly with manufacturers. (CX 8010 (Titus, Dep. at 248, 267); Rogan, Tr. 3431).

In any event, according to the Government Accountability Office, GPOs often broker terms that harm their members' interests. The GAO found that "GPOs' prices were not always lower and were often higher than prices paid by hospitals negotiating with vendors directly." U.S. Gov't Accountability Office, GAO-02-690T, Group Purchasing Organizations: Pilot Study Suggests Large Buying Groups Do Not Always Offer Hospitals Lower Prices, pgs. 3, 11-13, 18-19 (2002) (analyzing the extent to which hospitals buying pace makers and safety needles saved money by using a GPO contract).

Patterson's Response:

The proposed finding is misleading as Complaint Counsel acknowledge elsewhere that medical GPOs are very different from dental buying groups. CCFF Section III(A)(5) (entitled "Buying Groups Are Also Distinguished from Medical or Healthcare GPOs").

Benco's Response:

Mr. Misiak testified that there was no single definition of GPOs to be used across the dental and medical fields, and that a key difference for the medical GPOs Patterson dealt with was that they provided and met volume commitments. (Misiak, Tr. 1308-09). Mr. Rogan, too, testified that the medical GPOs are far different from dental GPOs, stating, "[I]f you look at the definition of as GP on the medical side, they buy the product and they have the relationship with the manufacturer. They aggregate the spend. They warehouse the product. They ship the product to the end user, which are normally hospital facilities, VAs, et cetera. That description does not show up in the dental world[.]" (Rogan, Tr. 3431). Mr. Rogan testified that the medical GPOs can make volume commitments because individual medical providers don't make their own decisions about what products to

purchase if they are in a GPO. (Rogan, Tr.. at 3432-33). And while Mr. Carvetta did testify that GPOs were more prevalent in the medical industry, he cautioned that he knew very little about GPOs in the medical industry. CX8033 (Cavaretta, Dep. at 49-50). The testimony of Mr. Ryan cited by Complaint Counsel does not, in any respect, support the proposed finding. (See CX8037 (Ryan, Dep. at 169-173).)

152. Vision Source is a buying group in the optometry market. [REDACTED].

Schein's Response:

Vision Source is not relevant to the case, and there has been no discovery of Vision Source. That said, the record evidence shows that Vision Source is a franchise of optometrists. It provides members with a buying group offer presumably designed to help offset the franchise royalty. (CX 0322 (Maurer, IHT at 173-74)).

Patterson's Response:

The cited references do not refer to Vision Source as a buying group, nor is there any evidence in the record that Vision Source is a buying group. Rather, Dr. Goldsmith testified that [REDACTED]

[REDACTED] (Goldsmith, Tr. 1967). And several Smile Source witnesses testified that Vision Source, like Smile Source is a "franchisor." (CX0322 (Maurer, IHT at 170 ("Q. What is Vision Source? A. Vision Source is the franchisor that promotes independent optometry.")); CX8019 (Moody, Dep. at 16 ("Q. 1991. What is Vision Source? A. It's an optometric network, franchise."))).

Benco's Response:

Benco has no specific response to the proposed finding.

153. The executives who started Smile Source first formed Vision Source, a buying group for ophthalmologists and optometrists. (CX0322 (Maurer, IHT at 16-17) (founder of Smile Source was Len Ellisor, Chairman of Vision Source Corporation); [REDACTED] CCFF ¶ 152).

Schein's Response:

CCFF 153 makes the same assertions regarding Vision Source as CCFF 152 and Schein incorporates its response to CCFF 152 here. (SRF 152). Otherwise, no response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

154. [REDACTED]
[REDACTED]; CX0319 (Reece, IHT at 104) (Smile Source's mission was to preserve independent dentistry "You may or may not be aware that [Smile Source] started on the optical side, and so they had a model that was already pretty well vetted, in terms of approach and it worked quite well for them...on that side of the business. They thought that there was an opportunity to step in and create a similar type of large fraternity like that, that could help protect [dentists'] independence. It is still working well on the optical side today and it continues to gain momentum on the dental side as well.")).

Schein's Response:

Vision Source is a franchise of optometrists. (Maurer, Tr. 4994). It provides members with a buying group offer, presumably to help offset the franchise royalty. The impact that Vision Source has on the optometry market is neither relevant nor supported by reliable evidence. Complaint Counsel failed to introduce any fact witnesses with personal knowledge of Vision Source or expert testimony concerning the optometry market. Neither Mr. Maurer nor Mr. Reece participate in that market. (RX 2952 (Maurer,

Dep. at 12-13); CX 0319 (Reece, IHT at 7-8)). While Mr. Moody testified about Vision Source during his deposition, Complaint Counsel failed to establish he had sufficient personal knowledge of independent optometrists to present reliable testimony concerning Vision Source's impact on them. (See CX 8019 (Moody, Dep. at 15)).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

155. Vision Source helps optometrist save money by aggregating members to provide volume discounts – as the group grew Vision Source had more leverage with the vendors. (CX8019 (Moody, Dep. at 44-45)).

Schein's Response:

The impact that Vision Source has on the optometry market is neither relevant nor supported by reliable evidence. Complaint Counsel failed to introduce any fact witnesses with personal knowledge of Vision Source or expert testimony concerning the optometry market. While Mr. Moody testified about Vision source during his deposition, Complaint Counsel failed to establish he had sufficient personal knowledge of independent optometrists to present reliable testimony concerning Vision Source's impact on them. (See CX 8019 (Moody, Dep. at 15)).

Moreover, according to the Government Accountability Office, GPOs often broker terms that harm their members' interests. The GAO found that "GPOs' prices were not always lower and were often higher than prices paid by hospitals negotiating with vendors directly." U.S. Gov't Accountability Office, GAO-02-690T, Group Purchasing Organizations: Pilot Study Suggests Large Buying Groups Do Not Always Offer Hospitals

Lower Prices, pgs. 3, 11-13, 18-19 (2002) (analyzing the extent to which hospitals buying pace makers and safety needles saved money by using a GPO contract).

Patterson's Response:

This proposed finding lacks a timeframe and is vague throughout. Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

156. The founders of the dental buying group KlearImpakt first created a buying group for independent audiologists and ear-nose-throat ("ENT") specialists called AudConnex. (R. Johnson, Tr. 5480-5481; CX8029 (R. Johnson, Dep. at 18-20)).

Schein's Response:

AudConnex is not relevant to the case, and there has been no discovery of AudConnex. Further, only two of the founders of Klear Impakt helped to form AudConnex, a buying group for audiologists: Richard Johnson and the owner of a marketing and advertising firm, Ryan Lewis. (CX 8029 (R. Johnson, Dep. at 15-18)). Other Klear Impakt founders were practicing dentists. (CX 8029 (R. Johnson, Dep. at 15-18)). Evidence regarding AudConnex is not relevant to the issues in this case.

Patterson's Response:

None of the cited references refer to AudConnex as a "buying group," and there is no evidence in the record that AudConnex is a buying group. Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

157. AudConnex “was designed to help [the hearing imbalance and ENT] industry to keep independent ENTs’ and audiologists’ practices strong and relevant,” including securing discounts for these doctors. (R. Johnson, Tr. 5480-5481; CX8029 (R. Johnson, Dep. at 18-21)).

Schein’s Response:

AudConnex is not relevant to the issues in this case, and the impact of AudConnex on independent ENTs and audiologists has not been supported by substantial or reliable evidence.

Moreover, according to the Government Accountability Office, GPOs often broker terms that harm their members’ interests. The GAO found that “GPOs’ prices were not always lower and were often higher than prices paid by hospitals negotiating with vendors directly.” U.S. Gov’t Accountability Office, GAO-02-690T, Group Purchasing Organizations: Pilot Study Suggests Large Buying Groups Do Not Always Offer Hospitals Lower Prices, pgs. 3, 11-13, 18-19 (2002) (analyzing the extent to which hospitals buying pace makers and safety needles saved money by using a GPO contract).

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

158. Dental distributors, including Benco and Guggenheim Dental (Paul Guggenheim’s family-owned distribution company that was later acquired by Patterson) benefitted through their membership in buying groups for distributors. These buying groups, including the National Distributing Contracting (“NDC”) and the American Dental Cooperative (“ADC”), helped small, independent dental distributors like Benco and Guggenheim Dental to leverage their collective buying power in dealings with manufacturers, and to compete against larger dental distributors. (CCFF¶¶ 159-162).

Schein's Response:

The NDC, formerly ADC, is not relevant to this case. Complaint Counsel has not introduced any evidence that would support a comparison of alleged distributor buying groups to buying groups of independent dentists. (*See* SRF 159-162).

Patterson's Response:

NDC and ADC are not “buying groups” as defined by Complaint Counsel. NDC is an organization of smaller dealers which used to be called ADC. (CX0315 (McFadden, IHT at 72 (It is “a cooperative of medical and dental distributors.”)); CX0304 (Ryan, IHT at 150 (ADC “was a group of regional and local distributors who incorporated together for the purpose of being able to buy products together as a cooperative and provide coverage together for the ability to acquire national lines of products and seek value-added services for their businesses...”)). NDC/ADC provided specific product lines to distributors, including private-label products, and operated a warehouse that sold products to distributors. CX0314 (Guggenheim, IHT at 28 (ADC had “specific product lines ” of “national exclusives” that distributors “wouldn’t have been able to...acquire”)); CX0314 (Guggenheim, IHT at 32 (They also have “private-label products...they had a pretty broad capability to source product on the private label side under a branded strategy, private-label strategy that they had called Koala [sic, Quala]...”)); CX0314 (Guggenheim, IHT at 28 (NDC operates its own warehouse for dental products supplies)); CX0302 (Jackson, IHT at 109) (“There's a warehouse so that they can buy in group purchases to, you know, so that – from manufacturers and get a better price.”)); CX0303 (McElaney, IHT at 28 (“Q. And what was Benco's relationship with NDC? A. We'd buy products from their warehouse. Q. Was NDC a GPO? A. No. Q. Was it a buying group? A. No. Q. So how did you buy product from NDC then? A. Give them a PO and buy the product.”))).

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding.

159. Benco was a founding member of NDC, a buying group for small, independent distributors. (Cohen, Tr. 437-438; CX8015 (Cohen, Dep. at 111); CX0304 (Ryan, IHT at 150)). NDC was previously called the American Dental Cooperative. (Cohen, Tr. 437-438).

Benco's membership in NDC helped Benco negotiate better terms and deals in purchasing products from dental product manufactures. (Cohen, Tr. 438-439). NDC also helped Benco compete against larger distributors. (Cohen, Tr. 438-439).

Schein's Response:

NDC is not relevant to this case. There is no evidence that establishes that NDC's model and methodology is reasonably similar to the "concept of buying groups in the dental industry" that have been allegedly boycotted in this matter, such that it bears any relevance. (CC Br. 11 & n.75). In fact, the evidence shows NDC is *not* comparable to buying groups of independent dentists. Unlike buying groups of independent dentists, NDC actually purchases supplies from the manufacturer and re-sells the supplies to its members. (CX 0302 (Jackson, IHT at 110 ("the NDC would buy the box of 10 and sell [to their members] whatever their demand would be so that they wouldn't have to buy, you know, large quantities that could, you know, expire or have dating."))).

Complaint Counsel cites testimony from Mr. Cohen to support the asserted facts, but Mr. Cohen made clear that he was not competent to testify regarding the NDC. He

testified, “I’m not the right one to ask about that. That was really my father’s decision ... you’d have to ask him about the beginning of it.” (Cohen, Tr. 438-39).

Patterson’s Response:

Notwithstanding Cohen’s testimony, NDC and ADC are not buying groups as defined by Complaint Counsel. NDC is an organization of smaller dealers which used to be called ADC. (CX0315 (McFadden, IHT at 72 (It is “a cooperative of medical and dental distributors.”)); CX0304 (Ryan, IHT at 150 (ADC “was a group of regional and local distributors who incorporated together for the purpose of being able to buy products together as a cooperative and provide coverage together for the ability to acquire national lines of products and seek value-added services for their businesses...”)). NDC/ADC provided specific product lines to distributors, including private-label products, and operated a warehouse that sold products to distributors. CX0314 (Guggenheim, IHT at 28 (ADC had “specific product lines ” of “national exclusives” that distributors “wouldn’t have been able to...acquire”)); CX0314 (Guggenheim, IHT at 32 (They also have “private-label products...they had a pretty broad capability to source product on the private label side under a branded strategy, private-label strategy that they had called Koala [sic, Quala]...”)); CX0314 (Guggenheim, IHT at 28 (NDC operates its own warehouse for dental products supplies)); CX0302 (Jackson, IHT at 109) (“There’s a warehouse so that they can buy in group purchases to, you know, so that – from manufacturers and get a better price.”)); CX0303 (McElaney, IHT at 28 (“Q. And what was Benco’s relationship with NDC? A. We’d buy products from their warehouse. Q. Was NDC a GPO? A. No. Q. Was it a buying group? A. No. Q. So how did you buy product from NDC then? A. Give them a PO and buy the product.”))).

Benco's Response:

Benco has no specific response to the proposed finding.

160. Paul Guggenheim was previously the President and a Board Member of ADC, a buying group of independent regional and local distributors that sought to aggregate their business in order to get better programs and to be able to acquire national lines of products. (CX0314 (Guggenheim, IHT at 28-30); Guggenheim, Tr. 1546). Guggenheim testified that the American Dental Cooperative was formed in order to achieve larger buying power and to aggregate the business of small and independent distributors. (CX0314 (Guggenheim, IHT at 28-30)).

Schein's Response:

ADC is not relevant to this case. Schein does not contest Mr. Guggenheim's position at ADC, which no longer exists, or that Mr. Guggenheim testified that ADC "was a group of independent regional and local distributors who incorporated together for the purpose of being able to buy products together as a cooperative and provide coverage together for the ability to acquire national lines of products and seek value-added services for their business and their customers, such as financing – in other words, aggregating all of their businesses together to be able to get a better program, from a bank as an example." (CX 0314 (Guggenheim, IHT at 28)).

There is no evidence that ADC is comparable or relevant to buying groups of independent dentists. As noted, ADC, now NDC, operates very differently than a buying group of independent dentists. (SRF 159; CX 0302 (Jackson, IHT at 110)).

As to the reason ADC was formed, Mr. Guggenheim made clear he was not competent to testify as to that question: "I don't know. I wasn't ... there in the early days. We came fairly late in that. So I don't remember the details of why they, you know, organized. ... I mean, my belief, but it may not be consistent with what they believed." (CX 0314 (Guggenheim, IHT at 29-30)).

Patterson's Response:

NDC and ADC are not “buying groups” as defined by Complaint Counsel. NDC is an organization of smaller dealers which used to be called ADC. (CX0315 (McFadden, IHT at 72 (It is “a cooperative of medical and dental distributors.”)); CX0304 (Ryan, IHT at 150 (ADC “was a group of regional and local distributors who incorporated together for the purpose of being able to buy products together as a cooperative and provide coverage together for the ability to acquire national lines of products and seek value-added services for their businesses...”)). NDC/ADC provided specific product lines to distributors, including private-label products, and operated a warehouse that sold products to distributors. CX0314 (Guggenheim, IHT at 28 (ADC had “specific product lines ” of “national exclusives” that distributors “wouldn’t have been able to...acquire”)); CX0314 (Guggenheim, IHT at 32 (They also have “private-label products...they had a pretty broad capability to source product on the private label side under a branded strategy, private-label strategy that they had called Koala [sic, Quala]...”)); CX0314 (Guggenheim, IHT at 28 (NDC operates its own warehouse for dental products supplies)); CX0302 (Jackson, IHT at 109) (“There's a warehouse so that they can buy in group purchases to, you know, so that – from manufacturers and get a better price.”)); CX0303 (McElaney, IHT at 28 (“Q. And what was Benco's relationship with NDC? A. We'd buy products from their warehouse. Q. Was NDC a GPO? A. No. Q. Was it a buying group? A. No. Q. So how did you buy product from NDC then? A. Give them a PO and buy the product.”))). Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only testimony of a Patterson witness discussing Patterson's business.

161. Guggenheim Dental, a dental distribution company owned by Paul Guggenheim's family, was a regional, full-service distributor that was later acquired by Patterson. (Guggenheim, Tr. 1528-1529).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only testimony of a Patterson witness discussing Patterson's business.

162. Guggenheim Dental benefitted from the buying power it achieved through its membership in the American Dental Cooperative. (CX0314 (Guggenheim, IHT at 31-33)). The American Dental Cooperative helped Guggenheim Dental, an independent distributor, gain access to certain product lines that it otherwise would not have had access to based on its individual purchasing volume. (CX0314 (Guggenheim, IHT at 32)).

Schein's Response:

First, there is no evidence that ADC is comparable or relevant to buying groups of independent dentists. ADC, now NDC, operates very differently than a buying group of independent dentists. (SRF 159; CX 0302 (Jackson, IHT at 110)).

Second, the cited evidence is not reliable support for the assertions Complaint Counsel seeks to make. Mr. Guggenheim's answer to the question, "Would you say Guggenheim Dental benefitted from the buying power of ADC?" was very equivocal. He answered, "I think so." (CX 0314 (Guggenheim, IHT at 32-33)). Regarding access to certain product lines, Mr. Guggenheim did not testify that Guggenheim Dental's

purchasing volume was preventing access. Rather, ADC had “national exclusives,” which Guggenheim gained access to as a member. (CX 0314 (Guggenheim, IHT at 32)).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only testimony of a Patterson witness discussing Patterson’s business.

G. Kois Buyers Group Background

163. Kois Buyers Group is a buying group. (Kois Sr., Tr. 179-180; Kois Jr., Tr. 308, 310, 312).

Schein’s Response:

No response.

Patterson’s Response:

Neither witness testified at the cited locations that the Kois Buyers Group was a “buying group” as Complaint Counsel defines that term. Rather, both witnesses were asked questions in which the Kois Buyers Group was referred to as a “buying group,” and never opined as to whether it was one. (Kois Sr., Tr. 179-180; Kois Jr., Tr. 308, 310, 312). Qadeer Ahmed, meanwhile, represented the Kois Buyers Group to Patterson as “not a standard BUYING GROUP.” (RX0377 at slide 3; RX2197 at slide 3). “We are profoundly different,” Ahmed wrote. (RX0377 at slide 3; RX2197 at slide 3). Ahmed also wrote to Chuck Cohen that the Kois Buyers Group was “not a buying group in the sense that you would be familiar with the term.” (RX1042 at 2). There is no contrary testimony.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only testimony of a Patterson witness discussing Patterson's business.

164. The group was formed by Dr. John C. Kois, Sr. in 2014 to help small practices achieve enough purchase volume to obtain cost savings. (Kois Sr., Tr. 179).

Schein's Response:

Incorrect. The Kois buying group was the idea of Qadeer Ahmed at ProCare. (CX 8007 (Kois Sr., Dep. at 30-31 ("Where did you get the idea to set up a buyers group? A. From a company called ProCare... Before you met ProCare and Qadeer Ahmed, had you done anything to start the process of trying to set up a buying group? A. No."))). Mr. Ahmed, who lives and works in Canada, was never deposed, so how he came up with the buying group idea is unknown. Schein does not take issue with the reason Dr. Kois agreed to lend his name to and promote the buying group. (Kois Sr., Tr. 181-82, 249).

Patterson's Response:

The Kois Buyers Group is not a "company" but is instead "a name that was part of what [they] did at the Kois Center. (Kois Sr., 203). John Kois Jr. did state the quoted words but immediately followed them with an explanation that "The overall goal is to save the dentists enough money that it can *pay for their education at the Kois Center.*" (CX0321 (Kois Jr., IHT at 35-36)). Thus, this proposed finding is also inaccurate in that the Kois Buyers Group was created allow dentists to take more classes at the Kois Center. (CX0321 (Kois Jr., IHT at 35-36)).

Benco's Response:

Benco has no specific response to the proposed finding.

165. Dr. John C. Kois, Sr. is one of the dental industry's key opinion leaders, and a well-known clinical educator. (Cohen, Tr. 567-568; Reece, Tr. 4409; [REDACTED]; Guggenheim, Tr. 1660).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

166. The exclusive U.S. distributor for the Kois Buyers Group is Burkhart Dental Supply. (Kois Sr., Tr. 182-183; Kois Jr., Tr. 322).

Schein's Response:

Schein does not dispute that Burkhart is the exclusive distributor for the Kois Buyers Group, but notes that the Kois Buyers Group does not make purchases on behalf of its members and members of the Kois Buyers Group are under no obligation to purchase from Burkhart. (Kois Sr., Tr. 248; Reece, Tr. 4436-37).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

167. As of September 2015, the Kois Buyers Group had 174 members. (CX8008 (Kois Jr., Dep. at 107)).

Schein's Response:

No response.

Patterson's Response:

Patterson has no specific response but notes that September 2015 is about five months *after* Complaint Counsel alleged April 9, 2015 end date for the alleged conspiracy (Kahn, Tr. 19), as well as about a year *after* Patterson's only interaction with the Kois Buyers Group, through Qadeer Ahmed. (CX0116 at 2; RX0377 at 1).

Benco's Response:

Benco has no specific response to the proposed finding.

168. As of October 2018, the Kois Buyers Group has 570 members. (Kois Jr., Tr. 308).

Schein's Response:

No response.

Patterson's Response:

The testimony was that the Kois Buyers Group has "approximately" 570 members. (Kois Jr., Tr. 308).

Benco's Response:

Benco has no specific response to the proposed finding.

169. To be eligible for membership, a dentist must have taken a course from the Kois Center and paid an annual membership fee of \$299. (Kois Jr., Tr. 317-318).

Schein's Response:

Vague. The membership fees for Kois Buyers Group have changed over time. Initially, the Kois Buyers Group charged between \$2,400 and \$6,000 per year. (CX 0290;

Kois Sr., Tr. 238-42). Because that business model failed, Kojs restructured the program, terminated the relationship with Mr. Ahmed, and reduced the membership fee to \$299 per year in 2015. (Kois Sr., Tr. 237-40; Kojs Jr., Tr. 364; *see also* Ryan, Tr. 1030 (discussing the importance of timeline)).

Patterson's Response:

This finding is accurate only for the time period beginning November 2015, well after the April 2015 alleged end of the alleged conspiracy. (Kahn, Tr. 19). Before November 2015, the Kojs Buyers Group charged a *monthly* fee ranging from \$199 to \$499, half of which went to Qadeer Ahmed, who was running the group at the time. (Kois Sr., Tr. 239–42). After the Kojs Buyers Group reduced its fee to \$299 per year in November 2015, it refunded all members who had paid the more expensive prior rate, including the portion of the membership fees that had gone to Ahmed. (Kois Sr., 240–42). Ahmed did not repay his portion of the refunded fees, which did not make Dr. Kojs happy. (Kois Sr., 242 (“JUDGE CHAPPELL: When you went to 299 a year and when he was gone, did you get money back from him? THE WITNESS: We did not. JUDGE CHAPPELL: Was that something that made you happy? THE WITNESS: No.”)).

Benco's Response:

Benco has no specific response to the proposed finding.

170. The Kojs Center is a private teaching center for practicing dentists located in Seattle, WA. (Kois Sr., Tr. 163).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

171. Dr. John C. Kois, Sr. is the director and founder of the Kois Center. (Kois Sr., Tr. 161, 164; CX8007 (Kois Sr., Dep. at 13)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

172. The Kois Center is world-renowned; it works with dentists from all over the world. (CX8007 (Kois Sr., Dep. at 13)).

Schein's Response:

No response.

Patterson's Response:

Patterson stipulates that the Kois Center works with dentists from all over the world. Dr. Kois did not testify that the Kois Center is "world-renowned."

Benco's Response:

Benco has no specific response to the proposed finding.

173. Approximately 4,000 dentists have taken a course at the Kois Center. (Kois Sr., Tr. 165).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

174. The nickname for the group of dentists who have taken a course at the center is “the Tribe.” (Kois Sr., Tr. 165).

Schein's Response:

No response.

Patterson's Response:

“The Tribe” is a nickname Dr. Kois uses for his students. (Kois Sr., Tr. 165).

Benco's Response:

Benco has no specific response to the proposed finding.

H. Smile Source Background

175. Smile Source is a buying group. (Goldsmith, Tr. 1948-1949 (Schein, Patterson, and Benco referred to Smile Source as a buying group); Guggenheim, Tr. 1799; Foley, Tr. 4524; Reece, Tr. 4394; Misiak, Tr. 1314-1320; CX2801 at 018 (Schein's Response to RFA ¶32 (Schein considered Smile Source to be a buying group))).

Schein's Response:

Smile Source is a particular kind of buying group. It is a franchisor and refers to itself as a [REDACTED] (Goldsmith, Tr. 2046). [REDACTED]
[REDACTED] (Goldsmith, Tr. 2053-54, 2064-65, 2075-78).

Patterson's Response:

According to Smile Source's witnesses, who as Smile Source executives are the best positioned to provide evidence on this point, Smile Source is not a buying group. (Goldsmith, Tr. 2040–41 (“Q. And you consider Smile Source to be a franchisor; is that right? A. That is correct.”); Goldsmith, Tr. 2046) (“Q. Okay. Now, Smile Source considers itself a franchise DSO; right? A. Of sorts, yes. Q. You’ve called yourself a franchise DSO before to others in the industry? A. I’ve called myself or I called Smile Source a franchise.”); Maurer, Tr. 4970 (“We are a franchise group.”)). Both Smile Source witnesses who testified at trial said that Smile Source is not a buying group. (Goldsmith, Tr. 1949 (“Judge Chappell: Did you consider Smile Source or do you consider Smile Source to be a buying group or a -- what is it, GPO? . . . A: I do not consider it to be that. Judge Chappell: Either of those. A: Correct.”); Maurer, Tr. 4969 (“Mr. Maurer, if I heard your testimony right, Smile Source is not a buying group. Is that right? A. Correct.”). Smile Source's witnesses testified that, instead, Smile Source is a franchisor. PF ¶ 109.

Benco's Response:

Benco has no specific response to the proposed finding.

176. Smile Source was based in Kingwood, Texas in around 2011. (Goldsmith, Tr. 1934-1937).

Schein's Response:

Smile Source is based in Kingwood, TX, and was based there in 2011. (Goldsmith, Tr. 1937). Smile Source was formed in 2006. (Goldsmith, Tr. 2070).

Patterson's Response:

Patterson has no specific response except to clarify that Smile Source's headquarters did not move after 2011; indeed its executive offices were in [REDACTED] in

January 2017 when Patterson met with Smile Source to present to the organization.

[REDACTED]

Benco's Response:

Benco has no specific response to the proposed finding.

177. Smile Source is a group of dentists that formed to preserve independent practice dentistry. (Goldsmith, Tr. 1934).

Schein's Response:

Smile Source is not just a “group of dentists.” It is a for-profit corporation that operates as a franchisor. (Goldsmith, Tr. 2040-41, 2070; RX 0290). It sells geographically-exclusive franchises to dentists, and claims that such franchises can better compete against DSOs. (Goldsmith, Tr. 2056-58; Maurer, Tr. 4936; RX 0290).

Dr. Goldsmith's testimony concerning Smile Source's formation also lacks foundation, as he neither created Smile Source, nor worked there at its inception. (Goldsmith, Tr. 1934). Moreover, Dr. Goldsmith's testimony that Smile Source is a “coalition of dentists” ignores the actual corporate structure of Smile Source, and is not supported by the actual franchise agreement. (Goldsmith, Tr. 1934; RX 0290).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

178. The goal of Smile Source is to level the playing field for independent dentists against corporate group practices by providing resources and discounts that independent dentists could not get on their own by leveraging economies of scale. (Goldsmith, Tr. 1934-1936).

Schein's Response:

As an initial matter, there is no evidence that buying groups provide independent dentists with discounts that they could not otherwise get on their own. While Schein does not dispute that Smile Source has marketed its goal as Dr. Goldsmith described, Smile Source is a for-profit dental franchisor. (Goldsmith, Tr. 2040-41, 2070; RX 0290). Smile Source's primary purpose is to make a profit.

Patterson's Response:

The proposed response incorrectly elevates the role of "discounts" in Dr. Goldsmith's testimony as to Smile Source's primary goals. Dr. Goldsmith testified at the cited location that Smile Source provides independent dentists with access to "resources" they could not otherwise get, and that these resources went well beyond access to discounts. (Goldsmith, Tr. 1934-36 ("Q. What were the goals of Smile Source? A. Primarily to level the playing field for independent practice dentists to give them the opportunity to be competitive with large corporate group practices and give them access to resources that they wouldn't otherwise have access to as a solo independent practice owner. Q. And how did Smile Source help independent dentists compete with corporate dentistry? A. Through a combination of factors. We provided education. We provided marketing services. We provided access to decreased or discounted cost of goods. And we really tried to leverage our economies of scale in different categories, whether it was access to services or goods.

JUDGE CHAPPELL: You said earlier you wanted to give independent practice dentists access to resources that they wouldn't otherwise have access to. What would those resources be other than potential discounts on products? THE WITNESS: We also had a - - we had hired the executive vice president of marketing from Johnson & Johnson to run our marketing department, so we designed a complete -- a comprehensive strategic marketing plan for our doctors, and so we would institute a marketing plan for them and help them place that marketing and advertising. In addition to that, we also provided education, so we were certified by the American Dental Association to provide continuing education, so we would -- we would provide them with education free or at an extremely highly discounted rate. And then in addition to that, we also had some accounting services and practice management consulting that we provided as well.”) (emphasis added)

Benco’s Response:

Benco has no specific response to the proposed finding.

179. In 2012, Smile Source partnered with Burkhart. (Goldsmith, Tr. 1947-1948,; Reece, Tr. 4394-4397).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

180. Burkhart offered Smile Source an aggressive pricing structure to support their growth. (Reece, Tr. 4397).

Schein's Response:

Imprecise. Burkhart's Mr. Reece testified to his *opinion* of Burkhart's offer – that Burkhart put forward “*what I would call* an aggressive pricing structure to support their growth.” (Reece, Tr. 4397 (emphasis added)).

Patterson's Response:

Burkhart also offered Smile Source engagement from representatives to give Smile Source a more “full-service feel” for its members, and it also offered an aggressive pricing structure to support its growth. (Reece, Tr. 4396-97 (“Q. . . . generally, what did Burkhart offer in its bid to work with Smile Source at that time in 2011, 2012? A. Well, one of the things that was lacking from their perspective was the engagement of the representative that was walking into their practice, and so we reassured them that they would get that account manager type of relationship and more of a full-service feel. And then we additionally put forward what I would call an aggressive pricing structure to support their growth.”)).

Smile Source's representative at trial, Dr. Goldsmith, testified that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Benco's Response:

Benco has no specific response to the proposed finding.

181. On average, Smile Source members saved [REDACTED]

Schein's Response:

Vague and lacks foundation. First, the asserted fact does not explain what the [REDACTED] [REDACTED] is compared to – catalog price, suggested retail price, or some other price? Second, there is no time frame reference; was this in the first year, last year or throughout Smile Source's relationship with Burkhart?

Neither Dr. Goldsmith, Mr. Reece, nor Mr. Ritsema (the author of CX 4243) have produced a complete analysis of all Smile Source members' savings throughout the course of the Smile Source/Burkhart relationship. [REDACTED]

[REDACTED]

[REDACTED].

(Goldsmith, Tr. 1965-66, 1991-92). None of this data was produced. Mr. Reece's testimony makes clear that he offered his *belief* of what Burkhart would say about its discounts, not based on any formal analysis of discounts: [REDACTED] [REDACTED]

[REDACTED]

[REDACTED] (Reece, Tr. 4427-28). As Mr. Ritsema noted, there were limitations of his own analysis, which was confined to the [REDACTED]

[REDACTED]
[REDACTED] (CX 4243-001). It did not look at [REDACTED]
[REDACTED] (CX 4243-001).

Patterson's Response:

The proposed finding is vague in that it does not state from what initial prices or pricing scheme Smile Source's members allegedly saved 15%-20%. Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

182. Burkhart gained new customers and new sales through its partnership with Smile Source. (Reece, Tr. 4408).

Schein's Response:

Schein does not dispute that Burkhart gained some sales from Smile Source. However, this does not mean Smile Source was necessary for Burkhart to gain new sales. Burkhart could have gained new customers by just lowering its prices or giving discounts on its own.

Patterson's Response:

The proposed finding lacks a timeframe and is also vague in failing to quantify how many new customers or how much profit Burkhart gained through "new sales" from working with Smile Source. Absent such information, there is no basis to suggest that Patterson would also have gained new customers and new sales from working with Smile Source as a second distributor in addition to Burkhart, particularly given that every Smile Source member Patterson checked in late 2013 was already a Patterson customer. PF ¶

153 (citing CX0148 at 1 (“[W]hen I went to SmileSources website, it looks like each location is under the individual doctor’s name. I checked out some of the names, mainly out of Texas and Denver, and we do conduct business with all that I looked up.”)).

Benco’s Response:

Benco has no specific response to the proposed finding.

183. Smile Source had 21 members at the beginning of 2011 and 28 members at the end of 2011. (RX2952 (Maurer, Dep. at 26-27)). At the end of 2012, Smile Source had 58 members. (RX2952 (Maurer, Dep. at 27)). At the end of 2013, Smile Source had 145 members. (RX2952 (Maurer, Dep. at 27-28)). At the end of 2015, Smile Source had 352 members. (RX2952 (Maurer, Dep. at 28)). At the end of 2016, Smile Source had 470 members. (RX2952 (Maurer, Dep. at 28)). At the end of 2017, Smile Source had 562 members. (RX2952 (Maurer, Dep. at 28)).

Schein’s Response:

The asserted fact excludes Smile Source’s three-year period before 2011 in which it was partnered with Schein, during which its growth was stagnant. Smile Source was formed in 2006 and Schein started to offer discounts to Smile Source members in 2008. (Sullivan, Tr. 3914; Goldsmith, Tr. 2070). From 2008 to 2011 Schein offered DSO-level discounts to Smile Source members, yet Smile Source was only able to attract [REDACTED] members over the three-year period. (Foley, Tr. 4524; Goldsmith, Tr. 2103).

Patterson’s Response:

Smile Source [REDACTED]

[REDACTED] When Dr. Maurer joined Smile Source in late 2012, the organization had about 32 members. (Maurer, Tr. 4937 (“Q. When did you begin working at Smile Source? A. Late 2012. Q. And you said there’s 650 locations and a thousand dentists.

That's today? A. Today. Q. What was it when you joined in 2012? A. I remember around 32.'')). Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

184. [REDACTED]

Schein's Response:

The cited evidence is not reliable support for the asserted fact. The document on which Mr. Reece's deposition testimony was based is a 2012 projection of anticipated growth. (CX 8021 (Reece, Dep. at 81); CX 0215). Even the 2012 estimate was only "where the business was projecting based on the timing of this document." (CX 8021 (Reece, Dep. at 81)). Mr. Reece did not know what the actual number was but "it hopefully was close." (CX 8021 (Reece, Dep. at 81-82)). As to 2017, Mr. Reece could [REDACTED]

[REDACTED] CX 8021 (Reece, Dep. at 82-83)). CX 4242 estimated that the number was [REDACTED] (CX 4242).

Patterson's Response:

Dr. Reece testified that the 2012 amount of \$794,000 was a projection and that he did not know whether it was accurate, though "it hopefully was close." (CX8021 (Reece, Dep. at 81-82 ("Q. And sitting here today, do you recall what the revenue number was for Smile Source in 2012? A. I do not.")). [REDACTED]

Benco's Response:

Benco has no specific response to the proposed finding.

I. Other Buying Groups Background

185. The Georgia Dental Association (“GDA”) formed a buying group known as GDA Supplies Plus. (CX8011 (Capaldo, Dep. at 11); CX0320 (Capaldo, IHT at 7-8)). The buying group is housed in a subsidiary of the GDA called the Integrity Dental Buyers Group. (CX8011 (Capaldo, Dep. at 11); CX0320 (Capaldo, IHT at 7-8)).

Schein's Response:

No response.

Patterson's Response:

This proposed finding has no timeframe, which is especially problematic because the Integrity Dental Buyers Group was not formed until *July 2015*, months after the alleged April 2015 end of the alleged conspiracy. PF ¶ 549 (citing CX8011 (Capaldo, Dep. at 11–12); Kahn, Tr. 19 (alleging that the purported conspiracy ended in *April 2015*); *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”)). Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

186. The GDA formed a buying group so their members could save money. (CX0320 (Capaldo, IHT at 34)).

Schein's Response:

The GDA formed a buying group for a number of reasons. A “major reason” was saving money for members, which could be through insurance, supplies, education, equipment, or other programs. (CX 0320 (Capaldo, IHT at 34-35)).

Patterson's Response:

This proposed finding has no timeframe, which is especially problematic because the Integrity Dental Buyers Group was not formed until *July 2015*, months after the alleged April 2015 end of the alleged conspiracy. PF ¶ 549 (citing CX8011 (Capaldo, Dep. at 11–12); Kahn, Tr. 19 (alleging that the purported conspiracy ended in *April 2015*); *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”)). Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

187. The GDA sent a Request for Proposal (“RFP”) to Benco on September 8, 2015, seeking a bid from Benco to be the distributor for GDA’s buying group, and Benco replied on September 13, 2015, that it declined to respond to the RFP, writing “Benco, as a matter of policy, does not participate in GPOs.” (CX1036 at 001; CX1037 at 001; CX0320 (Capaldo, IHT at 98)).

Schein's Response:

No response, other than to note that this document is from after the alleged conspiracy period.

Patterson's Response:

Patterson has no specific response except to note that this occurred four months *after* the alleged conspiracy allegedly ended. (Kahn, Tr. 19 (alleging that the purported conspiracy ended in *April 2015*); *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”)).

Benco's Response:

Benco has no specific response to the proposed finding.

188. The GDA sent an RFP to Patterson on September 8, 2015, seeking a bid from Patterson to be the distributor for GDA's buying group, and Patterson replied on September 10, 2015 that it would not respond to the RFP. (CX3031 at 001-003; CX0320 (Capaldo, IHT at 29, 94)).

Schein's Response:

No response, other than to note that this document is from after the alleged conspiracy period.

Patterson's Response:

This occurred four months *after* the alleged conspiracy allegedly ended. (Kahn, Tr. 19 (alleging that the purported conspiracy ended in *April* 2015); *see also* RXD0205 at 1 ("The Alleged Conspiracy Ended in April 2015")). Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

189. The GDA sent an RFP to Henry Schein by or before September 11, 2015, seeking a bid from Henry Schein to be the distributor for GDA's buying group, and the GDA never heard back. (CX2246 at 001; CX0320 (Capaldo, IHT at 29-30, 75-76)).

Schein's Response:

False. The full GDA story is set out in SF 765-785. In addition, this is after the alleged conspiracy period.

Schein had significant discussions with Mr. Capaldo and GDA regarding their buying group offering, Integrity Dental Buyers Group ("IDBG"). Mr. Capaldo testified that Schein's Mr. Porro "reached out to him" prior to issuing the RFP in September and the two had several discussions. (CX 0320 (Capaldo, IHT at 77-82)). Upon receipt of the RFP, Schein contacted Mr. Capaldo with concerns, such as how IDBG intended to "maintain participation by no less than 300 Purchasing Members," and IDGB's demand

for restrictions on which dentists Schein could call on in Georgia. (RX 2433-004, -006; CX 0320 (Capaldo, IHT at 82-84)). Schein's discussions with Mr. Capaldo regarding the RFP took place after the alleged conspiracy period.

Counter to the asserted fact, Schein and Mr. Capaldo continued to try to reach agreement into January 2016. (CX 0320 (Capaldo, IHT at 82-84); CX 8016 (Meadows, Dep. at 260-62); CX 2037-003). In February 2016, Schein informed Mr. Capaldo that it was "not prepared to move into a formal binding partnership," but that it "welcome[d] future updates and discussion down the road...." (CX 2397-001). This decision was also made after the alleged conspiracy period.

In August 2016, with the creation of Schein's Alternate Purchasing Channel, Schein contacted Mr. Capaldo again for an "exploratory call." (CX 0299-004; *see also* Titus, Tr. 5274-75).

Patterson's Response:

This occurred four months *after* the alleged conspiracy allegedly ended. (Kahn, Tr. 19 (alleging that the purported conspiracy ended in *April* 2015); *see also* RXD0205 at 1 ("The Alleged Conspiracy Ended in April 2015")). Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

190. The GDA reached an agreement around the beginning of Fall 2016 with SourceOne for its buyers group program. (CX8011 (Capaldo, Dep. at 28-29); CX0320 (Capaldo, IHT at 32-34)).

Schein's Response:

This is after the alleged conspiracy period. GDA reached out to SourceOne only after Atlanta Dental "at the last minute" said no to GDA. (CX 0320 (Capaldo, IHT at 32)).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

191. The GDA launched its buyers group program with SourceOne on December 16, 2016. (CX0320 (Capaldo, IHT at 32-34)).

Schein's Response:

No response, other than to note this is after the alleged conspiracy period.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

192. SourceOne is an intermediary to the manufacturers. [REDACTED]
[REDACTED]. Being an intermediary to the manufacturers means that SourceOne only owns the software dentists use for ordering, but SourceOne has agreements with certain distributors and manufacturers to deliver or distribute the dental supplies. [REDACTED]
[REDACTED]

Schein's Response:

Irrelevant (in that the asserted fact is after the alleged conspiracy and is about SourceOne's business model) and lacks foundation. Complaint Counsel relies exclusively on Mr. Capaldo's testimony, who works at GDA, not SourceOne or a manufacturer, and

failed to demonstrate that Mr. Capaldo has any foundation to speak to SourceOne's interactions with manufacturers or distributors.

Patterson's Response:

This proposed finding is vague in that it claims SourceOne is an intermediary to "the manufacturers," without saying which manufacturers, or between "the manufacturers" and whom. Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

193. SourceOne does not have access to all of the manufacturers that GDA dentists seek for dental supplies. (CX0320 (Capaldo, IHT at 42-43)).

Schein's Response:

No response, other than to note GDA's partnership with SourceOne is irrelevant and was after the alleged conspiracy period.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

194. SourceOne does not provide servicing on dental equipment. (CX0320 (Capaldo, IHT at 52-54)).

Schein's Response:

The asserted fact is irrelevant to the issues in this case. SourceOne does not offer servicing on dental equipment, but that does not mean that GDA was unable to acquire reduced prices on services. (CX 0320 (Capaldo, IHT at 52-53 ("[W]e have contracts with

four or five servicers in different parts of the state who charge less and go out and do the servicing of the equipment.”))). In addition, the GDA’s partnership with SourceOne was after the alleged conspiracy period.

Patterson’s Response:

Patterson has no specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

195. GDA has helped its buying group members compete with large DSOs by leveraging its members economies of scale. (CX0320 (Capaldo, IHT at 130-131)).

Schein’s Response:

Lacks foundation. Mr. Capaldo’s testimony is not based on fact but rather on belief, so cannot support the truth of the matter. His testimony about whether he “think[s] that I.D.B.G. has been successful” in helping members compete with large DSOs is not sufficient evidence to support the asserted fact. (CX 0320 (Capaldo, IHT at 130-31); *see also* Reece, Tr. 4400 (“JUDGE CHAPPELL: Let me say, we do not want to hear what you feel. We do not want to hear inference. We want to hear what you know.”))). In addition, the GDA’s partnership with SourceOne was after the alleged conspiracy period.

Patterson’s Response:

This proposed finding has no timeframe, which is especially problematic because the Integrity Dental Buyers Group was not formed until *July 2015*, months after the alleged April 2015 end of the alleged conspiracy. PF ¶ 549 (citing CX8011 (Capaldo, Dep. at 11–12); Kahn, Tr. 19 (alleging that the purported conspiracy ended in *April 2015*); *see also* RXD0205 at 1 (“The Alleged Conspiracy Ended in April 2015”)). Additionally, the cited

support for this proposed finding is the opinion of Frank Capaldo (head of the GDA) – there is no basis for that opinion in the cited testimony nor has Complaint Counsel introduced evidence from even one member of the GDA buying group to support this allegation.

Benco's Response:

Benco has no specific response to the proposed finding.

V. THE BIG THREE FEARED COMPETITION FOR BUYING GROUPS WOULD LEAD TO A “PRICE WAR” AND A “RACE TO THE BOTTOM” FOR THE INDUSTRY

A. Executives of The Big Three Viewed Buying Groups as a Threat.

196. Respondents were afraid that buying groups would lead to a price war between the dental products distributors. (CCFF ¶¶ 197-202, 198, 204, 208, 215, 217).

Schein's Response:

Not true.

Complaint Counsel cites no record evidence to support this finding. It only cites to other proposed findings, which – as set forth in Schein's specific replies – also fail to support its characterization of the evidence.

Substantively, the evidence shows that Schein had many reasons for skepticism concerning buying groups, including their inability to deliver incremental volume, the propensity to cannibalize existing sales, and the conflicts they caused among members, non-members, FSCs, Schein's internal divisions, manufacturers, and corporate customers. (SF 90-113, 174-79). While some documents discuss margin erosion, such erosion is due to cannibalization and the need to prevent unfair price discrimination among members and non-members. (*E.g.*, SRF 201-203, 709-711). While a few documents refer to the reaction of competitors to the existence or growth of buying groups, such documents do not support

an inference that Schein was “afraid” of a price war or that such concerns were a primary or significant factor in decision-making regarding buying groups.

Finally, even if one or more distributors were “afraid” of a price war, such concerns simply reflect oligopolistic interdependence, and reactions to common stimuli do not support an inference of conspiracy or a motive to conspire.

Patterson’s Response:

None of the cited proposed findings includes any Patterson witness who testified about a “price war.” Otherwise, Patterson has no specific response.

Benco’s Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding. None of the individual findings cited in this proposed finding contain evidence of Benco being “afraid that buying groups would lead to a price war.” (CCFF ¶¶ 198-200, 204, 215, 217).

197. In 2010, Schein’s President, Tim Sullivan, reported to Jim Breslawski, the president of Henry Schein North America Dental, that if Schein discounted to a buying group, there was a risk of “other competitors then following suit” resulting in a “huge price war.” (CX2113 at 001; Sullivan, Tr. 3921-3922).

Schein’s Response:

The asserted fact is incomplete and misleading.

Mr. Sullivan sent Jim Breslawski an email on September 15, 2010 reporting on the solution he and Hal Muller had reached regarding Smile Source. Mr. Sullivan noted – before the alleged conspiracy period – that “neither of us support [the] concept of buying groups” and observed that doing business with buying groups posed certain risks for

Schein, including “margin erosion, image, as well as competitors then following suit and [a] huge price war break[ing] out.” (CX 2113-001; Sullivan, Tr. 3921-22). This reference to a possible “price war” was, thus, the third (and last) item on a non-exhaustive list of problems with buying groups.

Complaint Counsel also mischaracterizes the document by failing to cite the next line in which Mr. Sullivan wrote that “neither of us want to lose [Smile Source] as an account.” (CX 2113-001). Indeed, despite the litany of concerns with buying groups, Schein decided to continue its established relationship with Smile Source by transferring the account from Special Markets to HSD. (Sullivan, Tr. 4132, 4138-40; CX 2454-001).

As such, the document does not support an inference that potential price-war concerns played a significant role in Schein’s buying group partnership decisions. Even if such concerns were considered, it would simply reflect oligopolistic interdependence and would not support a conspiracy inference.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Schein e-mail.

198. In a February 23, 2013 SharePoint bulletin post, Patrick Ryan, a Benco executive, instructed his team that “[i]f this door [to buying groups] is ever opened in dental, it’s all over for all us....it’s a race to the bottom” that could lead to a decline in margins to just “12% over cost.” (CX1149 at 002; Ryan, Tr. 1075-1083). Ryan confirmed at trial that he was referring to buying groups leading to a race among the whole industry to the bottom in terms of profitability. (Ryan, Tr. 1082-1083). Ryan testified: “Q. And when you wrote “a race to the bottom, you meant a race to the bottom in profitability? A. Yes. Q. And you meant a race among the whole industry. A. Yes.”) (Ryan, Tr. 1082).

Schein's Response:

The asserted fact mischaracterizes the evidence for two reasons.

First, the document and testimony cited clearly relate to cannibalization, not concerns about competitive reactions or price wars. Mr. Ryan simply speculated that, *if* buying groups negotiate lower prices, then those lower prices may spread to other customers, such as non-members. As the document notes:

If this door is ever opened in dental, its [sic] all over for all of us. It may seem like 'oh, why not? Let's get a bunch of cotton rolls', but picture a day when every single customer of yours is in some kind of buying club and all margins are now 12% over cost and its [sic] a race to the bottom.

(CX 1149-002). Neither the document nor the testimony refers to competing distributors or their willingness to do business with buying groups. Rather, Mr. Ryan simply imagines a scenario where buying groups cannibalize all existing sales.

Second, contrary to Complaint Counsel's characterization, Mr. Ryan's statement was not an instruction to Benco's sales force. His post was preceded by a post from a Benco sales rep complaining about his inability to provide volume discounts to unaffiliated offices. (Ryan, Tr. 1079-80; CX 1149-001-02). As Mr. Ryan testified, his post was merely an attempt to provide an example to his sales team so that they would understand how discounting to a buying group would affect their commissions. (Ryan, Tr. 1080-82).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit. First, Pat Ryan is a Benco employee, not a Benco

executive. Pat Ryan is not a member of Benco's Senior Leadership Team. (CX8015 (Cohen, Dep. at 347); CX0304 (Ryan, IHT at 11)).

Second, Pat Ryan's SharePoint post is not an instruction to his team or to any Benco team. Pat Ryan's post is simply a response to a post by another Benco employee. In CX1149, Gerald Barto, a Benco sales employee, posted about a situation in which he was unable to qualify multiple dental offices – that lacked common ownership – for discounted pricing under Benco's Partner Sharing program. (CX1149; Ryan, Tr. 1078-79). Benco's Partner Sharing (PS) program provides volume discounts to individual customers who purchase more than \$100,000 per year in dental supplies. (CX1084; CX1100; Benco FF ¶ 152). Another Benco employee, Jeff McAdoo first responds to Gerald Barto's post suggesting a way to seemingly avoid Benco's rules on Partner Sharing by ignoring the common ownership requirement inherent in Benco's Partner Sharing volume discount. At this point, Pat Ryan responds to clarify Benco's policy that "[t]o be recognized as one customer, one of the following three situations" must apply. (CX1149; Ryan, Tr. 1080 ("I reply with the situations where we recognize somebody as one customer.")). Therefore, the exchange between Mr. Barto, Mr. McAdoo, and Mr. Ryan contained in CX1149 was not about Benco being "afraid" of Buying Groups – or even about Buying Groups at all – but rather, about Benco's Profit Sharing discount program. ((Ryan, Tr. 1218).

Third, Pat Ryan's references to margins and "a race to the bottom" were addressed to the issue of Benco's sales commissions. As Ryan testified at trial, his intent was to try to get Mr. Barto and Mr. McAdoo to understand the impact on their commissions of intentionally circumventing Benco's requirements on common ownership by applying

Partner Sharing discounts to multiple dental practices that lacked common ownership. (Ryan, Tr. 1082).

Fourth, Pat Ryan has never worked in the medical supply industry and does not have any personal knowledge about the medical supply industry. (Ryan, Dep. 169-70). Ryan's comment about GPOs is introduced by analogizing GPOs in the medical industry to the dental industry. (CX1149). Accordingly, Ryan's entire comment regarding GPOs – of which the language quoted in this paragraph from the cited exhibit is taken out of context – is not credible evidence and should be accorded no weight by the court here.

Lastly, the cited exhibit and testimony contains only the statements and impressions of Pat Ryan, not Benco as a whole.

199. Ryan projected that buying groups could lead to a more than fifty percent drop in gross margins if competitors started discounting to buying groups. (CX1149 at 002 (Statement of Ryan: buying groups could lead to decline in margins to just 12% over cost); Ryan, Tr. 1082-1083; Cohen, Tr. 410 (Benco's gross margins are approximately 30%); [REDACTED]).

Schein's Response:

False.

First, Mr. Ryan did not "project" that buying groups would reduce margins by 50%. As he stated, "*picture a day* when every single customer of yours is in some kind of buying club and all margins are now 12% over cost...." (CX 1149-002). He did not project that this would happen or that buying groups would have this effect. As Mr. Ryan testified, this was nothing more than an extreme (hyperbolic) example to illustrate the impact that reduced margins would have on sales rep commissions. (Ryan, Tr. 1080-82; CX 1149-002).

Second, to the extent Complaint Counsel cites this evidence (or the proposed finding) for the truth of the matter asserted (*i.e.*, the impact of buying groups on margins), such evidence is pure speculation. (SRF 198). Complaint Counsel has not established that Mr. Ryan is competent to testify as to that effect. Complaint Counsel does not lay a foundation necessary to establish that Mr. Ryan had sufficient experience with buying groups to know what the effect of such groups would be on Benco's margins. Nor did Mr. Ryan perform any studies or analysis necessary to project the effect of buying groups on Benco's margins.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit. First, Pat Ryan is a Benco employee, not a Benco executive. Pat Ryan is not a member of Benco's Senior Leadership Team. (CX8015 (Cohen, Dep. at 347); CX0304 (Ryan, IHT at 11)).

Second, Pat Ryan's SharePoint post is not a "projection" about Buying Groups, but rather a response to a post by another Benco employee. In CX1149, Gerald Barto, a Benco sales employee, posted about a situation in which he was unable to qualify multiple dental offices – that lacked common ownership – for discounted pricing under Benco's Partner Sharing program. (CX1149; Ryan, Tr. 1078-79). Benco's Partner Sharing (PS) program provides volume discounts to individual customers who purchase more than \$100,000 per year in dental supplies. (CX1084; CX1100; Benco FF ¶ 152). Another Benco employee, Jeff McAdoo first responds to Gerald Barto's post suggesting a way to seemingly avoid Benco's rules on Partner Sharing by ignoring the common ownership requirement inherent

in Benco's Partner Sharing volume discount. At this point, Pat Ryan responds to clarify Benco's policy that "[t]o be recognized as one customer, one of the following three situations" must apply. (CX1149; Ryan, Tr. 1080 ("I reply with the situations where we recognize somebody as one customer.")). Therefore, the exchange between Mr. Barto, Mr. McAdoo, and Mr. Ryan contained in CX1149 was not about making any projections about Buying Groups – or even about Buying Groups at all – but rather, about Benco's Profit Sharing discount program. (Ryan, Tr. 1218).

Third, Pat Ryan's references to margins and "a race to the bottom" were addressed to the issue of Benco's sales commissions. As Ryan testified at trial, his intent was to try to get Mr. Barto and Mr. McAdoo to understand the impact on their commissions of intentionally circumventing Benco's requirements on common ownership by applying Partner Sharing discounts to multiple dental practices that lacked common ownership. (Ryan, Tr. 1082).

Fourth, Pat Ryan has never worked in the medical supply industry and does not have any personal knowledge about the medical supply industry. (Ryan, Dep. 169-70). Ryan's comment about GPOs is introduced by analogizing GPOs in the medical industry to the dental industry. (CX1149). Accordingly, Ryan's entire comment regarding GPOs – of which the language quoted in this paragraph from the cited exhibit is taken out of context – is not credible evidence and should be accorded no weight by the court here.

Fifth, Pat Ryan in the cited exhibit makes no reference at all to "if competitors started discounting to buying groups." (CX1149). Therefore, the proposed finding is nothing more than Complaint's Counsel strained interpretation, taken out of context, and

distorted to fit Complaint Counsel's own narrative, which is not supported by the actual evidence in the case.

Lastly, the cited exhibit and testimony contains only the statements and impressions of Pat Ryan, not Benco as a whole.

200. Benco's Chuck Cohen testified that he believed buying groups could erode margins for all dental distributors. (Cohen, Tr. 440-441; CX0301 (Cohen, IHT at 168)).

Schein's Response:

False.

While Schein does not dispute that – to the extent buying groups cannibalize existing sales – they might erode margins if the buying group has negotiated lower prices than the individual members could get on their own, the cited evidence does not support this notion. Moreover, the cited testimony does not support an inference that Mr. Cohen was concerned about “price wars” among Respondents, as opposed to mere cannibalization and unnecessary middlemen costs.

Complaint Counsel cited Mr. Cohen's trial testimony and his IHT testimony, with the former simply purporting impeachment of the latter. At trial, Mr. Cohen stated that he did not know what the margin impact of buying groups would be. (Cohen, Tr. 439-40 (“I believe that buying groups are a middleman.... I don't know [what] I ever believed about the margin impact of [buying groups]”)). His IHT testimony also said the exact opposite of the asserted fact. While he agreed that there was a theoretical possibility that a buying group “could erode Benco's margins,” he made it clear that “[t]he way they're configured today, I don't believe they can do that. But who knows what the next great idea will be.” (CX 0301 (Cohen, IHT at 168)). Ignoring this response, Complaint Counsel then asked

Mr. Cohen to speculate whether the same was true for all distributors, and Mr. Cohen simply agreed. This does not establish that Mr. Cohen actually considered the effect of buying groups on competing distributors except in response to Complaint Counsel's question.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Chuck Cohen's actual testimony was: "I don't know that I ever believed about the margin impact of them [i.e., Buying Groups]." (Cohen, Tr. 439). At trial, Complaint Counsel then tried to improperly impeach Cohen with testimony from his Investigational Hearing. Complaint Counsel's impeachment failed, however, because Complaint Counsel did not allow Cohen to read the second paragraph of what was a two-paragraph answer. (Cohen, Tr. 812-14). In that second paragraph, Cohen clarified that "The way they're configured today, I don't believe they can do that." (Cohen, IHT 168). Therefore, Complaint Counsel's proposed finding is actually the opposite of Cohen's testimony.

In his investigational hearing, Cohen further explained that Buying Groups – as they are currently configured and exist in the dental industry today – cannot obtain lower margins because they do not correspondingly reduce Benco's cost to serve. By comparison, Benco sells to DSOs and to Elite Dental Alliance members at lower margins because DSOs and EDA correspondingly reduce Benco's costs to serve those customers. Therefore, Benco provides a discount by passing on those cost savings to those customers. (Cohen, IHT 168-69; ("DSOs, because of their common ownership structure, require a

lower cost to serve on our part. Therefore, we can pass those savings along to the customer, to the entity, and offer a lower price.” (Cohen, IHT 40)).

201. In an April 23, 2014 email Neal McFadden, a Patterson executive, informed Patterson’s sales team that buying groups would lead to “a slippery slope.” (CX3016 at 001). McFadden testified that by “slippery slope” he meant “a race to the bottom in terms of pricing.” (CX8004 (McFadden, Dep. at 105-106)).

Schein’s Response:

To the extent Complaint Counsel suggest that a “race to the bottom” is synonymous with a “price war,” (*see* CC Br. 13), Complaint Counsel mischaracterizes the evidence.

CX 3016 is an internal Patterson email that simply notes that offering discounts to a buying group creates a “slippery slope.” Mr. McFadden testified in his deposition, that he “use[d] that expression” to mean that it was “out of the norm for what we deal with....” (CX 8004 (McFadden, Dep. at 106)). This document, therefore, relates to cannibalization and the potential discrimination between members and non-members, not competition among distributors or the propensity for a price war. Nothing in the document or in Mr. McFadden’s testimony refers to competition or potential competition among the Respondents.

For this reason, the cited evidence – and the asserted fact – does not support the claim in Complaint Counsel’s Post-Trial Brief that “the Big Three knew that if one of them did discount to buying groups, the others would also need to lower prices to avoid losing business.” (CC Br. 13).

Patterson’s Response:

This proposed finding is incorrect and misleading. First, McFadden did not send the email as a directive to “Patterson’s sales team.” McFadden replied to a single Patterson

branch manager (who was *not* on McFadden’s team) who contacted him with a question regarding a veterinarian who wanted to start a buying group for dental supplies for humans. (CX3016 at 1; CX8004 (McFadden, Dep. at 105–06)). McFadden also copied his former boss and VP of sales, David Misiak, and McFadden later forwarded the exchange to Paul Guggenheim, his current boss. (CX3016 at 1; CX8004 (McFadden, Dep. at 29, 54)).

Second, this proposed finding omits relevant portions of the cited documents. Specifically, McFadden wrote to the branch manager, “If you want to call him and dig into some details and ask the hard questions that’s fine.” (CX3016 at 001). This is consistent with McFadden’s trial testimony that Patterson branch managers always had the freedom to pursue buying groups if they made business sense. (McFadden Tr. at 2811 (“I always told -- when we got responses like this, I always told the local branch manager, if they wanted to pursue it, they could do it. They had that autonomy if they wanted to go do it, but I wasn't going to do it. I was focused on the DSO space.”)).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Patterson e-mail.

202. Executives from each of the Big Three described the rise of buying groups as a “slippery slope.” (CCFF ¶¶ 201, 203, 709- 711, 713, 809, 950).

Schein’s Response:

While certain individuals from each of Respondents have used the relatively common business term “slippery slope” at some point, the context of those documents make clear that the term refers to buying group cannibalization and the concerns about discrimination between members and non-members. (SF 90-113). Complaint Counsel has

not established that the use of this common term arose in suspicious circumstances or that it would otherwise support an inference of a conspiracy. Nor has Complaint Counsel shown that the term was used to refer to the possibility of a price war, or of competitive actions or reactions *among* respondents.

Patterson’s Response:

Patterson’s McFadden used the term “slippery slope” in response to a single inquiry from a veterinarian who wanted to start a buying group for dental supplies (CX3016 at 1; CX8004 (McFadden, Dep. at 105–06)). Notably, Patterson’s Tim Rogan also used the term “slippery slope” to describe what he termed “a GPO”—Jackson Health—but Complaint Counsel does not cite this document in this proposed finding. (RX0271 at 1 (Rogan to Carles: “This is a GPO. They are taking 2% off the top. This is a very slippery slope.”); *see also* FOF ¶ 175). Otherwise, Complaint Counsel has cited to nothing that supports the proposition that Patterson executives “described the rise of buying groups as a ‘slippery slope.’”

Benco’s Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding. Moreover, of the 8 individual findings referenced, only 1 pertains in any way to Benco. (CCFF ¶ 203). The only proposed finding that pertains to Benco does not discuss Buying Groups at all. The relevant paragraph of the cited exhibit actually refers to “dental societies, charities, etc.” (CX1222). Nonetheless, Complaint Counsel disingenuously omits this exact language from its quotation of the paragraph in proposed finding 203, below. (CCFF ¶ 203).

203. In a November 5, 2011 email to other Benco executives, Cohen wrote [REDACTED]

Schein's Response:

Complaint Counsel has unfairly quoted the document using ellipses to omit context that undermines Complaint Counsel's use and characterization of the evidence. Fairly quoted, the document establishes that the term "slippery slope" referred to concerns about cannibalization and price discrimination, not competitive reactions or purported "price wars."

CX 1222 states that [REDACTED]

[REDACTED] Too complicated, really slippery slope." (CX 1222-001). This document simply notes that there are concerns about treating buying groups differently than other organizations, and that it could result in having to give the same types of discounts to other customers. Thus, the document refers to price discrimination and cannibalization, not competitive reactions. As such, it does not support Complaint Counsel's proposed finding (CCFF 202) that the reference to "slippery slope" relates to competitors' reactions to the potential "rise of buying groups."

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Complaint Counsel intentionally omitted an entire parenthetical from the quoted paragraph, which is critical to understanding the meaning of the paragraph. The full, unaltered paragraph reads: "First, we don't make extra rebates to other organizations

(dental societies, charities, etc.) based on purchases. Too complicated, really a slippery slope.” (CX1222). Therefore, the quoted paragraph does not pertain to Buying Groups at all, but rather pertains to “dental societies, charities, etc.” – exactly as it was written.

204. Each Respondent, and its executives understood that buying groups could lower prices, slash Respondents’ margins, and fundamentally affect Respondents’ pricing power. (CCFF ¶¶ 197- 201, 208-211, 213, 214, 216, 219, 220, 228).

Schein’s Response:

Complaint Counsel cites no record evidence to support this finding. It only cites other proposed findings, which – as set forth in Schein’s specific replies – also fail to support its characterization of the evidence.

Substantively, it is a tautology that, *if* a distributor offers lower margins to a buying group than to other customers, then its margins for members of that group would be lower than for others. If, rhetoric aside, that is all Complaint Counsel is saying, then Schein does not dispute that.

The evidence, however, does not establish that buying groups received or are likely to receive lower margins than other Schein customers, or that buying groups have any effect on Schein’s so-called “pricing power.” In fact, the evidence shows that many independent dentists receive discounts greater than those negotiated by buying groups. (CX 7101-067 (showing large distribution of discounts); SF 1176). The evidence does, however, express concerns about potential cannibalization, which is one factor Schein considered in deciding whether or not to do business with buying groups. (SF 90-107). The evidence also expresses concerns about unfair discrimination between members and non-members, which was also a factor Schein considered in setting appropriate buying group discount levels.

Patterson's Response:

The cited paragraphs do not support the application of this proposed finding to Patterson, as Complaint Counsel cites to no Patterson witness who testified that “buying groups could lower prices, slash Respondents’ margins, and fundamentally affect Respondents’ pricing power.” Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding. Moreover, none of the cited individual proposed findings reference actual evidentiary support for Complaint Counsel’s inflammatory and aspirational summary conclusion that Benco “understood that buying groups could lower prices, slash Respondents’ margins, and fundamentally affect Respondents’ pricing power.” (CCFF ¶¶ 198, 199, 200, 211, 214, 216).

205. Typically, an industry’s profitability decreases as customers’ buying power increases. (CCFF ¶¶ 128, 216, 259-261, 1232, 1606).

Schein's Response:

Complaint Counsel cites no record evidence to support this finding. It only cites other proposed findings, which – as set forth in Schein’s specific replies – also fail to support its characterization of the evidence. Moreover, the proposed theoretical economic proposition would require expert economic testimony, and there was no such testimony offered in this case.

Substantively, the proposition is simply not true. Producers’ profitability only declines as customers’ buying power increases *if* the aggregation of buying power gives

rise to a monopsony, in which the buyers (collectively) reduce demand. In such cases, the restriction of demand results in lower prices. Conversely, if the aggregation of buying power results in enhanced demand – due to lower prices, economies of scale, or otherwise – then industry profitability may increase (or decrease) with increased buyer power. In this case, for example, sales to DSOs are more profitable on a net margin basis than sales to independent dentists. (SF 1294; CX 0306 (Foley, IHT at 52)). This is an example where increased buyer power increases profitability for the seller, rather than reducing it.

Patterson’s Response:

Patterson joins both Schein and Benco’s response.

Benco’s Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding.

Paragraph 205 is not even a proposed finding of fact. Rather it purports to offer Complaint Counsel’s opinion on economic theory without even any specific tie to the dental supply industry.

None of the individual proposed findings, or the evidence cited therein, comes close to supporting Complaint Counsel’s opinion on “typical” economic theory, as stated in paragraph 205.

206. Schein’s Jake Meadows wrote in a July 17, 2012 email: “We do not want our customers organizing and creating what are known as GPOs it takes the value away from the distributor.” (CX0170 at 001; Meadows, Tr. 2426).

Schein's Response:

Complaint Counsel's use of this documentary snippet is misleading. The document begins with an email to Mr. Meadows from an FSC asking about a potential buying group that the FSC and a (former) regional manager were starting to help form. (Meadows, Tr. 2468-69; CX 0170). Mr. Meadows did not shut down the business, but instead asked the "standard group of questions ... about a buying group," as he explained at trial. (Meadows, Tr. 2468-69; CX 0170). When he learned that an offer had already been proposed to the group, Mr. Meadows was "frustrated" because primary responsibility for buying groups, and contract-writing authority, resided with Special Markets at the time. (Meadows, Tr. 2470-72; CX 0170). Mr. Meadows did not write that Schein does not do business with buying groups, but expressed concern that some buying groups did not provide value to their members or align with Schein's value proposition. (Meadows, Tr. 2560 ("[W]hat we've worked on for a lot of years is presenting our brand as a high-touch, high-valued brand in the marketplace. And if a buying group were to present our brand as a price-only brand or a fulfillment house only and push aside the value that we create with our FSCs and our service, that would be detrimental to our brand in the marketplace.")).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Schein e-mail.

207. Schein's Jake Meadows testified that one of the negatives of doing business with buying groups was that "...existing customers would be the ones that would go take advantage of that

discount...if you discount an existing customer...we still have to service that customer, still have to put the same amount of resources towards that customer.” (Meadows, Tr. 2507).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness discussing Schein’s business.

208. In a February 2012 email to his direct reports, Schein’s Randy Foley wrote: “When existing customers enroll [in a buying group], it simply erodes margins.” (CX0238 at 001; CX8003 (Foley, Dep. at 132-133); Foley, Tr. 4552-4555).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Schein e-mail.

209. In a November 14, 2014 email, Schein’s Michael Porro wrote about a dental office that may not have been purchased by the DSO MB2: “If they are not buying in, it’s a buying group and HSD gets crushed on margins.” (CX2034 at 001).

Schein’s Response:

This document simply reflects the conflict between Special Markets and HSD that buying groups can cause (SF 98-106), and the fact that, when DSO pricing (*i.e.*, MB2

pricing) is arbitrated and offered to independent dentists (*i.e.*, through MB2's affiliate Dental Gator), there can be cannibalization that reduces margins. (SF 90-96, 286).

Mr. Porro, Schein's Atlantic Coast Zone General Manager, was fielding complaints from FSCs and a Schein Regional Manager about Dental Gator. (CX 2033). (The concerns from the field are directly contrary to Complaint Counsel's theory of the case that the field wanted to do business with buying groups, but was instructed not to by Mr. Sullivan). In any event, after Mr. Porro investigated, he learned that, through Dental Gator, MB2 was making equipment discounts available to practices it did not own. Mr. Porro lamented that, since Special Markets had offered this pricing, "I guess for now it is, what it is[.]" but he was frustrated because, while "it makes partial sense if the office has been bought by Gator or MB2 ... [i]f they are not buying in, it's a buying group and HSD gets crushed on margins." (CX 2034-001). Read in context, this is just a concern about the impact on FSCs resulting from the arbitrage and cannibalization that occurs when Schein does business with DSO/Buying Group hybrids, like MB2/Dental Gator.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Schein e-mail.

210. Patterson's Neal McFadden testified that dealing with buying groups could affect Patterson if the company was "lowering our cost to our existing clients." (CX8004 (McFadden, Dep. at 79-80)).

Schein's Response:

No response, other than to note that Mr. McFadden is just describing the risk of cannibalization.

Patterson's Response:

The proposed finding is misleading and omits relevant portions of McFadden's testimony. McFadden stated, "Well, we could not see any upside in dealing with a buying group. From a business strategy standpoint, where was the new business going to come from? It wasn't guaranteed business. The buying groups were not – we didn't feel at that time could drive compliance, that they should buy their products from Patterson Dental. We also looked at potentially 50 percent of the buying group clients being current Patterson clients. So, therefore, we are lowering our cost to our existing clients, which would be direct competition to our territory sales reps. So at that particular stage we were in a conundrum with how to culturally deal with buying groups." (CX8004 (McFadden, Dep. at 79-80)).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Patterson e-mail.

211. A Benco document titled "Buying Clubs" lists as a point [REDACTED]
[REDACTED]

Schein's Response:

Complaint Counsel's use of this documentary snippet is misleading. The document relates to a brainstorming session in which a hypothetical is presented. Under that hypothetical the nation's largest dental manufacturer, [REDACTED]

[REDACTED]

[REDACTED] (a modest decline) at some undefined point thereafter. (CX 1237-001). Under that hypothetical scenario, the document explores various “ideas about buying [groups.]” (CX 1237-002). Such a hypothetical exercise is not a prediction about what impact a buying group would have, let alone what a buying group unsupported by the nation’s largest manufacturer would have. Even if the document did make such a prediction, the prediction would be pure speculation as it is not supported by any study or analysis. CX 1237 contains no details of any actual margin analysis or study done, and Complaint Counsel elicited no testimony from any witness as to CX 1237.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

The bullet point quoted by Complaint Counsel is listed under a section entitled “Exercise re:.” (CX1237). Therefore, the quoted point pertains to an exercise or a hypothetical scenario, and does not reflect any view by the unnamed Benco author as to a current fact in existence at the time of the exhibit. Accordingly, this court should not give the cited exhibit or quoted language any evidentiary weight as it does not establish any fact at issue in this case.

212. Schein’s Sullivan testified at trial that buying groups can be threats. (Sullivan, Tr. 3911). Sullivan agreed that if Schein does not work with a buying group, that buying group might instead become a customer of a competitor. (Sullivan, Tr. 3912).

Schein's Response:

The asserted fact that “Sullivan testified at trial that buying groups can be threats” is an incomplete and misleading description of Mr. Sullivan’s testimony.

In response to Complaint Counsel’s question “Now, while buying groups are an opportunity, you’ve characterized buying groups as a threat to Schein, right?” Mr. Sullivan testified, “They can be threats and opportunities, yes.” (Sullivan, Tr. 3911 (emphasis added)). While Mr. Sullivan testified that he has always been skeptical of buying groups for external (e.g., cannibalization) and internal (e.g., conflicts with FSCs and Special Markets) reasons, he also thought they could be a good business fit for Schein if, for example, Schein had low penetration with the buying group members and the buying group offered some “stickiness” to ensure that business would be driven to Schein. (Sullivan, Tr. 4085 (“I have always been and I am to today very skeptical about the value that buying groups can bring to both Henry Schein or to its members who are our customers, very skeptical.”), 4088-91).

Schein does not dispute that if Schein does not work with a buying group, logically there is a *potential* that the buying group could partner with a competitor and shift Schein’s customers to that competitor. (Sullivan, Tr. 3912). However, the trial record is uncontroverted that very few buying groups exhibited the ability to drive compliance and shift volume. (SF 85-89; RX 2340-005 (“PGMS cannot guarantee that its members will purchase from Schein....”)). Indeed, the evidence shows that despite joining a buying group not affiliated with Schein, many dentists elect to stay with Schein as their chosen distributor. (RX 2594-001 (retaining members from Dental Co-Op once relationship was severed); Cavaretta, Tr. 5597-98 (Schein was able to retain and grow business with members of Steadfast after relationship was ended)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness discussing Schein's business.

213. Schein's Sullivan testified that buying groups can lead to a decrease in margins for Schein. (Sullivan, Tr. 3912).

Schein's Response:

Mr. Sullivan was asked to speculate about the hypothetical impact of buying groups. Mr. Sullivan speculated that buying groups "could" lead to a decrease in margins, not that they would. (Sullivan, Tr. 3912). As such, the testimony only establishes the tautological point that, if buying groups get discounts that are not otherwise available, then margins to existing customers could decrease.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness discussing Schein's business.

214. The Benco Strategic Planning Retreat Agenda for 2014 listed as an intended agenda item:
[REDACTED];
see also CCFF ¶¶ 128, 215-216).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the cited exhibit is one-page within a 60-page document that is a compilation of Chuck Cohen's notes in a program called Microsoft OneNote, a digital note-taking application. (CX1061). Microsoft OneNote is a computer program for free-form information gathering and can be used to gather notes, drawings, screen clippings and audio commentaries. Complaint Counsel has not established the source, purpose, or impact – if any – of the notes contained on the cited page. (CX1061-011). Moreover, Complaint Counsel failed during Chuck Cohen's deposition to lay any foundation regarding the cited exhibit. (Cohen, Dep. at 300-317). The page of the exhibit cited by Complaint Counsel here appears to contain a portion of an e-mail that was sent to Chuck Cohen, a website and contact information, some bullet points, and other lines of text. (CX1061-011). It is not a formal agenda or any actual agenda from any meeting. At best, it contains some writing by Chuck Cohen under the heading "Strategic Planning Retreat Agenda 2014." (CX1061-011). Whether some or all of the writing on this page made it into any agenda for any strategic planning retreat – that may or may not have even occurred – is unknown based on the cited exhibit. (CX1061-011). Moreover, Complaint Counsel has cited no actual retreat agenda or any other evidence that the retreat in question even took place at all.

Second, as to the bullet point quoted in the proposed finding, Chuck Cohen could not recall what he meant when he wrote it. (Cohen, Dep. at 314-17). But when asked why Benco might want to discuss the subject matter of margins dropping, Chuck Cohen

provided a clear explanation. (Cohen, Dep. at 314-15 (“we always want to talk about what happens if margins drop.... The reason why margins drop ... in the case study are not as important as how will we scale the business expenses differently if margins drop for whatever reason they drop.”)).

215. Cohen testified that [REDACTED]

Schein’s Response:

Complaint Counsel’s asserted fact is misleading in that it splices together two different answers, one in which Mr. Cohen was talking about Smile Source, and one in which he was talking about prices to independent dentists generally. In the former, Mr. Cohen recounts a document Complaint Counsel had shown him earlier, and in the latter, Mr. Cohen simply describes oligopolistic competition. By excerpting two different answers as if they were one, Complaint Counsel tries to create the impression that Patterson doing business with a buying group would lead to a margin drop for Benco. That was not Mr. Cohen’s testimony, nor did Complaint Counsel lay any foundation that Mr. Cohen had the requisite personal knowledge to answer the question. Indeed, Mr. Cohen’s answer to the question was, [REDACTED] The full exchange is as follows:

[REDACTED]

[REDACTED]

MR. KASS: Objection. Foundation.

- A. If Patterson does anything to drop the margins significantly to independent dental practices, that would have a – that would make a difference in the way Benco goes to market.

(CX 8015 (Cohen, Dep. at 315-16 (“There are other reasons why margins might drop. They’re just not mentioned here.”))).

Moreover, neither the asserted fact, nor the cited testimony, is reliable evidence of what happens to one distributor’s margins when another distributor does business with a buying group. Mr. Cohen did not study the question, and lacks foundation to speculate about the impact of one distributor’s contract with a buying group on a different distributor’s margins. In contrast, Complaint Counsel’s expert, Dr. Marshall, did study the issue, and his analysis shows that the losing distributors’ margins do not change when another distributor does business with a buying group. (CX 7100-150-86 (showing margins for the non-winning distributor remaining flat over time); Marshall, Tr. 3062 [REDACTED] [REDACTED] [REDACTED]).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, the cited testimony was elicited by Complaint Counsel in response to questions regarding CX1061-011. (Cohen, Dep. at 300-317). Specifically, the cited

testimony was elicited regarding a hypothetical case study from one-page of an exhibit within a 60-page document that is a compilation of Chuck Cohen's notes in a program called Microsoft OneNote, a digital note-taking application. (Cohen, Dep. at 300-317, discussing CX1061 (first introduced at Cohen, Dep. at 300)). Microsoft OneNote is a computer program for free-form information gathering and can be used to gather notes, drawings, screen clippings and audio commentaries. Complaint Counsel has not established the source, purpose, or impact – if any – of the notes contained on the cited page. (CX1061-011). Moreover, Complaint Counsel failed during Chuck Cohen's deposition to lay any foundation regarding the cited exhibit. (Cohen, Dep. at 300-317). The page of the exhibit in question appears to contain a portion of an e-mail that was sent to Chuck Cohen, a website and contact information, some bullet points, and other lines of text. (CX1061-011). It is not a formal agenda or any actual agenda from any meeting. At best, it contains some writing by Chuck Cohen under the heading "Strategic Planning Retreat Agenda 2014." (CX1061-011). Whether some or all of the writing on this page made it into any agenda for any strategic planning retreat – that may or may not have even occurred – is unknown based on the cited exhibit. (CX1061-011). Moreover, Complaint Counsel has cited no actual retreat agenda or any other evidence that the retreat in question even took place at all.

Second, as to the bullet point quoted in the proposed finding, Chuck Cohen could not recall what he meant when he wrote it. (Cohen, Dep. 314-17). But when asked why Benco might want to discuss the subject matter of margins dropping, Chuck Cohen provided a clear explanation. (Cohen, Dep. 314-15 ("we always want to talk about what happens if margins drop.... The reason why margins drop ... in the case study are not as

important as how will we scale the business expenses differently if margins drop for whatever reason they drop.”)).

Therefore, the cited response amounts to nothing more than Cohen’s hypothetical response to a hypothetical case study that may, or may not, have ever even occurred. Accordingly, it should be given no evidentiary weight by the court.

216. [REDACTED]

Schein’s Response:

Complaint Counsel has unfairly quoted the document using ellipses to omit context that undermines Complaint Counsel’s use and characterization of the evidence. Fairly quoted, the document contains [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CX 1061-010).³

Moreover, Complaint Counsel mischaracterizes Mr. Cohen’s testimony regarding what the quoted statement from the document meant. Mr. Cohen testified that he did not have a recollection of what the document meant, but from his perspective at the time he testified (in 2018) he *guessed* the concern was that various market forces could drive

³ CX 1061 is also inconsistent with the alleged conspiracy. If there were a conspiracy in which all Respondents had agreed to boycott buying groups, [REDACTED] Moreover, the same document also discusses [REDACTED] CX 1061-008 [REDACTED] [REDACTED]). As such, this document suggests that Benco did not perceive that either it or its competitors were under a sense of restricted freedom or obligation, as would be the case if there were a conspiracy.

margins down, including “better competitors at the low end, and then dentists consolidating, banding together, buying together, franchising, all kinds of different business models for dentists that enable some sort of buying consolidation.” (CX 8015 (Cohen, Dep. at 306)). Mr. Cohen noted that his list of factors that could lead to gross margins declining and continuing to decline was not a “comprehensive list [and] certainly not the only list.” (CX 8015 (Cohen, Dep. at 306)).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the cited exhibit is one-page within a 60-page document that is a compilation of Chuck Cohen’s notes in a program called Microsoft OneNote, a digital note-taking application. (CX1061). Microsoft OneNote is a computer program for free-form information gathering and can be used to gather notes, drawings, screen clippings and audio commentaries. Complaint Counsel has not established the source, purpose, or impact – if any – of the notes contained on the cited page. (CX1061-010). Moreover, Complaint Counsel failed during Chuck Cohen’s deposition to lay any foundation regarding the cited exhibit. (Cohen, Dep. at 300-317).

Second, as to the specific language quoted in the proposed finding from the underlying exhibit, Chuck Cohen testified that he could not recall what he meant when he wrote it. (Cohen, Dep. at 304).

Third, Complaint Counsel’s quotation above conveniently omits the majority of items listed within the parenthetical – which are not buying groups. (CX1061-010). The

full phrase and parenthetical is: “dentists are banding together (consolidators, franchises, buying clubs, etc.).” (CX1061-010). Complaint Counsel’s omissions, whether intentional or not, places an unjustified emphasis upon buying groups in the larger context of the exhibit, which has nothing else to do with buying groups. (CX1061-010).

Fourth, Chuck Cohen’s actual testimony differs substantially from Complaint Counsel’s fictional paraphrase in the proposed finding. What Cohen actually said was: “Sitting here today, I think buying clubs are – in this context, look like they were grouped in with other forms of dentists banding together. So whether it’s a DSO or franchise model, is what it seems to be what I wrote here, or buying club, one of the things that makes our business delightful is that dentists are independent, and dentists each make their own buying decisions.” (Cohen, Dep. 305). Nothing on the face of the underlying exhibit or in Cohen’s testimony says that buying clubs alone can force down Benco’s margins. (CX1061-010; Cohen, Dep. 300-317). Therefore, Complaint Counsel’s aspirational proposed finding should be ignored by the court.

217. Benco’s Chuck Cohen testified he was concerned that Schein or Patterson would sign up with Elite Dental Alliance (“EDA”) if Benco did not. (Cohen, Tr. 470). Cohen testified that “Benco is always concerned with what Schein and Patterson does” including “partnering with a buying group.” (Cohen, Tr. 470). Cohen further testified that Schein and Patterson opening up buying groups was a risk to Benco; and “[a]ny time Schein or Patterson changes their strategy there’s a risk to Benco . . . that we will lose customers.” (Cohen, Tr. 466-467).

Schein’s Response:

The asserted fact simply describes oligopolistic competition, but in doing so, mischaracterizes the testimony. Mr. Cohen was *asked* if “Benco was concerned that Schein or Patterson would sign up with EDA.” (Cohen, Tr. 470). Mr. Cohen did not respond specifically regarding EDA but rather answered broadly that he was “always concerned”

about whatever Schein or Patterson does. This hardly establishes that Benco had a particular concern at the time about EDA. Indeed, the document to which this testimony relates, and the testimony itself, reflect different concerns. The document discusses concerns about Schein or Patterson competing for EDA members, if Benco does a deal with EDA, not that Schein or Patterson would themselves do business with EDA. (CX 1084; Cohen, Tr. 469). As such, the document reflects concerns about the costs of having a middleman – EDA/Cain Waters – in the transaction. Mr. Cohen also explained that his concerns with saying no to Cain Waters/EDA was that Cain Waters might partner with Schein or Patterson, and that Benco would lose the benefits of the historic partnership it enjoyed. (Cohen, Tr. 470 (“I was concerned that Cain Waters, who had been a longtime partner of ours, would choose to take their partnership elsewhere... [S]o my concern was that Cain Waters would decide to go somewhere else with not just this EDA project but other projects as well.”)). This is not the same as a concern about the loss of members to a buying group.”

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, Elite Dental Alliance (“EDA”) was formed as a joint venture between Benco and Cain Watters. (Cohen, Tr. 451, 814). EDA did not exist until Benco formed it by entering into it agreement with Cain Watters. Therefore, it is a factual impossibility that Schein or Patterson “would sign up with” EDA. Accordingly, the court should disregard the first sentence of the proposed finding.

Second, the second sentence of the cited testimony in the proposed finding relates to a series of questions Complaint Counsel asked Chuck Cohen regarding Benco's alleged concern "that Schein or Patterson would sign up with EDA." (Cohen, Tr. 469-71). Since EDA did not exist until Benco formed EDA with Cain Watters, Cohen was not concerned that Schein or Patterson would sign up with EDA. Since the mid-2000's, long before the formation of EDA, Cain Watters had been one of Benco's Success Partners. (BFF 235; Cohen, Tr. 815-16). Cohen's concern then, as he clearly explained at trial, was that Benco did not want to lose its relationship with Cain Watters. (Cohen, Tr. 470 ("I was concerned that Cain Watters, who had been a longtime partner of ours, would choose to take their partnership elsewhere.")).

Third, in the third sentence of the proposed finding, Complaint Counsel's paraphrasing of Cohen's testimony is inaccurate. Contrary to the proposed finding, Cohen never testified that Schein and Patterson opening up buying groups was a risk to Benco. (Cohen, Tr. 466-67). Cohen's actual testimony was: "Any time Schein or Patterson changes their strategy, there's a risk to Benco." (Cohen, Tr. 467).

218. Ryan was concerned about Schein and Patterson working with buying groups. (Ryan, Tr. 1116-1117).

Schein's Response:

Mr. Ryan's testimony was not as limited as Complaint Counsel asserts. He generally described oligopolistic competition: "[a]nything that any competitor does concerns me, but it doesn't – it would never change what Benco does." (Ryan, Tr. 1116).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Contrary to the proposed finding, Pat Ryan never testified that he was concerned about Schein and Patterson working with buying groups. (Ryan, Tr. 1116-17). Ryan's actual testimony was: "Anything that any competitor does concerns me." (Ryan, Tr. 1116).

Lastly, the cited testimony contains only the statements and impressions of Pat Ryan, not Benco as a whole.

219. In an August 2011 email, a Patterson sales representative relayed her concerns to McFadden and a Patterson branch manager that the Florida Dental Association was considering the formation of a buying group that would lead to lower margins for Patterson. (McFadden, Tr. 2803-2804 (referring to RX0020)).

Schein's Response:

No response, other than to note that buying groups posed a conflict for FSCs.

Patterson's Response:

The cited document is dated more than eighteen months before Complaint Counsel alleges that Patterson joined the alleged conspiracy. (Compl. ¶ 36 (alleging Patterson joined the conspiracy in February 2013); *see also* RXD0204 at 1 ("Patterson Joined The Alleged Conspiracy in February 2013")). Furthermore, McFadden testified that the sales rep in question was concerned about her ability to earn a commission, not necessarily about lower margins for Patterson. (McFadden, Tr. 2803-2804 ("Terry is a very animated sales rep, a very good sales rep, and she's just sending out some information to me and Steve about disturbing news that she received that one of the doctors that's on the board of the

Florida Dental Association said they were going to offer discounts, and they feel they can get more of a discount for group ordering. And of course, she says, ‘That would KILL me.’ Of course, I’ve already said they’re on straight commission. And that’s what she’s basically stating, that, hey, this is going to lower my margin, is there anything I can do to capture that business before it goes in that direction.”)).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Patterson e-mail.

220. In a February 2013 email, Patterson’s Fruehauf wrote to Misiak about a request for a bid from what Fruehauf thought was a buying group. Fruehauf wrote: “I have had numerous discussions with [a Patterson branch manager] about our position and what it could mean if we set a precedent of offering lower prices such as this.” (Misiak, Tr. 1337-1339 (referring to CX0093); CX0316 (Misiak, IHT at 272, 275) (buying groups might cause Patterson to lose business or a percentage of it a consequence of offering lower prices to buying groups was that profits would be lower on business that Patterson already had)).

Schein’s Response:

No response.

Patterson’s Response:

Complaint Counsel’s cite citation to CX0316 does not support the parenthetical that “buying groups might cause Patterson to lose business or a percentage of it a consequence of offering lower prices to buying groups was that profits would be lower on business that Patterson already had.” Misiak stated merely that a local Patterson employee was concerned about losing business to a buying group, and that Misiak was unsure if that employee’s concern was accurate. (CX0316 (Misiak, IHT at 275 (“Q. Okay. Is it fair to say that co-ops can lead to Patterson losing business? A. That’s the belief of the local

manager here. I think without detailed assessment, I'm unsure.”))). Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Patterson e-mail.

221. On July 13, 2015, Schein's East Coast sales director, Jake Meadows, wrote in a SWOT analysis that buying groups were a threat. (CX2377 at 001; Meadows, Tr. 2444-2447). A SWOT analysis identifies strengths, weaknesses, opportunities and threats. (Meadows, Tr. 2444-2445). “Threat” as used in a SWOT analysis refers to risk. (Meadows, Tr. 2445).

Schein's Response:

The asserted fact overstates what the cited document says. As Mr. Meadows explained, “There are certain components within the buying group strategy that could create risk or a particular buying group itself that could create risk.” (CX 8016 (Meadows, Dep. at 90); Meadows, Tr. 2444-45). Mr. Meadows went on to explain that every item listed in his SWOT analysis had a strength, a weakness, an opportunity and a threat in them and that he listed buying group under threat because there was a “component of a particular relationship that would pose a risk to [Schein].” (CX 8016 (Meadows, Dep. at 92-93); Sullivan, Tr. 3911-12 (buying groups could fall into both the opportunity and threat square of a SWOT analysis)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Schein e-mail.

222. In a reply to Meadow's July 13, 2015 email, Schein's West Coast sales director, Joe Cavaretta, agreed with Meadows stating "LOL . . . this is almost exactly what I had." (CX2377 at 001).

Schein's Response:

There is little to no evidentiary value to Mr. Cavaretta's email. Mr. Cavaretta was not asked to put together a SWOT analysis; he was asked to list some items for discussion for a dinner the following day. He simply noted that Mr. Meadows listed a number of the same items that he planned to list. While Mr. Meadows provided his response in SWOT form, and assigned "buying groups" to the "T" category, there is no evidence that Mr. Cavaretta did the same. While Mr. Cavaretta responded that Mr. Meadows's SWOT analysis was "*almost* exactly what I had," there is no evidence that Mr. Cavaretta had buying groups listed as a threat in his own SWOT analysis and Complaint Counsel failed to elicit any testimony to that effect. (CX 2377-001 (emphasis added)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Schein e-mail.

223. In a February 2014 email, Schein's Sullivan suggested that GPOs be added to a Schein strategic plan document as a potential threat to the dental market. (CX2618 at 001).

Schein's Response:

The asserted fact is misleading and mischaracterizes the evidence. Mr. Sullivan suggested that GPOs be added to a Schein strategic plan situation analysis as a "potential

threat *or industry dynamic.*” (CX 2618-001). Moreover, while Mr. Sullivan thought buying groups had the possibility of being a threat to the dental industry, he also viewed them as an opportunity. (CX 8025 (Sullivan, Dep. at 144)).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Schein e-mail.

224. In an October 2014 email, written in advance of an executive planning meeting, Schein’s Sullivan lists “Buying Group mentality” as one of the “Top 5 ‘Keeps Me Up At Night’” issues. (CX0183 at 001; Sullivan, Tr. 3908-3911). Sullivan testified that he was referring to the prevalence of buying groups and the fact that his team had reported this customer trend to him. (Sullivan, Tr. 3910; CX0311 (Sullivan, IHT at 154-155)).

Schein’s Response:

The asserted fact is misleading in that “The New Normal..., Customer Trends..., Supplier Relationships..., Sales Team Structure..., [and] Meetings-R-US” were the “Top 5 Keeps Me Up at Night.” (CX 0183-001; CX 0311 (Sullivan, IHT at 155); Sullivan, Tr. 3909). Mr. Sullivan then listed “Buying Group mentality” along with “Mid Market and ultimately Elite DSO model” as bullets under “Customer Trends.” (CX 0183-001). Moreover, Complaint Counsel ignores Mr. Sullivan’s testimony that “Buying Group mentality” meant that he was thinking about the impact of buying groups which could be “positive” or “negative” and how Schein could structure themselves to “meet the demands of our customers.” (CX 0311 (Sullivan, IHT at 154-55)).

Patterson’s Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Schein e-mail.

225. [REDACTED]

Schein's Response:

The asserted fact is misleading, as Schein [REDACTED]

[REDACTED]

[REDACTED] (CX 2632-016). Indeed, buying groups are listed under [REDACTED]

[REDACTED] (CX 2632-016). As

Mr. Meadows and Mr. Sullivan testified, buying groups also presented an opportunity for Schein. (CX 8016 (Meadows, Dep. at 92-93); CX 8025 (Sullivan, Dep. at 144)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Schein e-mail.

226. The SWOT (Strengths, Weaknesses, Opportunities, and Threats) Analysis in a Patterson FY 2013 Dental Business Planning Document (dated February 2012) identifies the "Expansion of national buying groups" as a threat. (CX3068 at 024; Guggenheim, Tr. 1579-1580). Patterson strategic plans included SWOT analyses, which reflect strengths weaknesses, opportunities and threats to the business. (Guggenheim, Tr. 1579).

Schein's Response:

No response.

Patterson's Response:

The proposed finding is misleading. First, CX3068 is dated approximately a year before Complaint Counsel alleges Patterson joined the conspiracy. (CX3068 at 1; Compl. ¶ 36 (alleging Patterson joined the conspiracy in February 2013); *see also* RXD0204 at 1 (“Patterson Joined The Alleged Conspiracy in February 2013”)). Second, CX3068 lists the “[e]xpansion of national buying groups, group practices, [and] institutions” as a single external threat. CX3068 at 24. Third, the portion of Guggenheim’s testimony cited omits relevant information that undercuts Complaint Counsel’s theory of a conspiracy to boycott buying groups. Guggenheim testified that that the threat to Patterson was the *risk of missing out on one of these market segments*. (Guggenheim, Tr. 1581 (“Q. So were these entities identified as threats because Patterson wasn't positioned to penetrate those segments? A. In -- yeah. Yeah. I mean, that was not a -- we were under- -- it's a little different in each case. Each one of these has a little different nuance to it. So yeah, we weren't positioned. I guess you can say that summarizes but not specific.”)). Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Patterson e-mail.

227. A Patterson May 2014 SWOT analysis for a Florida market identifies “emergence of GPOs and our competitors [sic] willingness to negotiate with these groups” as a threat. (CX3283 at 010).

Schein's Response:

No response, except to note that earlier in the document, Patterson recognized that “Schein is participating in a GPO out of Jacksonville.” (CX 3283-005).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Patterson e-mail.

228. Patterson's President, Guggenheim, testified that buying groups were threats because "often [they] come with reduced pricing." (CX8023 (Guggenheim, Dep. at 221-222)).

Schein's Response:

The asserted fact does not fully capture Mr. Guggenheim's testimony. Mr. Guggenheim testified that not only buying groups, but also "group practices and institutions" were a threat to Patterson's profitability because "often [they] come with reduced pricing ... and an additional need for infrastructure." (CX 8023 (Guggenheim, Dep. at 221-22)).

Patterson's Response:

The cited testimony refers to CX3068. (CX8023 (Guggenheim, Dep. at 221-222)). Regarding this document, Guggenheim testified at trial that the threat to Patterson was the risk of missing out on one of the market segments listed in the external threats section of the SWOT document. ("Guggenheim, Tr. 1581 (Q. So were these entities identified as threats because Patterson wasn't positioned to penetrate those segments? A. In -- yeah. Yeah. I mean, that was not a -- we were under- -- it's a little different in each case. Each one of these has a little different nuance to it. So yeah, we weren't positioned. I guess you can say that summarizes but not specific."); CX3068 at 24). Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

229. In an email dated October 6, 2014, Benco's Cohen identified "rise of buying groups" as one of the five things he was "most worried about with respect to Benco and where the industry is today." (CX0054 at 001; Cohen, Tr. 442-444 (testifying that CX0054 was prepared for senior team strategy meeting)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The cited exhibit contains Chuck Cohen's responses to five questions posed by a business consultant, Jim Kochalka, who was facilitating an upcoming meeting. (CX0054; Cohen, IHT at 179-181). Cohen described Kochalka as a "business therapist" that Benco sometimes uses to facilitate meetings who "helps us work on how we get along as a group." (Cohen, IHT at 179-181). The cited language of the proposed finding was written by Kochalka as one of the questions posed to Cohen and others. (CX0054). Cohen's response did include the "rise of buying groups" as one of five items listed in his answer to Kochalka (CX0054). There is no further evidence in the record regarding what Kochalka may – or may not have – done with Cohen's answers.

230. Benco's Chuck Cohen testified that buying groups was one of things he "watch[ed] closely." (Cohen, Tr. 443).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The proposed finding is misleading because the cited testimony was far more general. Cohen's testimony was: "I worry about everything that can impact the dental market at any given time, and certainly buying groups are one of the things that I watch closely." (Cohen, Tr. 442-43).

231. In a conversation with Mitchell Huber, Benco's Director of Sales, Patrick Ryan referred to buying group Smile Source as "terrifying." (CX0015 at 001; Ryan, Tr. 1043; CX8037 (Ryan, Dep. at 339-340); CX0304 (Ryan, IHT at 190)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The cited phrase in the proposed finding is taken from a larger text message exchange between Pat Ryan and Mitch Huber. The initial text message in the conversation,

written by Ryan, was: “I think we need to stop talking about Amazon and start talking about Smile Source.” (CX0015). Ryan later writes “[t]hey are terrifying,” about Smile Source to underscore his point that he believed Amazon was being talked about too much and that there should be more discussion regarding Smile Source. (CX0015; Ryan, Tr. 1044 (testifying that in his personal opinion, Amazon was “overblown”)). Beyond that, Ryan testified that he did not know why he would have used the phrase. (Ryan, Dep. at 339-40).

Pat Ryan has led Benco’s Special Markets division since he founded it in 2004. (Ryan, Tr. 1155; Cohen, Tr. 803-804). Smile Source is a franchise DSO. (Maurer, Tr. 4935-36; Ryan, Tr. 1250). Amazon, in so far as it relates to the dental supply industry, is an online distributor of dental supplies. (Cohen, Tr. 489-490, 834). Therefore, Smile Source falls within Benco’s Special Markets division, whereas Amazon does not. (Cohen, Tr. 802-803). Accordingly, Pat Ryan as the head of Special Markets was more focused on Smile Source than on Amazon. (CX0015).

Lastly, the cited exhibit and testimony contains only the statements and impressions of Pat Ryan, not Benco as a whole.

232. [REDACTED]

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Mike McElaney, then Benco's Vice President of Sales, was the author of the presentation contained in the cited exhibit. (McElaney, IHT at 22-23). McElaney testified that what he meant by the cited language was that if other distributors recognized buying groups, there would be less independent dentists available for Benco's sales team to call on. (McElaney, IHT at 77-78). McElaney further explained that his personal view was that buying groups were not actually a threat to Benco because buying groups had always been a business model that failed in dentistry. (McElaney, IHT 80-81 ("I've never seen a [buying group] model that works.")).

233. In May 2014, Cohen received an email about a presentation he had made to a meeting of the Distributor Leadership Council in April 2014, summarizing his presentation about buying groups: "[S]mall dentists join these clubs to compete with the large corporate practices that already have leverage; these clubs are a real threat to Chuck." (CX0052 at 003).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the cited exhibit is not a summary of a presentation that Chuck Cohen gave. The cited exhibit contains only the notes of Brent Grover from a conversation at a meeting

of the Distributor Leadership Council. (Cohen, IHT at 144-45). In the cover e-mail attaching Grover's notes, Grover clearly states: "Here are Ken's and my compiled notes." (CX0052-001).

Second, the language quoted in the final two lines of the proposed finding was not written by Chuck Cohen. Since the cited exhibit is Brent Grover's notes, Grover is the person who wrote that sentence. (CX0052; Cohen, IHT at 144-45). Grover did not, however, necessarily express that view during the meeting. (Cohen, IHT 175-76 ("someone in the room may have said that.")).

Complaint Counsel has cited no evidence sufficient to determine who might have expressed the view quoted in the proposed finding. Therefore, it is inappropriate and unsupported for Complaint Counsel to attempt to attribute the statement to Chuck Cohen, as they have done in the proposed findings.

234. In a July 11, 2013 email, Benco's Regional Manager for the Rocky Mountain Region, described buying groups as "death to dealers." (CX1233 at 001).

Schein's Response:

This asserted fact is incomplete and misleading because, while Benco's Regional Manager Don Taylor may have indicated that buying groups could *theoretically* be "death to dealers," he also explained that buying groups had not had much (if any) success due to compliance issues. (CX 1233-001). Indeed, Complaint Counsel failed to include Mr. Taylor's other comment that "[e]very time I hear of one of these things trying to start, they die just as fast. Its [*sic*] impossible to get all of the offices on the same page and committed to the same thing." (CX 1233-001).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, Complaint Counsel never obtained any testimony from Don Taylor, the author of the cited exhibit. So there is no record of what Taylor may have meant by the phrase that Complaint Counsel has cherry-picked from his e-mail and quoted in the proposed finding.

Second, Taylor – in the very next sentence of the same e-mail – writes about buying groups: “Every time I hear of one of these things trying to start, they die just as fast. Its impossible to get all of the offices on the same page and committed to the same thing.” (CX1233).

Lastly, the cited exhibit and testimony contains only the statements and impressions of Don Taylor, not Benco as a whole.

235. In notes from a Benco meeting on April 9, 2014, buying clubs are identified as “a real threat to Chuck [Cohen].” (CX0052 at 003; CX0301 (Cohen, IHT at 146-147)).

Schein's Response:

No response, other than to note this asserted fact is duplicative of CCFF 233.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and mischaracterizes the cited exhibit.

First, the cited exhibit in the proposed finding is the same exhibit that was cited in proposed finding 233. (CCFF ¶ 233; CX0052). Therefore, Benco incorporates herein its response to Complaint Counsel's proposed finding 233.

Second, and most egregiously, the cited exhibit is most certainly not "notes from a Benco meeting" as Complaint Counsel states in the proposed finding. The cited exhibit is Brent Grover's notes from a meeting of the Distributor Leadership Council. (Cohen, IHT at 144-45).

Regardless of whether the proposed finding was a careless mistake or an intentional attempt to mischaracterize the cited exhibit, the proposed finding should be rejected by the court.

236. A transcript of a conversation between Benco's Ryan and Mitchell Huber, Ryan states that Smile Source is "terrifying." (CX0015 at 001; Ryan, Tr. 1043; CX8037 (Ryan, Dep. at 339-340); CX0304 (Ryan, IHT at 190)).

Schein's Response:

No response, other than to note this asserted fact is duplicative of CCFF 231.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The cited phrase in the proposed finding is taken from a larger text message exchange between Pat Ryan and Mitch Huber. The initial text message in the conversation, written by Ryan, was: “I think we need to stop talking about Amazon and start talking about Smile Source.” (CX0015). Ryan later writes “[t]hey are terrifying,” about Smile Source to underscore his point that he believed Amazon was being talked about too much and that there should be more discussion regarding Smile Source. (CX0015; Ryan, Tr. 1044 (testifying that in his personal opinion, Amazon was “overblown”)). Beyond that, Ryan testified that he did not know why he would have used the phrase. (Ryan, Dep. at 339-40).

Pat Ryan has led Benco’s Special Markets division since he founded it in 2004. (Ryan, Tr. 1155; Cohen, Tr. 803-804). Smile Source is a franchise DSO. (Maurer, Tr. 4935-36; Ryan, Tr. 1250). Amazon, in so far as it relates to the dental supply industry, is an online distributor of dental supplies. (Cohen, Tr. 489-490, 834). Therefore, Smile Source falls within Benco’s Special Markets division, whereas Amazon does not. (Cohen, Tr. 802-803). Accordingly, Pat Ryan as the head of Special Markets was more focused on Smile Source than on Amazon. (CX0015).

Lastly, the cited exhibit and testimony contains only the statements and impressions of Pat Ryan, not Benco as a whole.

237. In a March 8, 2012 email, Patterson’s Misiak wrote to Patterson’s Neal McFadden regarding a Florida Dental Association inquiry about forming a dental supply discount program: “I get these more often than I like. This stuff scares me. I’m gonna tell him thanks but no thanks.” (CX0084 at 001).

Schein's Response:

No response, other than to note that the cited document pre-dates Patterson's participation in the alleged conspiracy, and therefore undermines Complaint Counsels' claims about a "change in position" or acts against self-interest.

Patterson's Response:

This email is dated nearly a year *before* Patterson allegedly joined a conspiracy. Additionally, Patterson notes that it was already doing business with likely 30 to 35 percent of dentists in Florida. (Misiak, Tr. 1493).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Patterson e-mail.

238. In Respondents' view, buying groups posed a long-term threat to the industry as a whole, but offered potential short-term gains to any single distributor. (CCFF ¶¶ 221, 223- 227, 239-241, 243-250, 252).

Schein's Response:

False. Complaint Counsel cites no record evidence to support this finding. They only cite other proposed findings, which – as set forth in Schein's specific replies – also fail to support their characterization of the evidence.

Substantively, Schein was always generally skeptical of buying groups' ability to generate short-term gains, given their inability to deliver incremental volume and force compliance, and the high potential for cannibalization. (*See* Sullivan, Tr. 4085 ("I have always been and I am to[o] today very skeptical about the value that buying groups can bring ... to Henry Schein or to its members."), 4205, 4256-57, 4243-44; Cavaretta, Tr. 5568-70, 5574-76 (despite various challenges, "some buying groups did represent an

opportunity where there was mutual growth”); Titus, Tr. 5199 (“Some are good and healthy business partners for Henry Schein and some are not so good, and it was my job to help to establish those that made sense and those that perhaps did not.”); *see also* SF 183-88). Far from generating short-term (or long-term) gains for Schein, a number of buying groups that Schein did business with – such as Steadfast and Dental Co-Op – caused Schein to lose volume, not gain it. (*See* SF 593-601, 1212-19, 1240-41). Indeed, Dr. Marshall’s own analysis of Smile Source shows that Schein lost profits by doing business with Smile Source in the 2010-2011 and 2017 time periods. (SF 1722-35; RX 3058; Marshall, Tr. 3073-75, 3121-22).

Patterson’s Response:

No Patterson witness cited testified that “buying groups posed a long-term threat to the industry as a whole, but offered potential short-term gains to any single distributor,” and no Patterson document cited in the referenced proposed findings espoused that viewpoint. Otherwise, Patterson has no specific response.

Benco’s Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding. The proposed finding improperly lumps together all three Respondents, and, in doing so, seeks to use facts pertaining to one or more other Respondents to extend to Benco when, in fact, there is no evidence in the record justifying the proposed finding with respect to Benco.

None of the individual findings cited in this proposed finding contain evidence of Benco holding the view that “buying groups posed a long-term threat to the industry as a whole.” (CCFF ¶¶ 221, 223- 227, 239-241, 243-250, 252).

More egregiously, none of the individual findings cited in this proposed finding contain any evidence whatsoever that Benco believed buying groups “offered potential short-term gains to any single distributor.” (CCFF ¶¶ 221, 223- 227, 239-241, 243-250, 252). To the contrary, the overwhelming mountain of evidence in this case has firmly established that Benco has had a policy since the mid-1990’s that it does not recognize or do business with middlemen, including buying groups. (BFF ¶¶ 166-189). Benco believes that buying groups “are a failed business model in dentistry.” (Cohen, IHT at 377).

Since the proposed finding is wholly without any factual basis as to Benco, the court should disregard the proposed finding as to Benco.

239. Schein’s President, Tim Sullivan, testified about the “primary risk” posed by buying groups: “if we decide not to and the group decides to work with one of our competitors and now that puts our business at risk . . . we would want to know that, and that does matter to us.” (CX0311 (Sullivan, IHT at 254); *see also* CX0311 (Sullivan, IHT at 158, 254); CX0311 (Sullivan, IHT at 224) (Sullivan further explaining, “if we decide not to work with the [buying] group and the group decided to work with one of our competitors, and then those customers that were already existing business of ours now are members of this group move their business, we lose the business.”)).

Schein’s Response:

In the cited testimony, Complaint Counsel’s question was asked in the context of the downsides of *not* doing business with a buying group. Mr. Sullivan agreed that the risk, in that context, was that Schein might lose existing customers *if* the buying group contracted with a competing distributor and *if* members chose to switch to that distributor. This generic response does not state *whether* customers would go to a competing distributor, does not quantify the likelihood of that occurring, or address the magnitude of the loss. Rather, it simply indicates that Schein was competing in a concentrated market.

More importantly, Complaint Counsel’s question was not focused on the downsides of Schein doing business with buying groups. Even Complaint Counsel’s own expert

admits that the downsides of doing business with buying groups included the risk of cannibalization. Mr. Sullivan and other witnesses testified to numerous other downsides, including the buying group's inability to deliver incremental volume, conflicts with FSCs, conflicts between HSD and Special Markets, and conflicts between members and non-members. (See SF 90-113).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness discussing Schein's business.

240. Schein's President, Tim Sullivan, testified at trial that if Schein rejected a buying group, the buying group might shift Schein's customers to a competitor. (Sullivan, Tr. 3912). This would be a risk to Schein's business and could lead to a decrease in margins—also known as margin erosion. (Sullivan, Tr. 3912).

Schein's Response:

This asserted fact is misleading. While Schein does not dispute that if Schein does not work with a buying group, there's a *potential* that the buying group could shift Schein's customers to a competitor, the evidence shows that very few buying groups exhibited this capability of driving compliance and shifting volume. (SF 85-89; RX 2340-005 ("PGMS cannot guarantee that its members will purchase from Schein...")). Indeed, the evidence shows that despite joining a buying group not affiliated with Schein, many dentists elect to stay with Schein as their chosen distributor. (*E.g.*, RX 2594-001 (retaining members from Dental Co-Op once relationship was severed); Cavaretta, Tr. 5597-98 (Schein was able to retain and grow business with members of Steadfast after relationship was ended)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness discussing Schein's business.

241. In notes from a November 2015 budget meeting, Graham Stanley, the Chief Financial Officer of at least Henry Schein's U.S. dental business wrote: "Tim [Sullivan] clearly set out that HS should not be first to cooperate with GPOs, but also don't want to be last." (CX0189 at 002; Meadows, Tr. 2443-2444; Steck, Tr. 3843-3844 (Steck testified that all recipients of this document were in management, that Graham Stanley is a very trustworthy individual, and that Steck has no reason to doubt Graham Stanley's notes were accurate)).

Schein's Response:

The quoted document is taken out of context. It is also from after the alleged conspiracy period and contradicts Complaint Counsel's alleged change of conduct.

Mr. Stanley was CFO of Schein's global dental business, not of Henry Schein Inc. Mr. Stanley's one-sentence summary of the discussion at a budget meeting does not reflect the full nature of the discussion. His notes do not purport to be a complete or verbatim transcript. They are not reliable evidence of the content of the meeting. Moreover, as Mr. Sullivan testified, Mr. Stanley's notes were "poorly worded" as he did not "clearly set out" that Schein should not be the first to cooperate with buying groups. (CX 0311 (Sullivan, IHT at 218-19)). Mr. Sullivan testified that "the discussion was really about how do we want to work with [buying groups], how we have done in the past, and how do we set a strategy for working with them in the future" and how to address this trend in the marketplace. (CX 0311 (Sullivan, IHT at 218, 221)).

At this point, in November 2015, Schein had already developed a buying group template and formulary – called the BG plan – which senior HSD management had already approved. The statement about “HS should not be first to cooperate with GPOs, but also don’t want to be last” is properly understood – in the context of Mr. Sullivan giving an update on the prior year’s work to affirmatively develop a plan for working with buying group – as a willingness to work with buying groups when it makes economic sense.

Finally, the citation to Mr. Steck’s testimony is irrelevant and inadmissible. There was no testimony that Mr. Steck recalled the meeting, and his opinions about Mr. Graham’s propensity of truthfulness does not aid in the interpretation of the document or the accuracy of Mr. Graham’s notetaking skills.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness discussing Schein’s business.

242. In a presentation for a September 2013 meeting, Schein executives prepared a slide titled: “What do we not know about GPO’s” that listed the point “Will they be successful in baiting a Dental company into working with them?” (CX0193 at 014).

Schein’s Response:

Complaint Counsel did not ask a single witness at trial about this presentation, and their asserted fact misrepresents and takes the presentation out of context. The presentation does not support an inference of an agreement to boycott buying groups. In fact, it demonstrates the opposite.

The presentation was prepared by Henry Schein *Medical* to educate Henry Schein *Dental* on buying groups. (CX 0193 (presentation prepared by Brad Connett and Bill Barr of Henry Schein Medical)). As noted, medical GPOs differ substantially from dental buying groups, in that they typically negotiate directly with the manufacturer, serve larger customers, and require compliance. (SRF 77, 256-57). As the presentation notes, there are “5 major [medical] GPOs” (in addition to a number of smaller ones). The presentation then discusses the likelihood that these medical GPOs would expand their reach into dental, which raises many questions including whether “they [will] be successful in baiting a Dental company into working with them.” Notably, the presentation does not suggest any refusals to deal, but emphasizes the need for “a good Partner.” (CX 0193-020 (“What do we Do? ... We cant [*sic*] work with everyone ... Vet out GPO’s ... Limit your partners and drive exclusives at the GPO level”))).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Schein presentation.

243. In a November 18, 2014 email, Schein’s Jake Meadow identified the following “critical questions to present to the group”: “How can we stop the progression...Which competitors are embracing these relationships?” (CX2364 at 001).

Schein’s Response:

Complaint Counsel mischaracterizes the document by using ellipses to omit another question posed by Mr. Meadows of how “[Schein] can compete with existing GPOs?” (CX 2364).

The document reflects a series of questions Mr. Meadows proposed discussing at a November 2014 offsite meeting. Having been bombarded with concerns from FSCs about Dental Gator, Mr. Meadows wanted to discuss how to stop the progression of buying groups that were arbitraging Special Markets' DSO pricing, how HSD's FSCs could compete with such DSO/Buying Group hybrids (which had access to better pricing than FSCs), and whether Schein was alone in doing business with these groups or whether other competitors were embracing them too. (CX 2364). In response, Mr. Cavaretta responded that the "strategy can't be we [HSD] just don't play," it "has to be "we are going to play" or "we are going to be more aligned as a company," referring to the conflict between Special Markets and HSD. (CX 2364). Notably, at the offsite (and the following meeting a few weeks later), HSD senior leadership concluded that HSD needed to make developing a standard buying group template a "strategic priority" for 2015. (SF 295; CX 2475-009).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Schein e-mail.

244. Schein was concerned about how it would compete if buying groups had relationships with other distributors. (Meadows, Tr. 2599 (testifying about CX2364 at 001 ("How can we stop the progression...Which competitors are embracing these relationships?"))).

Schein's Response:

Complaint Counsel overstates Mr. Meadows' testimony, which was more specific and in the particular context of Schein's efforts to resolve conflicts arising from its business with Dental Gator. Mr. Meadows was concerned about how the FSCs on his team would

compete against DSO/Buying Group hybrids, if the latter had access to Special Markets' DSO pricing but his FSCs did not. (Meadows, Tr. 2595-600; *see also* CX 2355; CX 2034).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only testimony of a Schein witness discussing Schein's business.

245. In a January 28, 2015 email about MB2 and Dental Gator, Schein's Jim Breslawski wrote that Schein didn't want to "help open the floodgates on buying groups." (CX0188 at 001).

Schein's Response:

The asserted fact is misleading for two reasons. *First*, Mr. Breslawski's comment was focused on efforts by DSO/buying group hybrids – like MB2/Dental Gator – to arbitrage Special Markets' DSO pricing. As such, the concern here relates to the risk of cannibalization and the conflicts between members and non-members. *Second*, the asserted fact ignores Mr. Breslawski's testimony concerning the possibility that Special Markets pricing would be given to price-only buying groups, or "true buying groups," as Mr. Muller referred to them in his reply email. (CX 0188-001). As Mr. Breslawski explained, "price-only groups that are not adding additional value" did not "align naturally with [Schein's] value proposition;" and as such, Mr. Breslawski was merely "periodically remind[ing] our team of our model and the importance of us continuing to adhere to our model while at the same time learning and understanding everything that's out in the marketplace." (CX 8012 (Breslawski, Dep. at 136-38)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Schein e-mail.

246. Internal Benco documents also show that Benco believed Schein and Patterson's conduct with respect to buying groups directly affected Benco's ability to maintain a no buying group policy. (CX1218 at 007 ("Our Risks" include "Other GPOs get started, and are recognized by Schein or PDCO."); [REDACTED])

Schein's Response:

False. *First*, Complaint Counsel cites to an internal Benco slide titled "threat" that lists "dealers recognizing buying groups." However, Complaint Counsel cites nothing to support the inference that this meant that Schein and Patterson's conduct somehow affected Benco's ability to maintain its longstanding no-buying-group policy. Indeed, Benco held its no-buying-group policy since the mid-1990s (CCFF 395), and Schein has consistently done business with buying groups for just as long without impact to Benco's policy. (SF 159; Sullivan, Tr. 4020; Titus, Tr. 5191-93; Cavaretta, Tr. 5535-36; Foley, Tr. 4600). Additionally, CX 0067 is inconsistent with the alleged conspiracy. If there were a conspiracy in which all Respondents had agreed to boycott buying groups, [REDACTED] [REDACTED]. (CX 0067-015).

Second, Complaint Counsel cites to a case study on Benco partnering with its long-time client CWA to create Elite Dental Alliance (a buying group). (CX 1218-003). One of the potential risks Benco listed with respect to its decision to start its own buying group was that it may lead Schein or Patterson to start their own as well. (CX 1218-007).

Consequently, this document hypothesizes that if Benco creates a buying group, Patterson and Schein may respond by doing the same. It does not reflect a belief that Patterson's or Schein's conduct affected Benco's ability to maintain a no-buying-group policy. (CX 1218-007).

Patterson's Response:

The proposed finding of fact does not support the proposition that "Benco believed Schein and Patterson's conduct with respect to buying groups directly affected Benco's ability to maintain a no buying group policy." CX1218 is dated December 2015, which is eight months after Complaint Counsel alleges the conspiracy ended. (Kahn Tr. 19). Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibits.

First, the first cited exhibit is an e-mail that contains a Chuck Cohen OneNote post entitled "Case Study: Elite Dental Alliance." (CX1218). As its title clearly indicates, the exhibit is a case study examining Benco's joint venture with Cain Watters that created EDA. (CX1218). It has absolutely nothing to do with Benco's no-middlemen policy, whether Benco should maintain its policy, or whether Schein and Patterson's conduct impacts Benco's policy; it is simply a case study on EDA. (CX1218). Therefore, the first cited exhibit does not any contain evidence "that Benco believed Schein and Patterson's conduct with respect to buying groups directly affected Benco's ability to maintain a no buying group policy." (CX1218).

Second, although the quoted language in the proposed finding is included in the EDA Case Study, it does not support in any way the statement offered by Complaint

Counsel in the proposed finding. (CX1218-007). The quoted language appears under a section entitled “Our Risk” in which Cohen is listing potential risks to the formation and launch of EDA by Benco and Cain Watters. (CX1218-007). It is a reference to the potential of competition from Schein and Patterson against EDA; in context, it has absolutely nothing to do with Benco’s policy – as Complaint Counsel wrongly states in the proposed finding. (CX1218-007).

Third, the second cited exhibit is an internal Benco presentation providing an update and assessment of Benco’s sales organization. (CX0067). Mike McElaney, then Benco’s Vice President of Sales, was the author of the presentation contained in the cited exhibit. (McElaney, IHT at 22-23). McElaney testified that what he meant by the cited language was that if other distributors recognized buying groups, there would be less independent dentists available for Benco’s sales team to call on. (McElaney, IHT at 77-78). McElaney further explained that his personal view was that buying groups were not actually a threat to Benco because buying groups had always been a business model that failed in dentistry. (McElaney, IHT 80-81 (“I’ve never seen a [buying group] model that works.”)).

The second cited exhibit has absolutely nothing to do with Benco’s no-middlemen policy, whether Benco should maintain its policy, or whether Schein and Patterson’s conduct impacts Benco’s policy. (CX0067). Therefore, the second cited exhibit does not contain evidence “that Benco believed Schein and Patterson’s conduct with respect to buying groups directly affected Benco’s ability to maintain a no buying group policy.” (CX0067).

247. [REDACTED]

Schein's Response:

CX 1061 is inconsistent with the alleged conspiracy. In April 2014 (during the alleged conspiracy), [REDACTED]

[REDACTED] which suggests that Benco did not perceive that either it or its competitors were under a sense of restricted freedom or obligation to not sell to buying groups, as would be the case if there were a conspiracy.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibits.

First, the first cited exhibit is one-page within a 60-page document that is a compilation of Chuck Cohen's notes in a program called Microsoft OneNote, a digital note-taking application. (CX1061). Microsoft OneNote is a computer program for free-form information gathering and can be used to gather notes, drawings, screen clippings and audio commentaries. Complaint Counsel has not established the source, purpose, or impact – if any – of the notes contained on the cited page. (CX1061-011). Moreover, Complaint Counsel failed during Chuck Cohen's deposition to lay any foundation regarding the cited exhibit. (Cohen, Dep. at 300-317). The page of the exhibit cited by Complaint Counsel here appears to contain a portion of an e-mail that was sent to Chuck Cohen, a website and contact information, some bullet points, and other lines of text. (CX1061-011). It is not a formal agenda or any actual agenda from any meeting. At best, it contains some writing

by Chuck Cohen under the heading “Strategic Planning Retreat Agenda 2014.” (CX1061-011). Whether some or all of the writing on this page made it into any agenda for any strategic planning retreat – that may or may not have even occurred – is unknown based on the cited exhibit. (CX1061-011). Moreover, Complaint Counsel has cited no actual retreat agenda or any other evidence that the retreat in question even took place at all.

Second, as to the bullet point quoted in the proposed finding, Chuck Cohen could not recall what he meant when he wrote it. (Cohen, Dep. at 314-17). But when asked why Benco might want to discuss the subject matter of margins dropping, Chuck Cohen provided a clear explanation. (Cohen, Dep. at 314-15 (“we always want to talk about what happens if margins drop.... The reason why margins drop ... in the case study are not as important as how will we scale the business expenses differently if margins drop for whatever reason they drop.”)).

Third, the second cited exhibit is a two-page entry from Chuck Cohen’s notes in Microsoft OneNote. (CX1237). The second cited exhibit makes no reference to any strategic planning retreat, any case study, or to Smile Source. (CX1237). Therefore, the second cited exhibit provides no evidence support for Complaint Counsel’s proposed finding.

248. When Benco found out that Schein was working with Smile Source, it wanted to “push EDA to the next level as a way of competing against Schein’s GPO.” (Cohen, Tr. 480).

Schein’s Response:

Complaint Counsel mischaracterizes Mr. Cohen’s testimony. In July 2017, Mr. Ryan texted Mr. Cohen: “Schein recognizing 5-10 GPOs ... Smile[]Source for sure.” (CX 1527-004). Mr. Cohen responded, “We have to push EDA to the next level.” (CX 1527-

004). At trial, Complaint Counsel's question was not specific to Smile Source. Ms. Kahn asked, "Fair to say that you wanted to get EDA to the next level to compete against Schein's *GPOs*?" (Cohen, Tr. 480). Mr. Cohen did not answer that specific question (and Complaint Counsel did not ask it again). Mr. Cohen responded: "It's fair to say this is a spur that the market is changing and we need to make sure that our offering in the segment is as good as it can be." (Cohen, Tr. 480-81).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, Chuck Cohen did not testify that his desire to "push EDA to the next level" had anything to do with Smile Source. At trial, Complaint Counsel did not ask Cohen specifically about Smile Source, but rather both questions from Complaint Counsel were framed as "competing against Schein's GPOs." (Cohen, Tr. 480:23-481:7). Therefore, Complaint Counsel's proposed finding tying Cohen's desire to "push EDA to the next level" to Smile Source is without evidentiary basis.

Second, Cohen's desire to "push EDA to the next level" to "compete with Schein's GPOs" shows vigorous competition between Benco and Schein – it does not, as Complaint Counsel contends in this case, support the existence of any anticompetitive agreement between Benco and Schein. (Cohen, Tr. 480-81). To the contrary, Benco competes aggressively and fiercely with Schein, every day. (Cohen, Tr. 662, 804, 937; Cohen, IHT at 96, 98).

249. In Case Study of the EDA, Chuck Cohen identified that a “risk” of discounting to the EDA buying group was “[o]ther GPOs get started, and are recognized by Schein or PDCO [Patterson].” (CX1084 at 007; *see also* Cohen, Tr. 466). Cohen testified that he reviewed this case study with Benco’s senior team. (Cohen, Tr. 453-456).

Schein’s Response:

This is the same assertion that CCFF 246 makes regarding CX 1218, which forwards CX 1084. Schein incorporates its response to CCFF 246 here. (SRF 246).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit and testimony.

First, Elite Dental Alliance (“EDA”) was formed as a joint venture between Benco and Cain Watters. (Cohen, Tr. 451, 814). EDA did not exist until Benco formed it by entering into it agreement with Cain Watters. Therefore, it is a factual impossibility that Benco “identified [any] ‘risk’ of discounting to the EDA buying group.” Accordingly, the court should disregard the first sentence of the proposed finding.

Second, the cited exhibit is a Chuck Cohen OneNote post entitled “Case Study: Elite Dental Alliance.” (CX1084). As its title clearly indicates, the exhibit is a case study examining Benco’s joint venture with Cain Watters that created EDA. (CX1084). Although the quoted language in the proposed finding is included in the EDA Case Study, it does not support the statement offered by Complaint Counsel in the proposed finding. (CX1084-007). The quoted language appears under a section entitled “Our Risk” in which Cohen is listing potential risks to the formation and launch of EDA by Benco and Cain Watters. (CX1084-007). It is a refence to the potential of competition from Schein and

Patterson against EDA. (CX1084-007). As Chuck Cohen explained at trial, “it’s always a risk when we innovate and we’re copied by our major competitors. Because it blunts the innovation.” (Cohen, Tr. at 466).

250. McFadden believed that buying groups could be a potential opportunity for Patterson if Henry Schein was participating in them. (McFadden, Tr. 2709 (testifying that McFadden asked Rogan in August 2013 about Patterson exploring GPOs because: “I see here that Henry Schein is participating in this particular group, and I thought that this . . . could be a future potential opportunity if Henry Schein was participating in them . . .”); *see also* CX0106 (August 2, 2013 email, McFadden wrote to Misiak and Rogan: “Is it worth it to explore GPO?????????”)).

Schein’s Response:

In August 2013, during the alleged conspiracy period, Mr. McFadden received competitive intelligence that Schein was doing business with buying groups. He sent the intelligence to others at Patterson asking, “Is it worth it to explore GPO??????? ... just wondering.” (CX 0106-001). Complaint Counsel asked why he asked that question, and Mr. McFadden responded, “Because I see here that Henry Schein is participating in this particular group, and I thought that this was – could be a future potential opportunity if Henry Schein was participating in them, so I passed this on to the other guys as I had been abundantly told to focus on DSOs, so it was an opportunity to keep them posted about what was happening in the field.” (McFadden, Tr. 2709). Mr. McFadden’s email is completely contrary to the existence of the alleged conspiracy

Patterson’s Response:

The proposition that “McFadden believed that buying groups could be a potential opportunity for Patterson if Henry Schein was participating in them” is unsupported. The cited McFadden testimony describes his reaction to Schein’s working with a single buying group. (McFadden, Tr. 2709 (referring to CX0106)). Notably, McFadden does not express

surprise in CX0106 at Schein's working with the group. Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only testimony of a Patterson witness discussing Patterson's business.

251. Patterson executive, Rogan, believed there was no reason for Patterson to work with a buying group if Benco and Schein were also not competing for them. (CX0317 (Rogan, IHT at 239-240) (testifying about a statement Rogan wrote in an email in August 2013 ("Schein, Benco, and Patterson have always said no."): "What I'm saying here is that to the best of my knowledge [Benco and Schein] hadn't worked with any buying groups, so there's no reason for us to work with a buying group when we don't think it's a good idea . . . if our biggest competitors aren't doing it, I don't understand why – I'm basically saying to him, 'I don't understanding why you're even asking about this.'"); *see also* CX0106 (August 4, 2013 email from Rogan to McFadden, Misiak, and Josh Killian: "We don't need GPO's in the dental business. Schein, Benco, and Patterson have always said no.")).

Schein's Response:

Complaint Counsel misrepresents Mr. Rogan's testimony. In the cited testimony, Mr. Rogan explained Patterson's unilateral approach to buying groups: "[T]here's no reason for us to work with a buying group when we don't think it's a good idea." (CX 0317 (Rogan, IHT at 239-40)). Mr. Rogan's belief as to what Schein was or was not doing regarding buying groups, however, is not reliable evidence of what Schein was actually doing. As Mr. Rogan testified, "I have no idea if Schein or Benco have policies" and his email was just "to the best of my knowledge." (CX 0317 (Rogan, IHT at 239)). At trial, Mr. Rogan confirmed that he has never spoken to anyone at Schein in any fashion about buying groups. (Rogan, Tr. 3420-21, 3571, 3655, 3657). Instead, any comment made by Mr. Rogan regarding Schein's purported approach to buying groups was based on market intelligence and nothing else. (CX 8017 (Rogan, Dep. at 72-73)). In fact, Mr. Rogan's

belief was mistaken, as the market intelligence that Mr. McFadden forwarded *that same month*, in August 2013, indicated (and Mr. McFadden pointed out in a subsequent email) that Schein was doing business with GPOs. (SRF 250; CX 0106; CX 0161; McFadden, Tr. 2840-41).

Patterson's Response:

The proposition that Rogan “believed there was no reason for Patterson to work with a buying group if Benco and Schein were also not competing for them” is unsupported. The cited testimony describes Rogan’s unilateral reaction to a single buying group. (CX0317 (Rogan, IHT at 239–40 (referring to CX0106)). Moreover, Rogan testified at trial that this email reflected his opinion only. Rogan Tr. 2658-59. Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only testimony of a Patterson witness discussing Patterson’s business.

252. Patterson’s executives concede that the company’s buying group strategy depended on Benco and Schein’s conduct. (CCFF ¶¶ 250, 251; *see also* McFadden, Tr. 2709 (McFadden asked Rogan in August 2013 about Patterson exploring GPOs because GPOs could be “a future potential opportunity if Henry Schein was participating” in a group); CX0317 (Rogan, IHT at 239-240) (Rogan testified that if biggest competitors aren’t working with buying groups, there is no reason for Patterson to work with buying groups)).

Schein's Response:

False. Complaint Counsel cites the same testimony as in CCFF 250 and 251, and Schein incorporates its responses to those findings here. The cited testimony does not support the asserted fact. (*See* SRF 250-51). To the contrary, the evidence shows that Patterson was aware that Schein was doing business with buying groups during the alleged

conspiracy period, but this awareness did not change Patterson's own buying group strategy. (SF 126-35; Guggenheim, Tr. 1856-57 (Mr. Guggenheim testified that Schein was an "innovator" and that he always "believed ... that Henry Schein worked with buying groups"); Rogan, 3654-55; 3657; 3660-61; McFadden, Tr. 2841; CX 8004 (McFadden, Dep. at 46-47); CX 0161). Moreover, no one at Patterson ever communicated with anyone at Schein about buying groups, much less about what Schein's strategy was relating to buying groups. (Rogan, Tr. 3420-21, 3571, 3655, 3657; Misiak, Tr. 1504-05; Guggenheim, Tr. 1856; McFadden, Tr. 2836-37).

Patterson's Response:

The proposed finding is false, and notably not supported by Complaint Counsel's cited sources. Neither McFadden nor Rogan testified that "the company's buying group strategy depended on Benco and Schein's conduct." (emphasis added). McFadden testified that he wrote to his colleague about single group he heard was working with Schein in an effort keep him informed about "what was happening in the field." (McFadden, Tr. 2709 ("Q. So going back to my question, why were you asking Mr. Rogan if it was worth it to explore GPOs back in August 2013? A. Because I see here that Henry Schein is participating in this particular group, and I thought that this was -- could be a future potential opportunity if Henry Schein was participating in them, so I passed this on to the other guys as I had been abundantly told to focus on DSOs, so it was an opportunity to keep them posted about what was happening in the field.)). Rogan, when testifying about that same email, stated that whether competitors were working with buying groups was simply something for Patterson to "be aware of." (CX0317 (Rogan, IHT at 239-40 ("Q. Why would what Schein and Benco were doing with respect to buying groups matter to Patterson? A. Well, I think it's -- If our competitors are doing something, we should

be aware of it, so see if it's going to hurt us in a competitive way, and the deal here is I've established that buying groups aren't bringing any value, they just want a really low price, and nobody else is competing with us with them, so, if our biggest competitors aren't doing it, I don't understand why -- I'm basically saying to him 'I don't understand why you're even asking about this.'”). Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only testimony of a Patterson witness discussing Patterson's business.

253. When asked “what’s the concern if Schein and Benco bid on this [buying] group?,” Patterson’s President, Paul Guggenheim, testified “The potential that we could lose the business.” (CX0314 (Guggenheim, IHT at 265-266) (in reference to CX0092 at 001)).

Schein's Response:

No response.

Patterson's Response:

Guggenheim did not testify that this was *his* personal concern but, rather, his interpretation of David Misiak’s concern as expressed in CX0092. (CX0314 (Guggenheim, IHT at 265–66)). Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only testimony of a Patterson witness discussing Patterson's business.

254. Burkhart identified the same dilemma; Burkhart also identified the risk that if they didn’t engage with buying groups, they would lose customers to distributors willing to work with buying groups. (Reece, Tr. 4371).

Schein's Response:

Complaint Counsel overstates Mr. Reece's testimony, as he did not testify that Burkhart was specifically worried it may lose customers to distributors willing to work with buying groups. (Reece, Tr. 4371). Instead, Mr. Reece testified that if Burkhart decided not to engage with buying groups the "perception we had was that we would likely lose clients and/or the opportunity to hang onto those clients." (Reece, Tr. 4371). Therefore, Complaint Counsel provides no evidence that Burkhart had a specific concern about losing customers to distributors willing to work with buying groups. The evidence instead establishes that Burkhart, like Schein, was generally worried about losing customers to any competitor, regardless of whether it partnered with buying groups.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only testimony of a Burkhart witness discussing Burkhart's business.

255. Through partnering with buying groups to offer discounts, Burkhart gained customers from Schein. (CX4220 at 001 (Burkhart gained a \$2 million dollar account from Henry Schein through the Kois Buyers Group)).

Schein's Response:

The asserted fact is vague and overbroad, and the cited evidence does not support such breadth. At most, CX 4220 indicates that Burkhart won a single office that did \$2 million "in production" that had also done at least some business with Schein. But the cited document is not reliable evidence even for that. Complaint Counsel has not provided any evidence regarding what the account's "commitment" to Burkhart was, how much if

any business the account actually did with Schein, or how much business Schein retained after the account joined the Kois Buyers Group.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Burkhardt e-mail.

B. Respondents Knew Buying Groups in The Medical Supplies Industry Drove Down Margins.

256. Executives from each of the Big Three were aware that the successful entry of buying groups and GPOs in the medical supplies distribution market led to low margins for distributors. (CCFF ¶¶ 258- 264, 266-268).

Schein's Response:

Complaint Counsel cites no record evidence to support this finding, and only cites to its other proposed findings, which – as set forth in the specific replies – also fail to support Complaint Counsel's characterization of the evidence. Schein incorporates its responses to those specific proposed findings here. (SRF 258-64, 266-68).

Substantively, the asserted fact is based on the false or unproven premise that “buying groups and GPOs in the medical supplies distribution market led to low margins for distributors.” Complaint Counsel has not introduced any reliable evidence concerning the effect, if any, of buying groups or GPOs on medical supplies distribution. Complaint Counsel did not present any expert testimony concerning, or call any witness with personal knowledge of, the medical market or the factors that influence supply and demand, competition, or pricing in medical markets.

Moreover, the effect of GPOs on the medical supplies distribution market is irrelevant to the issues in this case. Medical GPOs function entirely differently than dental buying groups. (Rogan, Tr. 3429 (“GPOs as they’re known in the medical business ... actually do not exist in the dental business. Now, there are some medical GPOs that are dabbling in dentistry, but there are no dental GPOs that do what medical GPOs do.”), 3432-33). For example, Medical GPOs “buy the product and ... have the relationship with the manufacturer. They aggregate the spend. They warehouse the product. They ship the product to the end user....” (Rogan, Tr. 3431). In other words, medical GPOs displaced distribution. Dental buying groups are not alleged to have such an impact or business model. Whatever Schein, Patterson, and Benco thought would happen to margins if medical-style GPOs that displaced distribution entered the dental space, it is irrelevant to dental buying groups.

Nor does the claim – that “[e]xecutives ... were aware” of the impact of GPOs on medical margins – support an inference that Respondents had a motive to conspire. The fact that some witnesses may have used the terms “GPO” and “buying group” interchangeably when referring to dental buying groups, does not make the medical market, let alone medical GPOs, analogous to or informative of dental supplies distribution. The few (uninformed) references to medical markets does not suggest that the medical-market experience played any material role in influencing Schein’s decisions about which dental buying groups to partner with.

Patterson’s Response:

Complaint Counsel cited no record evidence to support this proposed finding.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding. None of the individual findings cited in this proposed finding contain evidence that Benco was “aware that the successful entry of buying groups and GPOs in the medical supplies distribution market led to low margins for distributors.” (CCFF ¶¶ 258- 264, 266-268).

First, the proposed finding improperly lumps together all three Respondents, and, in doing so, seeks to use facts pertaining to one or more other Respondents to extend to Benco when, in fact, there is no evidence in the record justifying the proposed finding with respect to Benco.

Second, Complaint Counsel has cited no evidence – because none exists in the entire voluminous record of this case – that anyone at Benco had ever worked in the “medical supplies distribution market” or had any personal knowledge of the medical supplies distribution market, the impact of buying groups and GPOs on that market, or any resulting impact on margins for distributors in that market. (*See* JX0002).

Third, the only Benco employee cited in any of the individual proposed findings to purported support Complaint Counsel’s unsupportable finding is Pat Ryan. But, Pat Ryan is a Benco employee, not a Benco executive. Pat Ryan is not a member of Benco’s Senior Leadership Team. (CX8015 (Cohen, Dep. at 347); CX0304 (Ryan, IHT at 11)). Therefore, the proposed finding’s claim as to “executives” of Benco is simply false on its face.

Fourth, Pat Ryan has never worked in the medical supply industry and does not have any personal knowledge about the medical supply industry. (Ryan, Dep. 169-70).

Therefore, the proposed finding – and the individual findings – contain no references to credible evidence and should be ignored.

Fifth, any analogy that Complaint Counsel may be attempting to draw between the medical supplies distribution market and the dental industry is inapplicable. (RX1090). Complaint Counsel has cited no evidence and never took any discovery regarding the medical supplies distribution market. (*See* JX0002). The only evidence in the entire case analyzing the relationship between the medical and dental industries and the structural differences as they relate to buying groups or GPOs, was developed by Benco. (RX1090-021 to RX1090-037 (Eugene Schneller, *Purchasing Organizations in the Medical and Dental Industries – the Role of Group Purchasing and Consolidation*)). Specifically, that evidence shows that market characteristics that have enabled GPOs to flourish in the medical industry are **not** prevalent in the dental industry. (RX1090-021 to RX1090-037) (emphasis added). Complaint Counsel’s mere opinion or speculation regarding the medical industry cannot serve as the basis for any proposed findings.

The proposed finding, and underlying individual findings, are yet another example of Complaint Counsel’s gross overreach in this case. Complaint Counsel is not offering proposed facts, but rather only Complaint Counsel’s opinion, speculation or inferences. Thus, Complaint Counsel’s proposed findings – like its distorted narrative and theory of this case – is not supported by the actual evidence in the case.

257. In the medical distribution market, the rise of buying groups resulted in a significant decline in the distributors’ margins. (CCFF ¶¶ 258-264, 266).

Schein's Response:

The asserted fact is not supported by the evidence. There was no expert testimony establishing any relevance of the medical distribution market to the dental distribution market. Nor did Complaint Counsel call any witness with personal knowledge of the medical market or the factors that influence supply and demand, competition, or pricing in medical markets.

Rather, the evidence at trial established that medical GPOs functioned very differently than dental buying groups. (Rogan, Tr. 3429, 3431-33). Moreover, Schein submitted a declaration in the *In re Dental Supplies Antitrust Litigation* from Schein President Jim Breslawski – which has been admitted into evidence in this matter – explaining the differences between the two markets. (RX 2933). As Mr. Breslawski, who had responsibility for both Schein's dental and medical distribution businesses, stated under oath:

I understand that class counsel has suggested that juxtaposing Schein's prices or margins in the dental distribution business against the prices or margins in the medical business would be a relevant comparison in this case. While I do not offer any opinions concerning what may be legally relevant, in my view the differences between the two businesses would make any comparison essentially meaningless. As described below, the many differences include:

- Customer size. Our medical customers are generally in the business of providing healthcare to the public. In today's market, healthcare is typically delivered via a formal or informal interconnected network of healthcare providers and facilities, with most procedures (generating the most significant need for supplies) taking place at large facilities (e.g., large, centrally controlled health systems, surgery centers, and hospitals). In contrast, most dental procedures take place at small dental offices. The larger medical facilities can generally be supplied at lower gross margin percentages because they generate higher gross margin dollars (i.e., gross profit dollars) and cost less to serve on a per unit basis. The size of medical facilities also gives them greater ability to switch significant sales from one manufacturer

to another, which has implications for medical pricing. This dynamic is absent from the dental business.

- Nature and mix of services. There are significant differences in the nature of the services provided by, and to, physician offices and dental offices. For example, unlike physician offices, dental practices tend to use mechanical equipment with virtually every patient visit, resulting in significant wear and tear to such equipment. Accordingly, one of the many reasons why dentists use Schein as a “primary” dental distributor is because it services equipment. Schein's dental business has built an entire infrastructure devoted to dental equipment sales and service that does not exist in medical because there is not the same demand for it there. Schein's costs in the dental business include tens of millions of dollars to provide equipment and other services, including specially trained personnel, delivery and service vans, showrooms, and branch support facilities. Schein, however, does not generally provide equipment services to its medical customers.
- Nature and mix of products. There is also little overlap in the products purchased by dental and medical practices, and to the extent there are “cross-over” products, they are not representative of the overall needs of the respective practices.

(RX 2933-002).

As such, even if Complaint Counsel could establish that margins in the medical business are lower than in the dental business (on a per unit basis, though not on a per customer basis), there is no evidence that this was caused by buying groups or GPOs.

Patterson’s Response:

Patterson joins the responses of Schein and Benco.

Benco’s Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding. None of the individual findings cited in this proposed finding contain credible, reliable evidence supporting Complaint Counsel’s opinion or speculation. (CCFF ¶¶ 258- 264, 266).

First, Complaint Counsel has cited no evidence and never even took any discovery regarding the “medical distribution market” or the “medical supplies distribution market.” (See JX0002). The only evidence in the entire case analyzing the relationship between the medical and dental industries and the structural differences as they relate to buying groups or GPOs, was developed by Benco. (RX1090-021 to RX1090-037 (Eugene Schneller, *Purchasing Organizations in the Medical and Dental Industries – the Role of Group Purchasing and Consolidation*)). Specifically, that evidence shows that market characteristics that have enabled GPOs to flourish in the medical industry are not prevalent in the dental industry. (RX1090-021 to RX1090-037) (emphasis added). Therefore, Complaint Counsel’s mere opinion or speculation regarding the “medical distribution market” cannot serve as the basis for any proposed findings.

Second, to the extent that Complaint Counsel – in the underlying individual findings – purports to cite to any statements or documents from Benco’s Pat Ryan, the proposed findings are not supported by credible evidence. Pat Ryan has never worked in the medical supply industry and does not have any personal knowledge about the medical supply industry. (Ryan, Dep. 169-70). Therefore, the proposed finding – and the individual findings – contain no references to credible evidence and should be ignored.

258. In a February 23, 2013 SharePoint bulletin post, Ryan, a Benco executive, wrote “GPOs are what [ruined] the medical supply business and why they work on single digit margins.” (CX1149 at 002; Ryan, Tr. 1081-1082).

Schein’s Response:

Neither the asserted fact, nor the document it cites, is reliable evidence concerning the truth of that matter asserted (*i.e.*, the effects of GPOs on medical margins) or Benco’s state of mind. As for the truth of the matter, Complaint Counsel did not introduce any

evidence to show that Mr. Ryan has personal knowledge of medical markets, or that he is an expert on medical market margins or on the impact, if any, of GPOs on such margins. As for state of mind, while Mr. Ryan mentioned medical GPOs in his SharePoint post, there is no evidence that this was a reason for Benco's decision to adopt its no-buying-group policy.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, Pat Ryan is a Benco employee, not a Benco executive. Pat Ryan is not a member of Benco's Senior Leadership Team. (CX8015 (Cohen, Dep. at 347); CX0304 (Ryan, IHT at 11)).

Second, Pat Ryan has never worked in the medical supply industry and does not have any personal knowledge about the medical supply industry. (Ryan, Dep. 169-70). Pat Ryan's speculation about an industry in which he never worked and about which has no personal knowledge is not credible and reliable evidence. Therefore, the proposed finding should be ignored.

Lastly, the cited exhibit and testimony contains only the statements and impressions of Pat Ryan, not Benco as a whole.

259. When Benco's Ryan wrote in his Sharepoint post in CX1149 at 002 that "GPOs are what [ruined] the medical supply business and why they work on single digit margins. If this door is ever opened in dental, it's all over for us....it's a race to the bottom," his reference to "a race to the bottom" meant a race to the bottom in profitability in the whole dental industry. (Ryan, Tr. 1081-1083).

Schein's Response:

Mr. Ryan's statement regarding GPOs in the medical supply business and speculation as to what might happen if medical-style GPOs enter the dental market are irrelevant. (SRF 258). There was no expert testimony establishing any relevance of the medical distribution market to the dental distribution market. Rather, the evidence at trial established that medical GPOs functioned very differently than dental buying groups. (Rogan, Tr. 3429, 3431-33). There are no allegations in the case regarding entrance into the dental market of medical-style GPOs that negotiate directly with manufacturers, take ownership of and warehouse products, and distribute the products to the end user.

Moreover, Complaint Counsel mischaracterizes Mr. Ryan's statement as "a race to the bottom ... in profitability." He was clearly referencing cannibalization. Mr. Ryan simply speculated that, *if* medical-style GPOs enter the dental market and negotiate lower prices, those lower prices may spread to other customers, such as non-members. As the document notes: "[i]f this door is ever opened in dental, its [*sic*] all over for all of us. It may seem like 'oh, why not? Let's get a bunch of cotton rolls', but picture a day when every single customer of yours is in some kind of buying club and all margins are now 12% over cost and its [*sic*] a race to the bottom." (CX 1149-002). Neither the document nor the testimony refers to competing distributors. Rather, Mr. Ryan simply imagines a scenario where medical-style GPOs cannibalize all existing sales.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, Pat Ryan is a Benco employee, not a Benco executive. Pat Ryan is not a member of Benco's Senior Leadership Team. (CX8015 (Cohen, Dep. at 347); CX0304 (Ryan, IHT at 11)).

Second, Pat Ryan has never worked in the medical supply industry and does not have any personal knowledge about the medical supply industry. (Ryan, Dep. 169-70). Pat Ryan's speculation about an industry in which he never worked and about which has no personal knowledge is not credible and reliable evidence. Therefore, the proposed finding should be ignored.

Third, the proposed finding conveniently ignores Pat Ryan's actual testimony. Instead, the proposed finding seeks to insert Complaint Counsel's interpretation of the cited language for Ryan's actual testimony regarding what he meant. When directly asked by Complaint Counsel what he meant by the cited language, Ryan testified that "I think that was just a hypothetical." (Ryan, Dep. 182). Therefore, the court should reject the proposed finding and Complaint Counsel's interpretation of the cited exhibit.

Lastly, the cited exhibit and testimony contains only the statements and impressions of Pat Ryan, not Benco as a whole.

260. In an August 27, 2013 email, Benco's Ryan warned his team about the impact of buying groups on the medical industry, explaining that "GPOs are why medical works at the margins they do. . . . No thanks." (CX1156 at 001; Ryan, Tr. 1080-1081).

Schein's Response:

Mr. Ryan's statement regarding GPOs in the medical supply business and speculation as to what might happen if medical-style GPOs enter the dental supply market, is irrelevant. There was no expert testimony establishing any relevance of the medical distribution market to the dental distribution market. Rather, the evidence at trial

established that medical GPOs functioned very differently than dental buying groups. (Rogan, Tr. 3429, 3431-33). There are no allegations in the case regarding entrance into the dental market of medical-style GPOs that negotiate directly with manufacturers, take ownership of and warehouse products, and distribute the products to the end user.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, Pat Ryan has never worked in the medical supply industry and does not have any personal knowledge about the medical supply industry. (Ryan, Dep. 169-70). Pat Ryan's speculation about an industry in which he never worked and about which has no personal knowledge is not credible and reliable evidence. Therefore, the proposed finding should be ignored and accorded no weight by the court here.

Second, the cited exhibit has never been shown to Pat Ryan during trial, during his deposition, or during his investigational hearing. Complaint Counsel has never asked Pat Ryan any questions, and Pat Ryan has never given any testimony under oath, about the cited exhibit in any context. Moreover, in looking at the trial testimony cited by the proposed finding, that cited testimony does not in any way address or say anything about the cited exhibit.

Third, Complaint Counsel has cited no evidence and never even took any discovery regarding the "medical industry." (See JX0002). The only evidence in the entire case analyzing the relationship between the medical and dental industries and the structural differences as they relate to buying groups or GPOs, was developed by Benco. (RX1090-

021 to RX1090-037 (Eugene Schneller, *Purchasing Organizations in the Medical and Dental Industries – the Role of Group Purchasing and Consolidation*)). Specifically, that evidence shows that market characteristics that have enabled GPOs to flourish in the medical industry are **not** prevalent in the dental industry. (RX1090-021 to RX1090-037) (emphasis added). Therefore, opinion or speculation regarding the “medical industry” cannot serve as the basis for any proposed findings.

Lastly, the cited exhibit and testimony contains only the statements and impressions of Pat Ryan, not Benco as a whole.

261. In a November 4, 2015 email, Benco’s Ryan wrote “Once a national dealer opens this door [to buying groups], in less than 5 years, we will turn into medical and be working for 10% over cost.” (CX0016 at 002). Ryan testified at trial that Schein, Patterson, and Benco were all national dealers; and Darby was not one of the national dealers Ryan was referencing in CX0016. (Ryan, Tr. 1088-1089). When Ryan wrote, “opens this door” in CX0016, he was referring to participation with buying groups. (Ryan, Tr. 1089-1090).

Schein’s Response:

This *post*-alleged-conspiracy email is not reliable evidence of either the effect of buying groups on margins or Benco’s state of mind in adopting and implementing its 1996 no-buying-group policy.

The email simply reflects Mr. Ryan’s speculation concerning the impact of GPOs. While Mr. Ryan drew an analogy to medical markets, Complaint Counsel did not establish that Mr. Ryan is an expert or has personal knowledge of margins or the cause and effect of buying groups on margins in medical markets.

While Mr. Ryan speculates about what would happen “[o]nce a national dealer opens the door,” such speculation is not reliable evidence of what would *actually* happen. (CX 0016-002).

Likewise, while this sentence mentions “national dealers,” and does not explicitly mention Darby or other distributors, there is no evidence that the impact on margins from a national distributor doing business with a buying group would be any different than a non-full-service, or regional full-service, distributor. In that regard, Complaint Counsel’s expert, Dr. Marshall, conceded that the alleged conspiracy was economically irrational and ineffective in *any* region in which there was another distributor that could have contracted with the buying group. (Marshall, Tr. 3132-33; *see also* CX 7100-156, -165, -173, -184 (showing that an alleged conspiracy would be unprofitable for all Respondents (collectively and individually) in each profitability analyses he conducted)).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit. Moreover, the proposed finding is compound and actually contains multiple proposed findings.

First, Pat Ryan has never worked in the medical supply industry and does not have any personal knowledge about the medical supply industry. (Ryan, Dep. 169-70). Pat Ryan’s speculation about an industry in which he never worked and about which has no personal knowledge is not credible and reliable evidence. Therefore, the proposed finding should be ignored and accorded no weight by the court here.

Second, the proposed finding is misleading because – in addition to Schein, Patterson, and Benco – Pat Ryan also testified that Darby was a national distributor. (Ryan, Tr. 1088). Specifically, when Complaint Counsel asked Pat Ryan at trial whether “Darby

is a national distributor,” Pat Ryan responded, “Yes.” (Ryan, Tr. 1088). Therefore, the second sentence of the proposed finding is not consistent with Pat Ryan’s trial testimony.

Lastly, the cited exhibit and testimony contains only the statements and impressions of Pat Ryan, not Benco as a whole.

262. In a February 1, 2011 email, Schein’s Joe Cavaretta wrote in response to an email about a group looking to form a buying group that “dealing with GPOs is incredibly risky” because “as soon as we start doing this, we will turn into medical. Margins will go down. . . . This is a bad deal all the way around.” (CX0165 at 001; Cavaretta, Tr. 5643-5646; CX0305 (Cavaretta, IHT at 131-132)). At trial, Cavaretta testified that he used the word GPO in this email to refer to buying group. (Cavaretta, Tr. 5644-5645; CX0165 at 001). Cavaretta testified that it was his understanding that the medical supply industry operated at lower margins as compared to dental. (Cavaretta, Tr. 5645).

Schein’s Response:

CX 0165 is not about the medical market or medical GPOs, but rather is an email chain about a specific group – the Business Intelligence Group, a marketing and consulting group that expressed interest in forming a buying group for dentists in order to “make money on patients and the dentist.”⁴ (CX 0165; RX 2311-002).

Before the start of the alleged conspiracy period, Mr. Cavaretta responded with the email that Complaint Counsel quotes, but Complaint Counsel leaves out key pieces. Mr. Cavaretta’s full response was, “[d]ealing with GPOs is incredibly risky on many fronts. We can discuss live but as soon as we start doing this we will turn into medical, margins will go down and commissions of course will follow. This is a bad deal all the way around. This is the very abbreviated version....” (CX 0165-001 (emphasis added)). Mr. Cavaretta

⁴ It is not clear that Business Intelligence Group sought to form a “buying group,” as defined by the FTC. It appears that they wanted “run a whitening campaign ... through Groupon or another Social Media Platform” and similar promotions. (CX 0165-002). This hardly qualifies as a buying group seeking to negotiate prices for full-service distribution.

was not equating medical GPOs with dental buying groups, but was describing the conflicts that dental buying groups can cause, particularly with Schein's FSCs. (See SF 97-103; Sullivan, Tr. 3915-16). As Mr. Cavaretta further explained at trial, the "many fronts" of risks he was referring to included the lack of compliance or a value proposition, as well as the risk of cannibalization. (Cavaretta, Tr. 5644-45).

To the extent that Mr. Cavaretta was speculating about medical markets, Complaint Counsel did not establish that Mr. Cavaretta was an expert in, or had personal knowledge of, medical market margins or the effect, if any, of buying groups on such margins.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Schein e-mail and to testimony of a Schein witness discussing Schein's business.

263. In an August 25, 2011 email, Schein's Cavaretta wrote in response to an email about a group trying to form a buying group to get discounts that "[o]nce the buying groups [enter] our market the dental model as we know it will change." (CX0166 at 002-003; Cavaretta, Tr. 5646-48). Cavaretta testified that what he was referring to "the model could potentially change to medical, who had that type of strategy, because margins could go down . . ." (Cavaretta, Tr. 5646-48).

Schein's Response:

CX 0166 is a *pre-alleged-conspiracy* internal Schein email expressing reservations and skepticism of buying groups.⁵ As Mr. Cavaretta testified, he had knowledge of the

⁵ Complaint Counsel has not clearly identified a start-date for the alleged conspiracy. Complaint Counsel points to calls or texts in 2011 (which are either facially innocuous, irrelevant, or devoid of content), and claims that "[b]y July 2011, Sullivan's position had changed." (CC Br. 27). But the July 2011 email Complaint Counsel cites shows no such thing. In that email, Mr. Sullivan merely notes that he does not think "a full service dealer would get involved with GPOs." (CC Br. 27 (citing CX 0185)). Complaint Counsel has not established that this view was informed by

potential buying group, and the FSC who wrote the email to Mr. Caverretta did not report to him. (Cavaretta, Tr. 5647-48; CX 0166).

While Mr. Cavaretta stated that the “the dental model as we know it will change” *if* buying groups grow, such testimony was simply his speculation. (CX 0166-002). Likewise, his testimony about the dental model changing to medical markets was not his contemporaneous statement or his personal opinion. Rather, he was simply anticipating Complaint Counsel’s question, saying “I know where you’re going,” and agreed that the model “*could* potentially change to medical....” (Cavaretta, Tr. 5648 (emphasis added)). Again, this is simply his speculation.

In that regard, Mr. Cavaretta made clear that the full-service dental distribution model was not set up to handle the reduced margins, reduced FSC commissions, and increased (middleman) costs that might occur if buying groups were able to negotiate substantially larger discounts. As he testified, “this whole e-mail is going back to the business strategy of doing business with buying groups ... you always got to look at the alignment and the compliance and the value proposition, so if that’s not there, then the model could potentially change to medical, who had that type of strategy, because margins could go down and you have the middleman” (Cavaretta, Tr. 5648).

Patterson’s Response:

No specific response.

communications with Benco, rather than, for example, Mr. Sullivan’s own experiences in 2010 with Pugh Dental, Smile Source, and others where conflicts between buying groups and FSCs were raised at the highest levels of the company. (See SF 195-209). Moreover, CX 0185 relates to Synergy Dental, which Schein – including Mr. Sullivan specifically – turned down over a year-and-a-half earlier, in March 2010. (SF 212-16; CX 2451). Thus, the July 2011 email does not reflect a change in Mr. Sullivan’s position.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Schein e-mail and to testimony of a Schein witness discussing Schein's business.

264. In a February 11, 2014 email, Patterson's McFadden wrote that the former President of Patterson, Inc.'s medical supplies division [Mike Orsclen] referred to medical GPOs as a "necessary evil" because "rather than selling directly to the end user, [Patterson] had to go through this GPO to get to the end user." (CX3419 at 001; McFadden, Tr. 2706-2707; CX0315 (McFadden, IHT at 28-32, 45)). Patterson's McFadden took the necessary evil statement to refer to the fact that GPOs offered low margins to medical supply distributors. (CX0315 (McFadden, IHT at 45)).

Schein's Response:

No response, other than to note that Mr. McFadden's statement regarding GPOs in the medical supply business is irrelevant. There was no expert testimony establishing any relevance of the medical distribution market to the dental distribution market. Rather, the evidence at trial established that medical GPOs functioned very differently than dental buying groups. (Rogan, Tr. 3429, 3431-33). There are no allegations in the case regarding entrance into the dental market of medical-style GPOs that negotiate directly with manufacturers, take ownership of and warehouse products, and distribute the products to the end user.

Patterson's Response:

Neal McFadden explained that medical GPOs were a necessary evil both because they stood between Patterson and the end user *and* because they required payment of a fee. (CX0315 (McFadden, IHT at 45-46 ("Q. And why would GPOs being a low margin make them a necessary evil? THE WITNESS: He said rather than selling directly to the end user, you had to go through this GPO to get to the end user, and that GPO required lower margin sales, **plus fees**, from what I can remember.")) (emphasis added)).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Patterson e-mail and to testimony of a Patterson witness discussing Patterson's business.

265. Patterson Medical had to pay a percentage of sales to the GPOs with which it worked. (McFadden, Tr. 2726-2727).

Schein's Response:

No response.

Patterson's Response:

No specific response. See Response to CCFF 264.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only testimony of a Patterson witness discussing Patterson's business.

266. In a November 2015 email to a Benco territory representative, Ryan stated his concern about the effect that dealing with buying groups would have on margins: "Once a national dealer opens this door, in less than five years, we will turn into medical and be working for 10 percent over cost." (CX0016 at 002).

Schein's Response:

This asserted fact is essentially the same as CCFF 261. Schein incorporates its response to that finding here. Put simply, Complaint Counsel did not establish that Mr. Ryan, at the time of the cited email or at the time of trial, had the requisite foundation regarding margins in the medical market, or what would happen and how quickly "once a national dealer opens this door." There is no evidence that Mr. Ryan undertook any studies or analyses of the question. To the extent Complaint Counsel is citing CX 0016 for Mr. Ryan's state of mind, it is simply a rationalization of Benco's "absolute policy on buying

clubs.” (CX 0016). As Mr. Ryan explained at trial, “we just don’t believe that there should be any kind of person or entity between us and the end user, the doctor.” (Ryan, Tr. 1216).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, Pat Ryan has never worked in the medical supply industry and does not have any personal knowledge about the medical supply industry. (Ryan, Dep. 169-70). Pat Ryan’s speculation about an industry in which he never worked and about which has no personal knowledge is not credible and reliable evidence. Therefore, the proposed finding should be ignored and accorded no weight by the court here.

Second, to the extent that Complaint Counsel in the first portion of the proposed finding offers only Complaint Counsel’s own interpretation of the cited language in the second half of the proposed finding, Complaint Counsel’s interpretation or opinion should be rejected and accorded no weight as evidence. Nowhere in the cited exhibit does Pat Ryan indicate that he is stating “his concern about the effect that dealing with buying groups would have on margins.” (CX0016). Pat Ryan is simply responding to a question from a Benco employee to “clarify Benco’s stance on Buying group.” (CX0016-002).

Lastly, the cited exhibit and testimony contains only the statements and impressions of Pat Ryan, not Benco as a whole.

267. When Ryan used the term “national dealer” in CX0016 at 002, he was referring specifically to Schein, Patterson and Benco. (Ryan, Tr. 1087-1089).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

The proposed finding is misleading because – in addition to Schein, Patterson, and Benco – Pat Ryan also testified that Darby was a national distributor. (Ryan, Tr. 1088). Specifically, when Complaint Counsel asked Pat Ryan at trial whether “Darby is a national distributor,” Pat Ryan responded, “Yes.” (Ryan, Tr. 1088). Therefore, the proposed finding is not consistent with Pat Ryan's trial testimony.

Lastly, the cited exhibit and testimony contains only the statements and impressions of Pat Ryan, not Benco as a whole.

268. When Ryan wrote “opens the door” in CX0016 at 002, he was referring to participating in a buying group. (Ryan, Tr. 1089-1090).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, Pat Ryan has never worked in the medical supply industry and does not have any personal knowledge about the medical supply industry. (Ryan, Dep. 169-70). Pat Ryan's speculation about an industry in which he never worked and about which has no personal knowledge is not credible and reliable evidence. Therefore, the proposed finding should be ignored and accorded no weight by the court here.

Second, the proposed finding is misleading because – in addition to Schein, Patterson, and Benco – Pat Ryan also testified that Darby was a national distributor. (Ryan, Tr. 1088). Specifically, when Complaint Counsel asked Pat Ryan at trial whether “Darby is a national distributor,” Pat Ryan responded, “Yes.” (Ryan, Tr. 1088). Therefore, the proposed finding is not consistent with Pat Ryan's trial testimony.

Lastly, the cited exhibit and testimony contains only the statements and impressions of Pat Ryan, not Benco as a whole.

VI. BENCO MAINTAINED AN “OPEN RELATIONSHIP” WITH PATTERSON AND SCHEIN FOR THE BIG THREE’S “MUTUAL BEST INTEREST.”

A. Open Relationship Among The Big Three Presidents.

269. Guggenheim and Cohen have known each other for at least 40 years. (Guggenheim, Tr. 1545 (Guggenheim has known Cohen 40-50 years); Cohen, Tr. 482 (Cohen has known Guggenheim “my whole life, 40 years.”)). Guggenheim and Cohen grew up together in the dental industry. (Guggenheim, Tr. 1545).

Schein's Response:

The length of time Mr. Guggenheim and Mr. Cohen have known each other is irrelevant to the issues in the case.

At most, evidence relating to the length of time, or history, of the relationship between Mr. Cohen and Mr. Guggenheim constitutes inadmissible character evidence. *See* Fed. R. Evid. 404 (“Evidence of a person's character or character trait is not admissible to

prove that on a particular occasion the person acted in accordance with the character or character trait”). As such, the asserted fact cannot be used to support an inference of a propensity to conspire.

Patterson’s Response:

Patterson joins the responses of Benco and Schein.

Benco’s Response:

Complaint Counsel’s proposed finding is misleading and mischaracterizes the cited testimony.

The first two sentences of the proposed finding are consistent with trial testimony from Paul Guggenheim and Chuck Cohen. The two men have known each other professionally for approximately 40 years. Chuck Cohen’s family has owned Benco since it was founded in 1924. (BFF ¶¶ 40-47). Paul Guggenheim worked for his family’s dental company, Guggenheim Dental, since the 1970s. (Guggenheim, IHT at 9-10). Prior to Patterson’s acquisition of Guggenheim Dental in approximately 2000, Benco and Guggenheim Dental were never competitors, as Benco operated only on the East Coast and Guggenheim Dental operated only on the West Coast. (Cohen, Tr. 494-95).

The third sentence of the proposed finding should be ignored because it is not based on any actual facts. It is a colloquial expression that does not aid the court in finding facts or in formulating the court’s opinion in this case. As a factual matter, it is inaccurate to suggest that Cohen and Guggenheim “grew up together” in any sense.

270. Sullivan and Cohen have known each other for several decades. (Cohen, Tr. 481-482 (Cohen has known Sullivan for 35 years); Sullivan, Tr. 3877 (Sullivan has known Cohen for more than 20 years)).

Schein's Response:

The length of time Mr. Sullivan and Mr. Cohen have known each other is irrelevant to the issues in the case.

At most, evidence relating to the length of time, or history, of the relationship between Mr. Cohen and Mr. Sullivan constitutes inadmissible character evidence. See Fed. R. Evid. 404 (“Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or character trait”). As such, the asserted fact cannot be used to support an inference of a propensity to conspire.

Patterson's Response:

No specific response.

Benco's Response:

Chuck Cohen and Tim Sullivan have known each other professionally for at least 20 years. (Cohen, Tr. 481-82; Sullivan, Tr. 3877).

271. Cohen has maintained a business relationship with Sullivan. (Cohen, Tr. 482-483; CX0301 (Cohen, IHT at 312, 320)).

Schein's Response:

The asserted fact mischaracterizes the testimony. Mr. Cohen simply testified that the relationship was a business or professional, not a personal, one. Complaint Counsel seeks to twist this testimony to suggest that there was some form of “business relationship” that went beyond this. But there is no evidence that Mr. Cohen and Mr. Sullivan were ever in business together, and thus did not have a business relationship in that sense. In response to the question, “Would you say you know Mr. Sullivan well?” Mr. Cohen testified, “No,

I wouldn't say well, but well in a business relationship sort of way, sure." (CX 0301 (Cohen, IHT at 312)). Complaint Counsel did not ask Mr. Cohen what he meant by "business relationship sort of way."

Moreover, evidence of a "business relationship" is not admissible to show a propensity to conspire. At most, such evidence constitutes inadmissible character evidence that does not rise to the level of a routine pattern or practice. *See* Fed. R. Evid. 404 ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or character trait"); 406 (evidence is only admissible if it rises to the level of "a person's habit" or an "organization's routine practice").

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading and mischaracterizes the cited testimony.

Chuck Cohen and Tim Sullivan have known each other professionally due to the positions at their respective companies. During the relevant time period, Chuck Cohen was the Managing Director of Benco and Tim Sullivan was the President of Henry Schein Dental. (Cohen, Tr. 401; 481-82). Cohen and Sullivan would see one other at industry events or communicate with each other from time to time. (Cohen, Tr. 483).

272. Cohen has maintained a relationship with Guggenheim. (Cohen, Tr. 482-483; [REDACTED]).

Schein's Response:

The asserted fact is vague as to the nature, if any, of the “relationship” between the two individuals. Moreover, evidence of a “relationship” is not admissible to show a propensity to conspire. At most, such evidence constitutes inadmissible character evidence that does not rise to the level of a routine pattern or practice. *See* Fed. R. Evid. 404 (“Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or character trait”); 406 (evidence is only admissible if it rises to the level of “a person’s habit” or an “organization’s routine practice.”).

Patterson's Response:

Patterson joins the responses of Benco and Schein.

Benco's Response:

Complaint Counsel’s proposed finding is misleading and mischaracterizes the cited testimony.

Chuck Cohen and Paul Guggenheim have known each other professionally due to the positions at their respective companies. During the relevant time period, Chuck Cohen was the Managing Director of Benco and Paul Guggenheim was the President of Patterson Dental. (Cohen, Tr. 401; 483-84). Cohen and Guggenheim would see one other at industry events or communicate with each other from time to time. (Cohen, Tr. 483).

273. Cohen communicated with Guggenheim through various means including phone calls, text messages, emails, and in-person meetings over the past ten years. (Cohen Tr. 482-483; [REDACTED]).

Schein's Response:

No response.

Patterson's Response:

Patterson joins Benco's response and adds that Cohen and Guggenheim are life-long friends who regularly communicated about irrelevant topic matter. PF ¶ 265.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Chuck Cohen and Paul Guggenheim have known each other professionally due to the positions at their respective companies. During the relevant time period, Chuck Cohen was the Managing Director of Benco and Paul Guggenheim was the President of Patterson Dental. (Cohen, Tr. 401; 483-84). Cohen and Guggenheim would see one other at industry events or communicate with each other from time to time. (Cohen, Tr. 483). Cohen and Guggenheim's communications involved topics such as each other's family, health, successes, and interests. (CX6027; Cohen, Tr. 778-79; Guggenheim, IHT at 326). Cohen and Guggenheim have also communicated regarding Patterson's potential acquisition of Benco. (Cohen, IHT at 320).

The only communications that Chuck Cohen ever had with Paul Guggenheim about buying groups is limited to two brief e-mail exchanges that never came close to forming any type of agreement. (Cohen, Tr. 705; Guggenheim, Tr. 1867-68).

274. Cohen has communicated with Sullivan through phone calls, text messages, emails, and in-person meetings over the past ten years. (Cohen, Tr. 483-484).

Schein's Response:

The means of communication over time is irrelevant to the issues in the case. Schein has addressed each communication that Complaint Counsel claims is relevant to its

case against Schein, and demonstrated that none support an inference of a conspiracy. (*See* SF 1396-1578). Moreover, text messages and emails contain the full content of the communication, and thus do not qualify as “opportunity evidence.” To the extent that the phone calls do not reflect their content, nothing can be inferred. Where there are surrounding texts and emails, they demonstrate that such communications were legitimate, innocuous, and/or irrelevant. Such evidence is also inadmissible to prove that there were communications about buying groups. *See* Fed. R. Evid. 404 (“evidence of ... [an] other act is not admissible to ... show that on a particular occasion the person acted in accordance with the character.”).

Patterson’s Response:

The cited testimony does not support this finding.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Chuck Cohen and Tim Sullivan have known each other professionally due to the positions at their respective companies. During the relevant time period, Chuck Cohen was the Managing Director of Benco and Tim Sullivan was the President of Henry Schein Dental. (Cohen, Tr. 401; 481-82). Cohen and Sullivan would see one other at industry events or communicate with each other from time to time. (Cohen, Tr. 483).

There were pro-competitive, business reasons for Cohen to communicate with Sullivan during the relevant time period. (Cohen, Tr. 735-779). The vast majority of communications between Cohen and Sullivan, between 2011 and 2016, were about the Competitive Hiring Agreement. (Sullivan, Tr. 4268). Cohen and Sullivan also communicated regarding Schein’s potential acquisition of Benco. (Sullivan, Tr. 4081).

Other communications between Cohen and Sullivan had nothing to do with business. (BFF ¶¶ 635-637). Cohen and Sullivan's communication involved topics such as charitable organizations (Cohen, Tr. 773-74; Sullivan, Tr. 4280), banter about sports (CX6027-007; CX6027-038; CX6027-043), and jokes (CX6027-027; CX6027-051).

The only communication that Chuck Cohen ever had with Tim Sullivan about buying groups is limited to one exchange regarding Atlantic Dental Care, which was not actually a buying group that never came close to forming any type of agreement. (Cohen, Tr. 705-706, 715).

275. Over the past ten years, Sullivan has communicated with Cohen through various means, including phone calls, text messages, emails and in-person meetings. (Sullivan, Tr. 3877-3878).

Schein's Response:

The means of communication over time is irrelevant to the issues in the case. Schein has addressed each communication Complaint Counsel has identified as relevant to its case, and demonstrated that none support an inference of a conspiracy. (*See* SF 1396-1578). Moreover, text messages and emails contain the full content of the communication, and thus, do not qualify as "opportunity evidence." To the extent that the phone calls do not reflect their content, nothing can be inferred. Where there are surrounding texts and emails, they demonstrate that such communications were legitimate, innocuous, and/or irrelevant. Such evidence is also inadmissible to prove that there were communications about buying groups. *See* Fed. R. Evid. 404 ("evidence of ... [an] other act is not admissible to ... show that on a particular occasion the person acted in accordance with the character.").

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Chuck Cohen and Tim Sullivan have known each other professionally due to the positions at their respective companies. During the relevant time period, Chuck Cohen was the Managing Director of Benco and Tim Sullivan was the President of Henry Schein Dental. (Cohen, Tr. 401; 481-82). Cohen and Sullivan would see one other at industry events or communicate with each other from time to time. (Cohen, Tr. 483).

There were pro-competitive, business reasons for Cohen to communicate with Sullivan during the relevant time period. (Cohen, Tr. 735-779). The vast majority of communications between Cohen and Sullivan, between 2011 and 2016, were about the Competitive Hiring Agreement. (Sullivan, Tr. 4268). Cohen and Sullivan also communicated regarding Schein's potential acquisition of Benco. (Sullivan, Tr. 4081).

Other communications between Cohen and Sullivan had nothing to do with business. (BFF ¶¶ 635-637). Cohen and Sullivan's communication involved topics such as charitable organizations (Cohen, Tr. 773-74; Sullivan, Tr. 4280), banter about sports (CX6027-007; CX6027-038; CX6027-043), and jokes (CX6027-027; CX6027-051).

The only communication that Chuck Cohen ever had with Tim Sullivan about buying groups is limited to one exchange regarding Atlantic Dental Care, which was not actually a buying group that never came close to forming any type of agreement. (Cohen, Tr. 705-706, 715).

276. Guggenheim has known Sullivan for 10 to 12 years. (Guggenheim, Tr. 1545).

Schein's Response:

The length of time Mr. Guggenheim has known Mr. Sullivan is irrelevant to the issues in the case. Complaint Counsel has not identified any communications between the two companies relating to buying groups. At most, evidence relating to the length of time, or history, of the relationship between Mr. Guggenheim and Mr. Sullivan constitutes inadmissible character evidence. *See* Fed. R. Evid. 404 (“Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or character trait”). As such, the asserted fact cannot be used to support an inference of a propensity to conspire.

Patterson's Response:

Patterson joins Schein’s response.

Benco's Response:

The proposed finding does not pertain to Benco.

277. Chuck Cohen, had an “open relationship” of trust with the executives at Schein and Patterson in which he felt he could “approach them with issues or to learn.” (Cohen, Tr. 492-493; CX1045 at 001 (October 2011 email from Chuck Cohen to his brother, Rick Cohen: “We currently have an open relationship with Schein and Patterson, one that’s worth maintaining.”); *see also* CX0301 (Cohen, IHT at 277-278) (“I work very hard to have a good relationship with Tim Sullivan and the guys at Schein, as well as the people from Guggenheim [Patterson]. I know [*sic*] them for a long time. I have a lot of respect for them. And I believe that honesty and forthrightness is important to a good business relationship like that. I give information, I get information, and I think credibility is important.”)).

Schein's Response:

Evidence of an “open relationship” is not admissible to show a propensity to conspire. At most, such evidence constitutes inadmissible character evidence. *See* Fed. R. Evid. 404 (“Evidence of a person’s character or character trait is not admissible to prove

that on a particular occasion the person acted in accordance with the character or character trait”).

Moreover, the asserted fact is not supported by the weight of the evidence. When asked, “[D]o you believe Benco has an open relationship with Schein and Patterson[,]” Mr. Cohen answered, “No.” (Cohen, Tr. 492). Complaint Counsel attempted to impeach this testimony with an email Mr. Cohen wrote in October 2011 to his brother. The email specifically mentions issues regarding a manufacturer (Dentsply), and the realization through competitive intelligence from Patterson that Dentsply was “giving each ... a different story.” (CX 1045-001). The email makes no mention of buying groups and so does not speak to any relationship between Respondents regarding an issue pertinent to this case.

Patterson’s Response:

Patterson joins the responses of Schein and Benco. Moreover, the cited testimony and documents do not mention an open relationship “of trust,” as Complaint Counsel alleges, and Cohen testified at trial that he does not believe Benco “has an open relationship with Schein and Patterson.” (Cohen, Tr. 492) (“Q. Mr. Cohen, do you believe Benco has an open relationship with Schein and Patterson? A. No.”). Finally, there is no evidence that *Patterson* felt it had an open relationship with Cohen.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the cited exhibit is an e-mail between Chuck Cohen and Rick Cohen regarding a visit that Paul Guggenheim requested and made to Benco’s headquarters. (CX1045).

The purpose of Guggenheim's visit to Benco was to inquire whether Benco was interested in selling its business to Patterson. (Cohen, Tr. 835-36).

Second, during Chuck Cohen's tenure as managing director of Benco, both Schein and Patterson made multiple attempts to acquire Benco. (Cohen, Tr. 834-36). As a privately-held, family business, Benco and Chuck Cohen "regularly" think about potential exit strategies. (Cohen, Tr. 835 ("As a private business owner, thinking about an exit strategy is always important.")). A sale of Benco to Schein or Patterson is a potential exit strategy that Chuck Cohen has evaluated. (Cohen, Tr. 835).

Third, Benco has a business justification for keeping open the dialogue with Schein and Patterson regarding an acquisition. (Cohen, Tr. 835). Accordingly, the context for Cohen's comment in the cited exhibit regarding an "open relationship" is the ongoing acquisition communications with Schein and Patterson. (Cohen, Tr. 836).

Fourth, Chuck Cohen has testified at length about the importance of, and reasons for, maintaining credibility in his relationship with Tim Sullivan. (Cohen, Tr. 550, 722-23, 738, 988; Cohen, IHT at 278-79). When asked at trial to explain the justification and the importance of maintaining credibility with Tim Sullivan, Cohen testified that it was due to the Competitive Hiring Agreement. (Cohen, Tr. 738 ("if Tim did not view me as honest and as able to deliver on my word, I don't believe he would have kept the agreement for the long term and I believe he would have canceled it.))). As Cohen explained at trial, the Competitive Hiring Agreement was integral and essential to Becon's rapid national expansion. (Cohen, Tr. 643-44). Maintaining the Competitive Hiring Agreement over the long-term was critical to Benco's growth and success from 1998 through 2016. (Cohen, Tr. 735).

278. Cohen always wanted to be viewed as honest and open with Tim Sullivan and Paul Guggenheim. (Cohen, Tr. 553 (“Q. And you always want to be viewed as honest and open with Tim Sullivan and Paul Guggenheim; right? A. I want to maintain a credible, good relationship with both, with my counterparts, yes. Q. And you would hate for Tim Sullivan to find out that you had lied to him or had been not fully forthcoming with respect to the ADC situation? A. My reputation is important, and I wouldn’t like anyone to think I was lying to them. Q. But specifically I’m talking about Tim Sullivan of Henry Schein.”)).

Schein’s Response:

Mr. Cohen’s concern about his reputation is irrelevant to the issues in the case. Moreover, the leading questions by Complaint Counsel are devoid of substance. No person wants to be viewed by anyone as dishonest. It does not suggest some nefarious relationship between Benco and Schein.

Moreover, evidence concerning Mr. Cohen’s concerns about his perceived reputation constitutes inadmissible character evidence. *See* Fed. R. Evid. 404 (“Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or character trait”). As such, the asserted fact is not admissible to show a propensity to conspire, and does not support an inference of a conspiracy.

Patterson’s Response:

Patterson joins the responses of Schein and Benco.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, during Chuck Cohen’s tenure as managing director of Benco, both Schein and Patterson made multiple attempts to acquire Benco. (Cohen, Tr. 834-36). As a privately-held, family business, Benco and Chuck Cohen “regularly” think about potential

exit strategies. (Cohen, Tr. 835 (“As a private business owner, thinking about an exit strategy is always important.”)). A sale of Benco to Schein or Patterson is a potential exit strategy that Chuck Cohen has evaluated. (Cohen, Tr. 835).

Second, Benco has a business justification for keeping open the dialogue with Schein and Patterson regarding an acquisition. (Cohen, Tr. 835). Accordingly, the context for Cohen’s comment in the cited exhibit regarding an “open relationship” is the ongoing acquisition communications with Schein and Patterson. (Cohen, Tr. 836).

Third, Chuck Cohen has testified at length about the importance of, and reasons for, maintaining credibility in his relationship with Tim Sullivan. (Cohen, Tr. 550, 722-23, 738, 988; Cohen, IHT at 278-79). When asked at trial to explain the justification and the importance of maintaining credibility with Tim Sullivan, Cohen testified that it was due to the Competitive Hiring Agreement. (Cohen, Tr. 738 (“if Tim did not view me as honest and as able to deliver on my word, I don’t believe he would have kept the agreement for the long term and I believe he would have canceled it.”)). As Cohen explained at trial, the Competitive Hiring Agreement was integral and essential to Becon’s rapid national expansion. (Cohen, Tr. 643-44). Maintaining the Competitive Hiring Agreement over the long-term was critical to Benco’s growth and success from 1998 through 2016. (Cohen, Tr. 735).

279. Cohen has contacted his counterparts at Patterson and Schein about issues in the dental industry. (Cohen, Tr. 484). Occasionally, Cohen has reached out about the same dental industry issue to Sullivan at Schein and Guggenheim at Patterson—with each competitor in separate communications. (Cohen, Tr. 484-485).

Schein's Response:

Mr. Cohen's communications with Mr. Sullivan and Mr. Guggenheim about "issues in the dental industry" is irrelevant to the issues in this case. The cited testimony discusses "dental manufacturer issues," not buying groups. (Cohen, Tr. 484). There are no allegations that such contacts are unlawful or anticompetitive. Moreover, evidence of Mr. Cohen's actions regarding dental manufacturer or other issues does not establish any habit, pattern, or practice regarding buying groups, and therefore, is inadmissible to show a propensity to conspire to boycott buying groups. *See* Fed. R. Evid. 404, 406.

Patterson's Response:

Patterson joins the responses of Schein and Benco.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

The proposed finding misstates Chuck Cohen's testimony. Cohen testified that on "a few occasions" he contacted Tim Sullivan and Paul Guggenheim about "dental manufacturer issues." (Cohen, Tr. 484). The first and second sentences of the proposed finding contain a misstatement, intentional or otherwise, that seeks to expand Cohen's testimony from "dental manufacturer issues" to – as Complaint Counsel wrongly puts it – "issues in the dental industry." Therefore, the court should reject Complaint Counsel's proposed finding as inconsistent with the evidence.

280. Benco is smaller than Schein and Patterson (Cohen, Tr. 430; *see also* CCF ¶¶ 23, 38), and Cohen believed that Benco's voice alone was not as loud as Schein, Patterson, and Benco's voices together. (Cohen, Tr. 488 ("I have a very small voice in the business. Those guys have big voices...Sometimes our mutual best interest is good for me."); Cohen, Tr. 489 ("Q. And again, that was because Benco's voice alone is not as loud as Benco, Schein and Patterson's voices

together? A. We're a small player in the market, and there's sometimes when there's mutual best interest, so yes.'')).

Schein's Response:

The asserted fact is irrelevant to the issues in the case. The cited testimony discusses a manufacturer issue with Procter & Gamble and others. (Cohen, Tr. 488). There are no allegations that such manufacturer issues raise anticompetitive concerns. Nor do Mr. Cohen's views regarding the effectiveness of "Benco's voice" in addressing manufacturer issues have anything to do with buying groups or concerted action regarding buying groups.⁶ To the contrary, Benco's belief as to the importance of its "voice" alone or in combination with others constitutes character evidence, and is not admissible to show a propensity to conspire to boycott buying groups. *See* Fed. R. Evid. 404, 406.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The cited testimony from Chuck Cohen is discussing a series of communications from Cohen to Guggenheim and Sullivan that related to end-user data that distributors provide to manufacturers. (CX1054; CX1055). On June 12, 2013, Cohen separately sent e-mails to Sullivan and Guggenheim regarding formalizing industry practice of supplying

⁶ Importantly, there is no allegation that joint activity among Respondents, other than as it relates to buying groups, is anticompetitive or unlawful. Joint action among competitors is often procompetitive and desirable. Indeed, entire industries – such as those involving standards – are premised on cooperation among competitors. Most industries also involve substantial joint action among competitors through trade associations, joint ventures, or contractual relationships. As such, documents that reflect a desire for joint action – unrelated to buying groups – are irrelevant to the issues in this case.

end-user data to suppliers such as Dentsply, 3M, Hu Friedy, and Ivoclar. (CX1054; CX1055). Cohen's e-mails reflect his concern that "manufacturers receive data feeds from [distributors] about sales of their products to end users" without restrictions. (CX8023 (Guggenheim, Dep. at 81), CX2337, CX1055).

Sullivan did not reply to Cohen's e-mail or ever discuss the issue with Cohen. (Sullivan, Tr. 4080). Guggenheim told Cohen that Patterson had already formalized their end user data sharing in their vendor agreements. (CX1055, CX3070, CX3071, CX3222).

The communications concerning end-user data sharing with suppliers have nothing to do with buying groups. (Sullivan, Tr. 4262). They are not evidence of the alleged buying group conspiracy; nor can they support an inference of such a conspiracy.

281. Cohen initiated multiple contacts with Tim Sullivan and Paul Guggenheim to seek outcomes in their mutual best interests. (Cohen, Tr. 485, 487-489; Cohen, Tr. 488 ("Sometimes our mutual best interest is good for me."); Cohen, Tr. 489 ("We're a small player in the market, and there's sometimes [I initiate communication] when there's mutual best interest")).

Schein's Response:

The asserted fact mischaracterizes the evidence. The cited testimony relates to specific manufacturer issues with Procter & Gamble and others, not "[general] outcomes in [Respondents'] mutual best interests." (Cohen, Tr. 485, 487-89).

Moreover, the asserted fact is irrelevant. There are no allegations that such manufacturer issues raise anticompetitive concerns, or that such issues had anything to do with buying groups. As such, the cited evidence is inadmissible to show a propensity to conspire to boycott buying groups. *See* Fed. R. Evid. 404, 406.

Patterson's Response:

Complaint Counsel's proposed finding mischaracterizes the evidence and is not supported by the record. Cohen testified that he raised issues with Sullivan or Guggenheim on a "few occasions." (Cohen, Tr. 484). And, in the cited testimony for this finding, Cohen testified about two communications with Cohen and Sullivan: (1) "contact[ing] Tim Sullivan of Schein and Paul Guggenheim of Patterson to urge them to . . . include a poison pill clause" in their manufacturer agreements and (2) "raising a Proctor & Gamble pricing issue" with Sullivan and Guggenheim. (Cohen, Tr. 485-489). There is no evidence that *Patterson* viewed communications received from Cohen as being "in their mutual best interests."

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The proposed finding is **not** supported by the evidence cited. Complaint Counsel brazenly asserts that Cohen initiated "multiple contacts" with Sullivan and Guggenheim. The cited testimony, however, discusses only one, single contact from Cohen to Sullivan and Guggenheim.

All of the cited testimony from Chuck Cohen is discussing the same single contact from Cohen to Guggenheim and Sullivan relating to end-user data that distributors provide to manufacturers. (Cohen, Tr. 485-89 (discussing CX1054 & CX1055)).

As described in the prior proposed finding - on June 12, 2013, Cohen separately sent e-mails to Sullivan and Guggenheim regarding formalizing industry practice of supplying end-user data to suppliers such as Dentsply, 3M, Hu Friedy, and Ivoclar. (CX1054; CX1055). The communications concerning end-user data sharing with suppliers

have nothing to do with buying groups. (Sullivan, Tr. 4262). They are not evidence of the alleged buying group conspiracy; nor can they support an inference of such a conspiracy.

The cited testimony does not relate to “multiple contacts” from Cohen to Guggenheim and Sullivan. It relates to the same single contact. Accordingly, the court should reject Complaint Counsel’s erroneous proposed finding.

282. In an October 2011 email to Rick Cohen, Chuck Cohen’s brother and a co-owner of Benco, Chuck Cohen described the “big potential” of an upcoming visit by Guggenheim was “maintaining our current strong and open relationship” with Patterson because it was one “that [Benco] may need to tap into at some point in the future.” (CX1045 at 001). Cohen illustrated this point by recounting a recent episode in which the executives of Patterson had passed on sensitive information to Benco, noting that as a result, Benco needed those specific, friendly leaders at Patterson to remain in charge. (CX1045 at 001 (“Example: Larry [Cohen] & Paul [Guggenheim] have personally just shared thoughts & strategies regarding Dentsply’s introduction of a mid-priced tooth line, and found out that (surprise!) Dentsply management was giving each of us a different story. A win for Patterson doesn’t mean a loss for us - - we need the current management of Patterson to get some wins so they aren’t overthrown!”)). Cohen also states in this email that he “would be happy to accommodate the request” if Tim Sullivan wanted a tour of Benco’s facilities because “we need to be good neighbors.” (CX1045 at 001).

Schein’s Response:

The *pre-alleged-conspiracy* asserted fact is irrelevant and not supported by the weight of the evidence. The email Complaint Counsel cites arose from an upcoming tour by Mr. Guggenheim of Benco’s facilities, and specifically mentions issues regarding a manufacturer (Dentsply). (CX 1045). There are no allegations in this case regarding manufacturer issues or touring competitors’ facilities. As such, the cited evidence is inadmissible to show a propensity to conspire to boycott buying groups. *See* Fed. R. Evid. 404, 406.

Patterson’s Response:

Patterson joins the responses of Benco and Schein, and notes that the document is dated *two years* before the beginning of Complaint Counsel’s alleged conspiracy period

and has nothing to do with buying groups. Moreover, the purpose of the visit referenced in CX1045 was a potential acquisition of Benco. (Cohen, Tr. 835-36).

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit. Moreover, the proposed finding is compound and actually contains multiple proposed findings.

First, the cited exhibit is an e-mail between Chuck Cohen and Rick Cohen regarding a visit that Paul Guggenheim requested and made to Benco's headquarters. (CX1045). The purpose of Guggenheim's visit to Benco was to inquire whether Benco was interested in selling its business to Patterson. (Cohen, Tr. 835-36).

Second, during Chuck Cohen's tenure as managing director of Benco, both Schein and Patterson made multiple attempts to acquire Benco. (Cohen, Tr. 834-36). As a privately-held, family business, Benco and Chuck Cohen "regularly" think about potential exit strategies. (Cohen, Tr. 835 ("As a private business owner, thinking about an exit strategy is always important.")). A sale of Benco to Schein or Patterson is a potential exit strategy that Chuck Cohen has evaluated. (Cohen, Tr. 835).

Third, Benco has a business justification for keeping open the dialogue with Schein and Patterson regarding an acquisition. (Cohen, Tr. 835). Accordingly, the context for Cohen's comment in the cited exhibit regarding an "open relationship" is the ongoing acquisition communications with Schein and Patterson. (Cohen, Tr. 836).

Fourth, the remainder of the proposed finding contains only Complaint Counsel's interpretation of the cited exhibit. Since Complaint Counsel has never asked Chuck Cohen (not at trial, not during his deposition, and not during his investigational hearing) about any

other line in the cited exhibit – other than the comment regarding an “open relationship” – there is no evidence in the record regarding what Cohen may have meant. The cited exhibit says what it says, but Complaint Counsel has no evidentiary basis or support for its interpretations, theories or wild speculation about Cohen’s intentions. Therefore, the final 10 lines of the 13-line proposed finding should be disregarded and accorded no evidentiary weight by the court.

283. Benco had a lot of the same expenses as Schein and Patterson (CX8015 (Cohen, Dep. at 311)), but did not have the same volume of customers as Schein and Patterson. (CX1071 at 001 (October 2014 email from Chuck Cohen, forwarding an April 2014 document, “At Benco, we have the expenses and overhead, but we don’t have the volume.”); [REDACTED])

[REDACTED] CX1078 at 001 (June 2015 Cohen note: “In light of declining margins due to buying clubs & Amazon, need to consolidate. Get bigger or be gone, we don’t have the scale to survive with the cost structure..”); [REDACTED])

Schein’s Response:

Benco’s overhead-to-volume ratio as compared to Schein’s or Patterson’s is not a relevant fact. Nor did Complaint Counsel establish any foundation for Mr. Cohen to make such comparisons. There is no evidence that Mr. Cohen or Benco undertook, or were capable of undertaking, a reliable analysis of the issue. In fact, Mr. Cohen testified, “I have no idea what Schein or Patterson’s expense level is.” (CX 8015 (Cohen, Dep. at 311)).

Patterson’s Response:

The first assertion overstates Chuck Cohen’s testimony. Cohen testified that although Benco offers a lot of the same services and has a lot of same expenses as Schein and Patterson, he has “no idea what Schein or Patterson’s expense level is” and “[could not] comment specifically on Schein or Patterson’s expenses.” (CX8015 (Cohen, Dep. at

311)). None of the other cited testimony or documents supports the assertion that “Benco has a lot of the same expenses as Schein and Patterson. The second assertion about Benco’s customer volume compared with Schein and Patterson is not supported by the cited testimony or documents, which do not reference Benco’s volume of customers in relation to Schein or Patterson’s volumes of customers.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit. Moreover, the proposed finding is compound and actually contains multiple proposed findings.

First, Complaint Counsel’s proposed finding misstates Chuck Cohen’s testimony. At Cohen’s deposition, Complaint Counsel asked if Benco has the same expenses as Schein and Patterson. Cohen responded – “I have no idea what Schein or Patterson’s expense level is....I don’t know what their expenses look like.” (Cohen, Dep. at 311). Complaint Counsel, not happy with Cohen’s answer, asked the question a second time. Cohen again responded – “I can’t comment specifically on Schein or Patterson’s expenses.” (Cohen, Dep. at 311). The testimony could not have been more clear. Therefore, Complaint Counsel’s proposed finding – containing the exact words that Complaint Counsel tried to put in Cohen’s mouth twice at his deposition, and that he clearly rejected twice – should be rejected by the court.

Second, the second half of the first sentence of the proposed finding similarly misstates Cohen’s testimony. Complaint Counsel cited CX1071 to support the statement comparing Benco’s expenses and volume to Schein and Patterson. The cited exhibit, however, only says “At Benco, we have the expenses and the overhead, but we don’t have the volume.” (CX1071). It says absolutely nothing about Schein and Patterson and it

contains no comparison at all between Benco and Schein or Patterson. (CX1071). When Complaint Counsel tried to put those words in Cohen's mouth during his deposition, Cohen flatly rejected the attempt. (Cohen, Dep. at 328-29). Again, the proposed finding should be rejected by the court.

Third, Complaint Counsel's citation to CX1069 does not support the statement in the proposed finding. (CX1069). The cited exhibit is a 35-page presentation from which Complaint Counsel has cherry-picked one line and quoted it in the proposed finding. (CX1069-021). The quoted language, however, is different than the statement in the proposed finding and does not support it. The citation to Cohen's deposition is simply discussing the same cherry-picked line from CX1069, and similarly does not support the statement in the proposed finding. (Cohen, Dep. at 515 (discussing CX1069-021)).

Finally, Complaint Counsel's citation to CX1078 does not support the statement in the proposed finding. (CX1078). The cited exhibit is a calendar entry regarding potentially reaching out to Burkhart regarding a merger with Benco, from which Complaint Counsel has cherry-picked one line and quoted it in the proposed finding. (CX1078). The quoted language, however, is different than the statement in the proposed finding and does not support it. The citation to Cohen's deposition is simply discussing the same cherry-picked line from CX1078, and similarly does not support the statement in the proposed finding. (Cohen, Dep. at 339-41 (discussing CX1078)).

B. Pattern of Cooperation Among the Big Three to Confront Threats to Distributors Together.

284. Cohen had a practice of contacting Sullivan and Guggenheim to seek cooperation between the firms. (Cohen, Tr. 484-489 ("Sometimes our mutual best interest is good for me"); Guggenheim, Tr. 1546, 1547; ("Q. Is it fair to say that in the past Benco's Chuck Cohen has contacted you about various dental issues that he wanted you to look into? A. Yeah, that's fair to

say.”); Sullivan, Tr. 4080 (“Q. So we’ve looked at three instances, that KaVo Kerr handpiece issue, the P&G issue, and now the poison pill issue, where Mr. Cohen reached out to you about manufacturers. A. Correct.”)).

Schein’s Response:

The asserted fact is not supported by the evidence, and the cited evidence is not relevant to the issues in the case. The cited testimony concerns manufacturer issues and other issues for which there were a legitimate or innocuous reason for the contact. The cited testimony does not establish that Benco has a general “practice” to seek cooperation from Schein or Patterson. As such, the evidence about specific contacts unrelated to buying groups, or about Benco’s general willingness to seek cooperation on such matters, is not admissible to show a propensity to conspire to boycott buying groups. *See* Fed. R. Evid, 404, 406.

Patterson’s Response:

None of the cited testimony refers to Cohen’s communications with Sullivan and Guggenheim as “seek[ing] cooperation between the firms.” Guggenheim testified that Cohen had contacted him “about various dental issues [Cohen] wanted [Guggenheim] to look into.” (Guggenheim, Tr. 1547). Additionally, there is no evidence that *Patterson* viewed communications received from Cohen as “seek[ing] cooperation between the firms.”

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, it is simply inaccurate to state that Cohen had “a practice” of contacting Sullivan and Guggenheim to seek cooperation. This statement is nothing more than Complaint Counsel’s aspirational speculation which is not supported by the actual evidence

in the case. As Complaint Counsel, unfortunately, has been prone to do throughout this case, the proposed finding takes a small bit of testimony, or an exhibit, and project's Complaint Counsel's own biased interpretation, opinion, or speculation onto the evidence in a futile effort to craft an ominous narrative that advances a government case that conspicuously lacks evidence to justify proper inferences by the court. Complaint Counsel's attempts should be rejected.

Second, Complaint Counsel cites Chuck Cohen's trial testimony for the unsupportable statement in the proposed finding. Nowhere within the cited testimony, however, does Chuck Cohen say anything close to his having "a practice" of contacting Sullivan and Guggenheim to seek cooperation. (Cohen, Tr. 484-89).

Third, Complaint Counsel brazenly asserts that Cohen had "a practice" of contacting Sullivan and Guggenheim. The cited testimony, however, discusses only one, single contact from Cohen to Sullivan and Guggenheim. All of the cited testimony from Chuck Cohen is discussing the same single contact from Cohen to Guggenheim and Sullivan relating to end-user data that distributors provide to manufacturers. (Cohen, Tr. 485-89 (discussing CX1054 & CX1055)).

As described in response to multiple proposed findings above - on June 12, 2013, Cohen separately sent e-mails to Sullivan and Guggenheim regarding formalizing industry practice of supplying end-user data to suppliers such as Dentsply, 3M, Hu Friedy, and Ivoclar. (CX1054; CX1055). The communications concerning end-user data sharing with suppliers have nothing to do with buying groups. (Sullivan, Tr. 4262). They are not evidence of the alleged buying group conspiracy; nor can they support an inference of such a conspiracy. The cited testimony does not relate to "a practice" of Cohen contacting

Guggenheim and Sullivan. It relates to the same single contact. Accordingly, the court should reject Complaint Counsel's erroneous proposed finding.

Fourth, the cited testimony from Tim Sullivan does not discuss "a practice" of Cohen in contacting Sullivan and Guggenheim. The cited testimony discusses only three isolated contacts from Cohen to Sullivan and Guggenheim regarding manufacturer issues. (Sullivan, Tr. 4080). The first contact has been discussed in the responses to the proposed findings herein and above. The second and third contacts will be discussed in detail in the responses to the proposed findings below. As to all three, legitimate interfirm communications about manufacturer issues cannot support the alleged conspiracy regarding buying groups, or an inference that Respondents had "a practice" of communicating about buying groups. (BFF ¶¶ 605-37).

285. In 2010, Cohen contacted Sullivan about a manufacturer that was selling a product directly to dentists on its website, even though Schein and Benco were both distributors for this manufacturer. (Sullivan, Tr. 3887-3888; CX2346 at 003). After receiving Cohen's call, Sullivan immediately emailed Schein executives characterizing Cohen as being "furious about this" development in the call between them. (CX2346 at 003; Sullivan, Tr. 3888).

Schein's Response:

The *pre-alleged-conspiracy* asserted fact constitutes evidence of "other acts" and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Communications regarding manufacturer issues (relating to Kavo) are not relevant; there is no allegation that the cited communication was anticompetitive; and the unsolicited call from Mr. Cohen – over a year before the start of the alleged conspiracy – about Kavo does not establish any pattern or practice of discussing buying groups among the two companies. As such, this evidence is inadmissible to show a propensity to conspire years later to boycott buying groups.

Patterson's Response:

None of the cited testimony or documents support the assertion that Sullivan “immediately emailed” Schein executives about his call with Cohen. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

At trial, Complaint Counsel introduced a series of communications between Mr. Cohen and Mr. Sullivan on March 16, 2010 as evidence of an alleged buying group conspiracy. (CX6027-001-002). The March 16, 2010 communications occur more than a year before Complaint Counsel claims the alleged conspiracy began. Moreover, the March 16, 2010 communications had nothing to do with buying groups, but rather an issue with KaVo's new handset program. (Sullivan, Tr. 4076, CX2346, CX2452).

Benco and Schein had distributor agreements with KaVo. (Sullivan, Dep. at 354). KaVo was offering sample handsets, but “[t]he problem was with their keeping them, it wasn't like they would then choose the dealer that they want this to be billed through. They were billing the customers directly, which goes against [the distributor] agreement with them.” (Sullivan, Tr. 4075).

There is no evidence that the March 16, 2010 communications had anything to do with buying groups and predated the alleged conspiracy by more than a year. They thus cannot support Complaint Counsel's claims. (Sullivan, Tr. 4261-62). The fact that Mr. Sullivan and Mr. Cohen communicated about legitimate business issues provides no support to Complaint Counsel's allegation that Schein later agreed to behave in a certain way with regard to buying groups at Benco's behest.

Finally, there is no evidence that Chuck Cohen ever contacted Paul Guggenheim or anyone at Patterson about this issue.

286. Schein's VP of Equipment, Brian Watson contacted the manufacturer about the issue (CCFF ¶ 285) that Cohen brought to Tim Sullivan's attention, and the manufacturer agreed to suspend its practice of selling directly to dentists. (CX2346 at 001-002; Sullivan, Tr. 3888-3889).

Schein's Response:

The asserted *pre-alleged-conspiracy* fact constitutes evidence of "other acts" and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Communications regarding manufacturer issues (relating to Kavo) are not relevant to this case; there is no allegation that the cited communication was anticompetitive; and Mr. Watson's telephone call with Kavo (or the reason that prompted it) does not establish any pattern or practice of discussing buying groups among the two companies. As such, the asserted fact is inadmissible to show a propensity to conspire years later to boycott buying groups.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Schein e-mail.

287. Cohen subsequently texted Sullivan to let him know the "good news" that the issue Cohen had contacted Sullivan about was resolved and the manufacturer would rescind the offending plan to sell directly to dentists. (Sullivan, Tr. 3888-3889; CX2346 at 001).

Schein's Response:

The asserted *pre-alleged-conspiracy* fact constitutes evidence of “other acts” and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Communications regarding manufacturer issues (relating to Kavo) are not relevant to this case; there is no allegation that the cited communication was anticompetitive; and Cohen’s unsolicited text about Kavo does not establish any pattern or practice of discussing buying groups among the two companies. As such, the asserted fact is inadmissible to show a propensity to conspire years later to boycott buying groups.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Schein e-mail.

288. Sullivan and the Schein executives already knew from an internal Schein email that the manufacturer about which Cohen had contacted Sullivan had agreed to cease selling directly to dentists. (CX2346 at 001). Sullivan nonetheless copied or re-typed Cohen’s text message and shared it in its entirety with the Schein executives. (Sullivan, Tr. 3888-3889; CX2346 at 001).

Schein's Response:

The asserted pre-alleged-conspiracy fact constitutes evidence of “other acts” and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Communications regarding manufacturer issues (relating to Kavo) are not relevant to this case; there is no allegation that the cited communication was anticompetitive; and Mr. Sullivan’s forwarding of Mr. Cohen’s text about Kavo to others knowledgeable about the issue does not establish any pattern or practice of discussing buying groups among the two

companies. As such, the asserted fact is inadmissible to show a propensity to conspire years later to boycott buying groups.

Patterson's Response:

Sullivan and Schein executives already knew from an internal Schein email that the manufacturer about which Cohen had contacted Sullivan was “reworking the program to make sure it is DEALER FRIENDLY and that all transactions go through the dealer.” (CX2346 at 001) (caps in original). Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Schein e-mail.

289. On another occasion, in late 2011, Cohen reached out to dental products manufacturer Procter & Gamble because he wanted a change to the packaging and pricing of a Procter & Gamble product. (Cohen, Tr. 488-489). The company declined. (Cohen, Tr. 489 (“Their response is: We’re Procter & Gamble, and we’re not making the change you suggest.”)).

Schein's Response:

The asserted fact constitutes evidence of “other acts” and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. As such, the asserted fact is irrelevant.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

At trial, Complaint Counsel introduced two December 2011 e-mails sent by Mr. Cohen – one to Mr. Sullivan and a second to Mr. Guggenheim – about Procter & Gamble. (Guggenheim, Tr. 1547; Sullivan, Tr. 3890-93; Cohen, Tr. 488; CX2422, CX1049, CX3067). Procter & Gamble is a manufacturer of dental products; not a buying group. (Cohen, Tr. 832-33; Sullivan, Tr., 3891; Guggenheim, Tr. 1692). The Procter & Gamble e-mails had “nothing to do with buying groups.” (Cohen, Tr. 833; Sullivan, 4262; Guggenheim, Tr. 1692).

Legitimate interfirm communications about manufacturer issues cannot support the alleged conspiracy regarding buying groups, or an inference that Respondents communicated about buying groups.

290. After Cohen learned that Procter & Gamble would not agree to his request to change the packaging and pricing of the product, Cohen sent emails to brought the issue to both of Benco’s closest competitors asking Sullivan of Schein and Guggenheim of Patterson to raise the issue of Procter & Gamble’s packaging and pricing of the product with Procter & Gamble. (Cohen, Tr. 489; CX1049 at 001 (December 10, 2011 email from Cohen to Sullivan); CX1050 at 001-002 (December 10, 2011 email from Cohen to Guggenheim); *see also* CX2422 at 001-002 (December 11, 2011 email from Sullivan to Schein’s Vice President, Merchandise Marketing, forwarding Cohen’s December 10, 2011 email)).

Schein’s Response:

The asserted fact constitutes evidence of “other acts” and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Communications regarding manufacturer issues (relating to P&G) are not relevant to this case; there is no allegation that the cited communication (which appears to be designed to *reduce* price or cost) was anticompetitive; and Mr. Cohen’s unsolicited emails do not establish any pattern or practice of discussing buying groups among the Respondents. As such, the asserted fact is inadmissible to show a propensity to conspire to boycott buying groups.

Patterson's Response:

Complaint Counsel's proposed finding is irrelevant to this case, and mischaracterizes the testimony. In Cohen's December 10, 2011 email to Guggenheim - over a year *before* Complaint Counsel alleges Patterson joined a conspiracy - Cohen wrote: "I'm not telling you whether or not Patterson should sell the product, that's your call. But I am giving you the heads up in the hopes that you'll make someone on your Marketing team aware of the issue, and then maybe bring it to the attention of P&G management." (CX1050 at 002). Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

At trial, Complaint Counsel introduced two December 2011 e-mails sent by Mr. Cohen – one to Mr. Sullivan and a second to Mr. Guggenheim – about Procter & Gamble. (Guggenheim, Tr. 1547; Sullivan, Tr. 3890-93; Cohen, Tr. 488; CX2422, CX1049, CX3067). Procter & Gamble is a manufacturer of dental products; not a buying group. (Cohen, Tr. 832-33; Sullivan, Tr., 3891; Guggenheim, Tr. 1692). The Procter & Gamble e-mails had "nothing to do with buying groups." (Cohen, Tr. 833; Sullivan, 4262; Guggenheim, Tr. 1692).

Legitimate interfirm communications about manufacturer issues cannot support the alleged conspiracy regarding buying groups, or an inference that Respondents communicated about buying groups.

291. Cohen asked Sullivan and Guggenheim at his competitors' companies for help in addressing the issue with Procter & Gamble packaging and pricing of a product because Benco is "a small player in the market, and there's sometimes when there's mutual best interest." (Cohen, Tr. 489).

Schein's Response:

The asserted fact constitutes evidence of “other acts” and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Communications regarding manufacturer issues (relating to P&G) are not relevant to this case; there is no allegation that the cited communication (which appears to be designed to reduce price or cost) was anticompetitive; and Mr. Cohen’s unsolicited emails do not establish any pattern or practice of discussing buying groups among the Respondents. As such, the asserted fact is inadmissible to show a propensity to conspire to boycott buying groups.

Patterson's Response:

Patterson joins the responses of Schein and Benco.

Benco's Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

At trial, Complaint Counsel introduced two December 2011 e-mails sent by Mr. Cohen – one to Mr. Sullivan and a second to Mr. Guggenheim – about Procter & Gamble. (Guggenheim, Tr. 1547; Sullivan, Tr. 3890-93; Cohen, Tr. 488; CX2422, CX1049, CX3067). Procter & Gamble is a manufacturer of dental products; not a buying group. (Cohen, Tr. 832-33; Sullivan, Tr., 3891; Guggenheim, Tr. 1692). The Procter & Gamble e-mails had “nothing to do with buying groups.” (Cohen, Tr. 833; Sullivan, 4262; Guggenheim, Tr. 1692).

Legitimate interfirm communications about manufacturer issues cannot support the alleged conspiracy regarding buying groups, or an inference that Respondents communicated about buying groups.

292. On December 10, 2011 at 3:39 pm, Cohen sent an email to Guggenheim sharing Benco's margin and profitability analysis on the Procter & Gamble product and asking Guggenheim to raise Benco's pricing issue with Patterson's marketing department and ultimately with Procter & Gamble. (Guggenheim, Tr. 1547-1549; Cohen, Tr. 488-489; CX1050 at 002 (Cohen email to Guggenheim, "But I am giving you the heads up in the hopes that you'll make someone on your Marketing team aware of the issue, and then maybe bring it to the attention of P&G management.")).

Schein's Response:

The asserted fact constitutes evidence of "other acts" and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Communications regarding manufacturer issues (relating to P&G) are not relevant to this case; there is no allegation that the cited communication (which appears to be designed to *reduce* price or cost) was anticompetitive; and Mr. Cohen's unsolicited email does not establish any pattern or practice of discussing buying groups among the two companies. As such, the asserted fact is inadmissible to show a propensity to conspire to boycott buying groups.

Patterson's Response:

In Cohen's December 10, 2011 email to Guggenheim, Cohen wrote: "I'm not telling you whether or not Patterson should sell the product, that's your call. But I am giving you the heads up in the hopes that you'll make someone on your Marketing team aware of the issue, and then maybe bring it to the attention of P&G management." (CX1050 at 2). Guggenheim looked into it and decided *not* to pursue the issue. "I looked into this briefly, and we determined that we were comfortable with [P&G's pricing]," Guggenheim testified. (Guggenheim, Tr. 1547-1554). "I think I determined [Cohen] was right, but again, we didn't really care." (Guggenheim, Tr. 1552). Similarly, when Cohen urged Guggenheim in June 2013 to include a "poison pill" clause in Patterson's manufacturer contracts, to prevent manufacturers from using distributor sales data to compete with distributors, Guggenheim looked into it, learned that Patterson was already,

independently, including such provisions in its contracts, and again did nothing. (Guggenheim, Tr. 1557–1565); (CX6027 at 31 (Row 265)). Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

At trial, Complaint Counsel introduced two December 2011 e-mails sent by Mr. Cohen – one to Mr. Sullivan and a second to Mr. Guggenheim – about Procter & Gamble. (Guggenheim, Tr. 1547; Sullivan, Tr. 3890-93; Cohen, Tr. 488; CX2422, CX1049, CX3067). Procter & Gamble is a manufacturer of dental products; not a buying group. (Cohen, Tr. 832-33; Sullivan, Tr., 3891; Guggenheim, Tr. 1692). The Procter & Gamble e-mails had “nothing to do with buying groups.” (Cohen, Tr. 833; Sullivan, 4262; Guggenheim, Tr. 1692).

Legitimate interfirm communications about manufacturer issues cannot support the alleged conspiracy regarding buying groups, or an inference that Respondents communicated about buying groups.

293. On December 10, 2011 at 3:42 pm, within minutes of sending his email to Guggenheim, Cohen sent a nearly identical email to Sullivan sharing Benco's margin and profitability analysis on the product and asking Sullivan to raise Benco's pricing issue with Schein's marketing department and ultimately with Proctor & Gamble. (Cohen, Tr. 488-489; CX1049 at 001-002 (Cohen email to Sullivan, “But I am giving you the heads up in the hopes that you'll make someone on your Marketing team aware of the issue, and then maybe bring it to the attention of P&G management.”); Sullivan, Tr. 3890-3891).

Schein's Response:

The asserted fact constitutes evidence of “other acts” and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Communications regarding

manufacturer issues (relating to P&G) are not relevant to this case; there is no allegation that the cited communication (which appears to be designed to *reduce* price or cost) was anticompetitive; and Mr. Cohen's unsolicited email does not establish any pattern or practice of discussing buying groups among the two companies. As such, the asserted fact is inadmissible to show a propensity to conspire to boycott buying groups.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

At trial, Complaint Counsel introduced two December 2011 e-mails sent by Mr. Cohen – one to Mr. Sullivan and a second to Mr. Guggenheim – about Procter & Gamble. (Guggenheim, Tr. 1547; Sullivan, Tr. 3890-93; Cohen, Tr. 488; CX2422, CX1049, CX3067). Procter & Gamble is a manufacturer of dental products; not a buying group. (Cohen, Tr. 832-33; Sullivan, Tr., 3891; Guggenheim, Tr. 1692). The Procter & Gamble e-mails had “nothing to do with buying groups.” (Cohen, Tr. 833; Sullivan, 4262; Guggenheim, Tr. 1692).

Legitimate interfirm communications about manufacturer issues cannot support the alleged conspiracy regarding buying groups, or an inference that Respondents communicated about buying groups.

294. Cohen's nearly identical December 10, 2011 emails to Sullivan and Guggenheim asked Sullivan and Guggenheim to keep Cohen's role in raising the issue quiet asking them not to “mention this e-mail to your team, I'd rather it not get back to Amy Moorman that I put this issue on your radar.” (CX1049 at 001-002; CX1050 at 002).

Schein's Response:

The asserted fact constitutes evidence of “other acts” and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Communications regarding manufacturer issues (relating to P&G) are not relevant to this case; there is no allegation that the cited communication (which appears to be designed to *reduce* price or cost) was anticompetitive; and Mr. Cohen’s unsolicited emails do not establish any pattern or practice of discussing buying groups among the Respondents. As such, the asserted fact is inadmissible to show a propensity to conspire to boycott buying groups

Patterson's Response:

Patterson joins the responses of Schein and Benco.

Benco's Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

At trial, Complaint Counsel introduced two December 2011 e-mails sent by Mr. Cohen – one to Mr. Sullivan and a second to Mr. Guggenheim – about Procter & Gamble. (Guggenheim, Tr. 1547; Sullivan, Tr. 3890-93; Cohen, Tr. 488; CX2422, CX1049, CX3067). Procter & Gamble is a manufacturer of dental products; not a buying group. (Cohen, Tr. 832-33; Sullivan, Tr., 3891; Guggenheim, Tr. 1692). The Procter & Gamble e-mails had “nothing to do with buying groups.” (Cohen, Tr. 833; Sullivan, 4262; Guggenheim, Tr. 1692).

Legitimate interfirm communications about manufacturer issues cannot support the alleged conspiracy regarding buying groups, or an inference that Respondents communicated about buying groups.

295. Cohen's nearly identical December 10, 2011 emails to Sullivan and Guggenheim regarding Procter & Gamble spelled out the collective issue and the collective solution he was proposing. Both emails state, "I think you see the issue: we (all of us) are going to lose money on every box we sell.... When we at Benco called this issue to the attention of P&G management, they replied that no one else (i.e. you, Schein, Burkhardt) seemed concerned about it, so they're not going to make any changes. Our feeling is that we distributors either need more margin, or P&G needs to take out the cavity rinse." (CX1049 at 001-002; CX1050 at 001-002; Guggenheim, Tr. 1547-1550; 1551; Sullivan, Tr. 3890-3891; CX3067 at 002).

Schein's Response:

The asserted fact mischaracterizes the evidence. The separate unsolicited emails that Mr. Cohen sent do not "spell[] out [a] collective issue" or propose a "collective solution." The email simply lays out Benco's perspective. The email to Mr. Guggenheim does not mention any communication with Schein, and the email to Mr. Sullivan does not mention any communication with Patterson.⁷

The asserted fact constitutes evidence of "other acts" and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Communications regarding manufacturer issues (relating to P&G) are not relevant to this case; there is no allegation that the cited communication (which appears to be designed to *reduce* price or cost) was anticompetitive; and Mr. Cohen's unsolicited emails do not establish any pattern or practice of discussing buying groups among the Respondents. As such, the asserted fact is inadmissible to show a propensity to conspire to boycott buying groups.

Patterson's Response:

Patterson joins the responses of Schein and Benco, and also notes the first sentence of this finding is not "supported by specific references to the evidentiary record" in

⁷ Even if the emails were relevant to a claim of two separate bi-lateral conspiracies, which they are not, the fact that Mr. Cohen sent separate emails to Mr. Sullivan and to Mr. Guggenheim negates any inference of an "overarching" agreement among all three Respondents.

violation of the Court’s February 21, 2019 Order on Post-Trial Briefs. None of the cited testimony or documents indicate that Patterson viewed the Procter & Gamble pricing as a “collective issue” or that Cohen’s suggestion was a “collective solution.”

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

At trial, Complaint Counsel introduced two December 2011 e-mails sent by Mr. Cohen – one to Mr. Sullivan and a second to Mr. Guggenheim – about Procter & Gamble. (Guggenheim, Tr. 1547; Sullivan, Tr. 3890-93; Cohen, Tr. 488; CX2422, CX1049, CX3067). Procter & Gamble is a manufacturer of dental products; not a buying group. (Cohen, Tr. 832-33; Sullivan, Tr., 3891; Guggenheim, Tr. 1692). The Procter & Gamble e-mails had “nothing to do with buying groups.” (Cohen, Tr. 833; Sullivan, 4262; Guggenheim, Tr. 1692).

Legitimate interfirm communications about manufacturer issues cannot support the alleged conspiracy regarding buying groups, or an inference that Respondents communicated about buying groups.

296. One of the few differences between Cohen’s nearly identical December 10, 2011 emails to Sullivan and Guggenheim was his individual references to seeing each of them in person a few weeks before. (CX1050 at 001 (Cohen to Guggenheim: “Great to see you in PA a few weeks ago, thanks for making the trip. Two quick issues”); CX1049 at 001 (Cohen to Sullivan: “Great to see you a few weeks ago in NYC!”)).

Schein’s Response:

The asserted fact constitutes evidence of “other acts” and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Communications regarding manufacturer issues (relating to P&G) are not relevant to this case; there is no allegation

that the cited communication (which appears to be designed to *reduce* price or cost) was anticompetitive; and Mr. Cohen's unsolicited emails do not establish any pattern or practice of discussing buying groups among the Respondents. As such, the asserted fact is inadmissible to show a propensity to conspire to boycott buying groups.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

At trial, Complaint Counsel introduced two December 2011 e-mails sent by Mr. Cohen – one to Mr. Sullivan and a second to Mr. Guggenheim – about Procter & Gamble. (Guggenheim, Tr. 1547; Sullivan, Tr. 3890-93; Cohen, Tr. 488; CX2422, CX1049, CX3067). Procter & Gamble is a manufacturer of dental products; not a buying group. (Cohen, Tr. 832-33; Sullivan, Tr., 3891; Guggenheim, Tr. 1692). The Procter & Gamble e-mails had “nothing to do with buying groups.” (Cohen, Tr. 833; Sullivan, 4262; Guggenheim, Tr. 1692).

Legitimate interfirm communications about manufacturer issues cannot support the alleged conspiracy regarding buying groups, or an inference that Respondents communicated about buying groups.

297. Both Sullivan and Guggenheim responded to Cohen that they would look into the issue Cohen raised in his December 10, 2011 email regarding Procter & Gamble. (Guggenheim, Tr. 1551-1552 (“Q. You responded to Chuck Cohen on December 12, 2011? A. Yes. That’s right. Q. And you told him, ‘I’m running down the numbers on the P&G issue’? A. Uh-huh. Q. And what did you mean by that? A. I was going to investigate. . . .”); CX3067 (December 12, 2011 email from Guggenheim to Cohen, “I’m running down the numbers on the P&G issue”);

(Sullivan, Tr. 3891-3893) (“Q. And you told him that you would ask your team to check this out.? A. I did.)).

Schein’s Response:

The asserted fact constitutes evidence of “other acts” and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Communications regarding manufacturer issues (relating to P&G) are not relevant to this case; there is no allegation that the cited communication (which appears to be designed to *reduce* price or cost) was anticompetitive; and Mr. Sullivan’s response to Mr. Cohen does not establish any pattern or practice of discussing buying groups among the two companies. As such, the asserted fact is inadmissible to show a propensity to conspire to boycott buying groups.

Patterson’s Response:

Complaint Counsel’s proposed finding mischaracterizes the evidence. See *supra* ¶292. Guggenheim testified that looked into it and decided not to pursue the issue: “I looked into this briefly, and we determined that we were comfortable with [P&G’s pricing].” See *supra* ¶292 (Guggenheim, Tr. 1547–1554). “I think I determined [Cohen] was right, but again, we didn’t really care,” so Patterson did nothing. See *supra* ¶292 (Guggenheim, Tr. 1552).

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

At trial, Complaint Counsel introduced two December 2011 e-mails sent by Mr. Cohen – one to Mr. Sullivan and a second to Mr. Guggenheim – about Procter & Gamble. (Guggenheim, Tr. 1547; Sullivan, Tr. 3890-93; Cohen, Tr. 488; CX2422, CX1049, CX3067). Procter & Gamble is a manufacturer of dental products; not a buying group.

(Cohen, Tr. 832-33; Sullivan, Tr., 3891; Guggenheim, Tr. 1692). The Procter & Gamble e-mails had “nothing to do with buying groups.” (Cohen, Tr. 833; Sullivan, 4262; Guggenheim, Tr. 1692).

Legitimate interfirm communications about manufacturer issues cannot support the alleged conspiracy regarding buying groups, or an inference that Respondents communicated about buying groups.

298. Patterson investigated the issue about Procter & Gamble’s packaging and pricing of a product that Cohen brought to Guggenheim’s attention. (Guggenheim, Tr. 1552-1554, 1564-1565; *see also* CX8023 (Guggenheim, Dep. at 124-125) (“I think is accurate to say that for the most part I investigated it.”)).

Schein’s Response:

The asserted fact constitutes evidence of “other acts” and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404.

Patterson’s Response:

Complaint Counsel’s proposed finding mischaracterizes the evidence. See *supra* ¶292. Guggenheim testified that looked into it and decided not to pursue the issue: “I looked into this briefly, and we determined that we were comfortable with it. The Procter & Gamble line was an important line to us. . . . We looked at it as an overall broad value of the Procter & Gamble line and determined that we were comfortable with that, and so we moved on, never called P&G about it, never did anything more.” See *supra* ¶292 (Guggenheim, Tr. 1549). Otherwise, Patterson has no specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

At trial, Complaint Counsel introduced two December 2011 e-mails sent by Mr. Cohen – one to Mr. Sullivan and a second to Mr. Guggenheim – about Procter & Gamble. (Guggenheim, Tr. 1547; Sullivan, Tr. 3890-93; Cohen, Tr. 488; CX2422, CX1049, CX3067). Procter & Gamble is a manufacturer of dental products; not a buying group. (Cohen, Tr. 832-33; Sullivan, Tr., 3891; Guggenheim, Tr. 1692). The Procter & Gamble e-mails had “nothing to do with buying groups.” (Cohen, Tr. 833; Sullivan, 4262; Guggenheim, Tr. 1692).

Legitimate interfirm communications about manufacturer issues cannot support the alleged conspiracy regarding buying groups, or an inference that Respondents communicated about buying groups.

299. Schein investigated the issue about Procter & Gamble’s packaging and pricing of a product that Cohen brought to Sullivan’s attention. (Sullivan, Tr. 3891-3893; Sullivan Tr. 3893) (“Q. And you told him that you would ask your team to check this out.? A. I did. Q. And, in fact, you had done just that. We saw you had forwarded Chuck Cohen’s email to Paul Hinsch, VP of marketing, right? A. Correct. Q. You also told Chuck Cohen that you appreciate him bringing this to your attention. Do you see that. A. I do.”); CX2422 at 002 (Sullivan forwards Cohen’s email to Hinsch on December 10; Hinsch responds to Sullivan, “I don’t think we focused on the plan with the rinse. I will ask the team to do so.”); CX1049 at 001 (December 11, 2011, email from Sullivan to Cohen, “Thanks Chuck. I will ask team to check this out. I don’t think we included that in our analysis. I appreciate you b[r]inging to my attention. I’ll be in touch.”)).

Schein’s Response:

The asserted fact constitutes evidence of “other acts” and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Communications regarding manufacturer issues (relating to P&G) are not relevant to this case; there is no allegation that the cited communication (which appears to be designed to *reduce* price or cost) was anticompetitive; and Mr. Sullivan’s decision to internally inquire about the shipping issue Mr. Cohen raised does not establish any pattern or practice of discussing buying groups

among the two companies. As such, the asserted fact is inadmissible to show a propensity to conspire to boycott buying groups.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

At trial, Complaint Counsel introduced two December 2011 e-mails sent by Mr. Cohen – one to Mr. Sullivan and a second to Mr. Guggenheim – about Procter & Gamble. (Guggenheim, Tr. 1547; Sullivan, Tr. 3890-93; Cohen, Tr. 488; CX2422, CX1049, CX3067). Procter & Gamble is a manufacturer of dental products; not a buying group. (Cohen, Tr. 832-33; Sullivan, Tr., 3891; Guggenheim, Tr. 1692). The Procter & Gamble e-mails had “nothing to do with buying groups.” (Cohen, Tr. 833; Sullivan, 4262; Guggenheim, Tr. 1692).

Legitimate interfirm communications about manufacturer issues cannot support the alleged conspiracy regarding buying groups, or an inference that Respondents communicated about buying groups.

300. Cohen testified that his communications with Sullivan and Guggenheim regarding the Procter & Gamble issue are an example of his open relationship with Schein and Patterson. (Cohen, Tr. 493).

Schein's Response:

The asserted fact is based on a false premise. When asked, “Do you believe Benco has an open relationship with Schein and Patterson,” Mr. Cohen answered, “No.” (Cohen,

Tr. 492). While Mr. Cohen did not again correct Ms. Kahn when she later embedded that false premise into her question, it does not establish that there was an “open relationship.”

Moreover, the asserted fact is irrelevant and inadmissible. Specific instances of conduct (*e.g.*, the Proctor & Gamble issue) are not admissible to prove character (*e.g.*, Benco’s “open relationship” attitude), and neither are they admissible to show actions in conformity therewith. Fed. R. Evid. 404, 406. Moreover, communications regarding manufacturer issues (relating to P&G) are not relevant to this case; there is no allegation that the cited communications (which appear to be designed to *reduce* price or cost) was anticompetitive; and the relationship between the P&G issue and Benco’s alleged “open relationship” attitude does not establish any pattern or practice of discussing buying groups among the Respondents. As such, the asserted fact is inadmissible to show a propensity to conspire to boycott buying groups.

Patterson’s Response:

Complaint Counsel has not introduced any evidence that Patterson saw the Procter & Gamble communications as an example of an “open relationship” with Benco, and tellingly cites none. On the contrary, the record is replete with examples of sustained competition showing Patterson, Benco and Schein’s desire to compete with one another. See, *e.g.*, PF ¶48 (Cohen wrote in a February 22, 2013 email, right after Complaint Counsel alleged Patterson joined the purported Benco-Schein conspiracy, “We need Patterson to have a LONG, SLOW DECLINE.”) (caps in original); PF ¶51 (Sullivan Tr., 4017) (“Fierce competition between the two, yes.”); PF ¶54 (Cavaretta Tr., 5536-37) (“fierce competition” between Patterson and Schein included “[r]ecruiting each other’s

reps” and “on a regular basis” walking into dental offices “trying to win the business over and take the business from Patterson.”). Otherwise, Patterson has no specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the source of the cited exhibit is an e-mail between Chuck Cohen and Rick Cohen regarding a visit that Paul Guggenheim requested and made to Benco’s headquarters. (CX1045). The purpose of Guggenheim’s visit to Benco was to inquire whether Benco was interested in selling its business to Patterson. (Cohen, Tr. 835-36).

Second, during Chuck Cohen’s tenure as managing director of Benco, both Schein and Patterson made multiple attempts to acquire Benco. (Cohen, Tr. 834-36). As a privately-held, family business, Benco and Chuck Cohen “regularly” think about potential exit strategies. (Cohen, Tr. 835 (“As a private business owner, thinking about an exit strategy is always important.”)). A sale of Benco to Schein or Patterson is a potential exit strategy that Chuck Cohen has evaluated. (Cohen, Tr. 835).

Third, Benco has a business justification for keeping open the dialogue with Schein and Patterson regarding an acquisition. (Cohen, Tr. 835). Accordingly, the context for Cohen’s comment regarding an “open relationship” is the ongoing acquisition communications with Schein and Patterson. (Cohen, Tr. 836).

Fourth, the Procter & Gamble e-mails had “nothing to do with buying groups.” (Cohen, Tr. 833; Sullivan, 4262; Guggenheim, Tr. 1692). Legitimate interfirm communications about manufacturer issues cannot support the alleged conspiracy

regarding buying groups, or an inference that Respondents communicated about buying groups.

301. In 2013, Benco had a policy of including “poison pill” clauses in its manufacturer contracts to prevent the manufacturers from using the Benco’s transactional data to sell to Benco’s customers directly without going through distributors. (Cohen, Tr. 485-486). Benco’s poison pill clause required manufacturers to give Benco three year’s notice before selling directly to customers. (Cohen, Tr. 485).

Schein’s Response:

The asserted fact constitutes evidence of “other acts” and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Actions regarding manufacturer issues are not relevant to this case; and Mr. Cohen’s data policies do not establish any pattern or practice of discussing buying groups among the Respondents. As such, the asserted fact is inadmissible to show a propensity to conspire to boycott buying groups.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The cited testimony from Chuck Cohen is discussing a series of communications from Cohen to Guggenheim and Sullivan that related to end-user data that distributors provide to manufacturers. (CX1054; CX1055). On June 12, 2013, Cohen separately sent e-mails to Sullivan and Guggenheim regarding formalizing industry practice of supplying end-user data to suppliers such as Dentsply, 3M, Hu Friedy, and Ivoclar. (CX1054; CX1055). Cohen’s e-mails reflect his concern that “manufacturers receive data feeds from

[distributors] about sales of their products to end users” without restrictions. (CX8023 (Guggenheim, Dep. at 81), CX2337, CX1055).

Sullivan did not reply to Cohen’s e-mail or ever discuss the issue with Cohen. (Sullivan, Tr. 4080). Guggenheim told Cohen that Patterson had already formalized their end user data sharing in their vendor agreements. (CX1055, CX3070, CX3071, CX3222).

The communications concerning end-user data sharing with suppliers have nothing to do with buying groups. (Sullivan, Tr. 4262). They are not evidence of the alleged buying group conspiracy; nor can they support an inference of such a conspiracy.

302. Benco learned from a manufacturer that Schein and Patterson did not have the same policy requiring a poison pill clause. Benco was concerned because, in Cohen’s words, “If Benco signed a contract with a manufacturer that contained a poison pill clause, but Schein and Patterson had not, Benco’s customer base is still at risk if that manufacturer goes direct.” (Cohen, Tr. 487).

Schein’s Response:

The evidence does not support this asserted fact. Mr. Cohen did not have personal knowledge of what Schein’s contracts required.

Regardless, the asserted fact constitutes evidence of “other acts” and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Actions regarding manufacturer issues are not relevant to this case; and Mr. Cohen’s beliefs about Schein’s data policies or the (indirect) impact of those policies on Benco, do not establish any pattern or practice of discussing buying groups among the two companies. As such, the asserted fact is inadmissible to show a propensity to conspire to boycott buying groups.

Patterson’s Response:

Complaint Counsel’s proposed finding is misleading and not supported by evidence in the record. When Cohen contacted Guggenheim in June 2013 regarding a “poison pill”

clause, Guggenheim looked into it, learned that Patterson was already, independently, including such provisions in its contracts, and did nothing in response to Cohen's communication. PRF 292 (Guggenheim, Tr. 1557–1565); (CX6027 at 31 (Row 265)). The first sentence of this finding is also not "supported by specific references to the evidentiary record" in violation of the Court's February 21, 2019 Order on Post-Trial Briefs.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The cited testimony from Chuck Cohen is discussing a series of communications from Cohen to Guggenheim and Sullivan that related to end-user data that distributors provide to manufacturers. (CX1054; CX1055). On June 12, 2013, Cohen separately sent e-mails to Sullivan and Guggenheim regarding formalizing industry practice of supplying end-user data to suppliers such as Dentsply, 3M, Hu Friedy, and Ivoclar. (CX1054; CX1055). Cohen's e-mails reflect his concern that "manufacturers receive data feeds from [distributors] about sales of their products to end users" without restrictions. (CX8023 (Guggenheim, Dep. at 81), CX2337, CX1055).

Sullivan did not reply to Cohen's e-mail or ever discuss the issue with Cohen. (Sullivan, Tr. 4080). Guggenheim told Cohen that Patterson had already formalized their end user data sharing in their vendor agreements. (CX1055, CX3070, CX3071, CX3222).

The communications concerning end-user data sharing with suppliers have nothing to do with buying groups. (Sullivan, Tr. 4262). They are not evidence of the alleged buying group conspiracy; nor can they support an inference of such a conspiracy.

303. Cohen contacted and urged Sullivan of Schein and Guggenheim of Patterson to include specific poison pill contractual provisions in their contracts with manufacturers. (Cohen, Tr. 487-488).

Schein's Response:

The asserted fact constitutes evidence of “other acts” and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Communications regarding manufacturer issues are not relevant to this case; there is no allegation that the cited communication (which appears to be related to intellectual property protection) was anticompetitive; and Mr. Cohen’s unsolicited communications about data policies do not establish any pattern or practice of discussing buying groups among the Respondents. As such, the asserted fact is inadmissible to show a propensity to conspire to boycott buying groups.

Patterson's Response:

Complaint Counsel’s proposed finding is misleading and not supported by evidence in the record. When Cohen contacted Guggenheim in June 2013 regarding a “poison pill” clause, Guggenheim looked into it, learned that Patterson was already, independently, including such provisions in its contracts, and did nothing in response to Cohen’s communication. PRF 292 (Guggenheim, Tr. 1557–1565); (CX6027 at 31 (Row 265)).

Benco's Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The cited testimony from Chuck Cohen is discussing a series of communications from Cohen to Guggenheim and Sullivan that related to end-user data that distributors provide to manufacturers. (CX1054; CX1055). On June 12, 2013, Cohen separately sent

e-mails to Sullivan and Guggenheim regarding formalizing industry practice of supplying end-user data to suppliers such as Dentsply, 3M, Hu Friedy, and Ivoclar. (CX1054; CX1055). Cohen's e-mails reflect his concern that "manufacturers receive data feeds from [distributors] about sales of their products to end users" without restrictions. (CX8023 (Guggenheim, Dep. at 81), CX2337, CX1055).

Sullivan did not reply to Cohen's e-mail or ever discuss the issue with Cohen. (Sullivan, Tr. 4080). Guggenheim told Cohen that Patterson had already formalized their end user data sharing in their vendor agreements. (CX1055, CX3070, CX3071, CX3222).

The communications concerning end-user data sharing with suppliers have nothing to do with buying groups. (Sullivan, Tr. 4262). They are not evidence of the alleged buying group conspiracy; nor can they support an inference of such a conspiracy.

304. In separate but nearly identical June 12, 2013, emails, Cohen urged Sullivan and Guggenheim to adopt Benco's policy to include poison pill clauses in their respective manufacturer contracts. (Cohen, Tr. 486-488; (Guggenheim, Tr. 1556-1595; CX1055 at 001-002 and CX2337 at 001 ("In every negotiation since [the first meeting with the manufacturer], we insisted on, and received, the three-year 'poison pill' clause At Benco, we're NOT changing our stance on this issue, and urge you to re-examine the agreements you've already signed to make sure they include the 'poison pill' clause."))).

Schein's Response:

The asserted fact constitutes evidence of "other acts" and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Communications regarding manufacturer issues are not relevant to this case; there is no allegation that the cited communication (which appears to be related to intellectual property protection) was anticompetitive; and Mr. Cohen's unsolicited communications about data policies do not establish any pattern or practice of discussing buying groups among the Respondents. As

such, the asserted fact is inadmissible to show a propensity to conspire to boycott buying groups.

Patterson's Response:

Complaint Counsel's proposed finding is misleading. When Cohen contacted Guggenheim in June 2013 regarding a "poison pill" clause, Guggenheim looked into it, learned that Patterson was already, independently, including such provisions in its contracts, and did nothing in response to Cohen's communication. PRF 292 (Guggenheim, Tr. 1557–1565); (CX6027 at 31 (Row 265)).

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The cited testimony from Chuck Cohen is discussing a series of communications from Cohen to Guggenheim and Sullivan that related to end-user data that distributors provide to manufacturers. (CX1054; CX1055). On June 12, 2013, Cohen separately sent e-mails to Sullivan and Guggenheim regarding formalizing industry practice of supplying end-user data to suppliers such as Dentsply, 3M, Hu Friedy, and Ivoclar. (CX1054; CX1055). Cohen's e-mails reflect his concern that "manufacturers receive data feeds from [distributors] about sales of their products to end users" without restrictions. (CX8023 (Guggenheim, Dep. at 81), CX2337, CX1055).

Sullivan did not reply to Cohen's e-mail or ever discuss the issue with Cohen. (Sullivan, Tr. 4080). Guggenheim told Cohen that Patterson had already formalized their end user data sharing in their vendor agreements. (CX1055, CX3070, CX3071, CX3222).

The communications concerning end-user data sharing with suppliers have nothing to do with buying groups. (Sullivan, Tr. 4262). They are not evidence of the alleged buying group conspiracy; nor can they support an inference of such a conspiracy.

305. On June 12, 2013, Cohen wrote to Guggenheim, “At Benco, we’re NOT changing our stance on this issue, and urge you to re-examine the agreements you’ve already signed to make sure that they include the ‘poison pill’ clause.” (CX1055 at 002).

Schein’s Response:

The asserted fact constitutes evidence of “other acts” and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Communications regarding manufacturer issues are not relevant to this case; there is no allegation that the cited communication (which appears to be related to intellectual property protection) was anticompetitive; and Mr. Cohen’s unsolicited communication about data policies does not establish any pattern or practice of discussing buying groups among the Respondents. As such, the asserted fact is inadmissible to show a propensity to conspire about buying groups.

Patterson’s Response:

Complaint Counsel’s proposed finding is misleading. When Cohen contacted Guggenheim in June 2013 regarding a “poison pill” clause, Guggenheim looked into it, learned that Patterson was already, independently, including such provisions in its contracts, and did nothing in response to Cohen’s communication. PRF 292 (Guggenheim, Tr. 1557–1565); (CX6027 at 31 (Row 265)).

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

The cited exhibit is discussing a series of communications from Cohen to Guggenheim and Sullivan that related to end-user data that distributors provide to manufacturers. (CX1054; CX1055). On June 12, 2013, Cohen separately sent e-mails to Sullivan and Guggenheim regarding formalizing industry practice of supplying end-user data to suppliers such as Dentsply, 3M, Hu Friedy, and Ivoclar. (CX1054; CX1055). Cohen's e-mails reflect his concern that "manufacturers receive data feeds from [distributors] about sales of their products to end users" without restrictions. (CX8023 (Guggenheim, Dep. at 81), CX2337, CX1055).

Sullivan did not reply to Cohen's e-mail or ever discuss the issue with Cohen. (Sullivan, Tr. 4080). Guggenheim told Cohen that Patterson had already formalized their end user data sharing in their vendor agreements. (CX1055, CX3070, CX3071, CX3222).

The communications concerning end-user data sharing with suppliers have nothing to do with buying groups. (Sullivan, Tr. 4262). They are not evidence of the alleged buying group conspiracy; nor can they support an inference of such a conspiracy.

306. On June 12, 2013, Cohen wrote to Sullivan, "At Benco, we're NOT changing our stance on this issue, and urge you to re-examine the agreements you've already signed to make sure that they include the 'poison pill' clause." (CX2337 at 001).

Schein's Response:

The asserted fact constitutes evidence of "other acts" and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Communications regarding manufacturer issues are not relevant to this case; there is no allegation that the cited communication (which appears to be related to intellectual property protection) was anticompetitive; and Mr. Cohen's unsolicited communication about data policies does not establish any pattern or practice of discussing buying groups among the two companies.

As such, the asserted fact is inadmissible to show a propensity to conspire to boycott buying groups.

The evidence also does not establish that Mr. Sullivan responded to Mr. Cohen. In fact, Mr. Sullivan forwarded Mr. Cohen's email to *legal counsel*, and *sought legal advice* about it. (CX 2337). As such, any inference of a conspiracy would be improper.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

The cited exhibit is discussing a series of communications from Cohen to Guggenheim and Sullivan that related to end-user data that distributors provide to manufacturers. (CX1054; CX1055). On June 12, 2013, Cohen separately sent e-mails to Sullivan and Guggenheim regarding formalizing industry practice of supplying end-user data to suppliers such as Dentsply, 3M, Hu Friedy, and Ivoclar. (CX1054; CX1055). Cohen's e-mails reflect his concern that "manufacturers receive data feeds from [distributors] about sales of their products to end users" without restrictions. (CX8023 (Guggenheim, Dep. at 81), CX2337, CX1055).

Sullivan did not reply to Cohen's e-mail or ever discuss the issue with Cohen. (Sullivan, Tr. 4080). Guggenheim told Cohen that Patterson had already formalized their end user data sharing in their vendor agreements. (CX1055, CX3070, CX3071, CX3222).

The communications concerning end-user data sharing with suppliers have nothing to do with buying groups. (Sullivan, Tr. 4262). They are not evidence of the alleged buying group conspiracy; nor can they support an inference of such a conspiracy.

307. After receiving Cohen's June 12, 2013 email regarding Benco's concern with inclusion of poison pill clauses, Guggenheim looked into the issue. (Guggenheim, Tr. 1560-1564); CX3222 (Cohen email to Guggenheim, "I received your message on the HF issue, glad you're on top of it."). Guggenheim later communicated with Cohen to inform Cohen of what he had learned. (Guggenheim, Tr. 1562-1564). Guggenheim communicated to Cohen the fact that Patterson had included the clause at issue in its own contracts. (Guggenheim, Tr. 1565); CX6027 at 031 (Row 265) (June 18, 2013 text from Guggenheim to Cohen about Patterson's inclusion of similar clauses)).

Schein's Response:

The asserted fact constitutes evidence of "other acts" and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Communications regarding manufacturer issues are not relevant to this case; there is no allegation that the cited communication (which appears to be related to intellectual property protection) was anticompetitive; and Mr. Cohen's unsolicited communication about data policies do not establish any pattern or practice of discussing buying groups among the Respondents. As such, the asserted fact is inadmissible to show a propensity to conspire about buying groups.

Patterson's Response:

Complaint Counsel's proposed finding mischaracterizes the evidence. Guggenheim testified that: "I asked Scott [former Patterson employee], I asked Jonelle [General Counsel] [about the inclusion of poison pill clause in Patterson's manufacturer contracts]. They seemed to agree that we had those contracts. We actually never pulled the contracts or looked at anything. That was their recollection that that was the case, so that was the response I gave back to [Cohen]. I never actually looked at a contract to confirm that. We just -- you know, Jonelle didn't remember anything. Scott recalled I believe that, yes, in

fact that was in the agreements, and that's the end of it.” (Guggenheim, Tr. 1561, 1565). Patterson did nothing in response to Cohen’s email.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The cited testimony is discussing a series of communications from Cohen to Guggenheim and Sullivan that related to end-user data that distributors provide to manufacturers. (CX1054; CX1055). On June 12, 2013, Cohen separately sent e-mails to Sullivan and Guggenheim regarding formalizing industry practice of supplying end-user data to suppliers such as Dentsply, 3M, Hu Friedy, and Ivoclar. (CX1054; CX1055). Cohen’s e-mails reflect his concern that “manufacturers receive data feeds from [distributors] about sales of their products to end users” without restrictions. (CX8023 (Guggenheim, Dep. at 81), CX2337, CX1055).

Sullivan did not reply to Cohen’s e-mail or ever discuss the issue with Cohen. (Sullivan, Tr. 4080). Guggenheim told Cohen that Patterson had already formalized their end user data sharing in their vendor agreements. (CX1055, CX3070, CX3071, CX3222).

The communications concerning end-user data sharing with suppliers have nothing to do with buying groups. (Sullivan, Tr. 4262). They are not evidence of the alleged buying group conspiracy; nor can they support an inference of such a conspiracy.

308. After receiving Cohen’s June 12, 2013 email regarding Benco’s concern with inclusion of poison pill clauses, Sullivan looked into the issue. (CX2337 at 001 (June 13, 2013 email from Sullivan to Paul Hinsch: “Paul, what are your thoughts in general regarding this issue? . . . Right now, which suppliers do we share such end-user data with?”)). Sullivan also forwarded Cohen’s June 12, 2013, email to his boss. (Sullivan, Tr. 4079-4080; CX2337 at 001).

Schein's Response:

The asserted fact mischaracterizes the evidence. Mr. Sullivan forwarded Mr. Cohen's email to *legal counsel, and sought and received legal advice*. (CX 2337). After receiving such advice, and noting that he would act in accordance with it ("will do"), Mr. Sullivan further noted that the "exchange of information" with manufacturers is "clearly in our best interest" and that he "ha[s] no concerns." (CX 2337-001). Mr. Sullivan also asked his direct report for more information about any other data exchange relationships Schein had with other manufacturers. (CX 2337). At no point did Mr. Sullivan suggest that he would reach an agreement or share information with Mr. Cohen. Nor does the evidence show that Mr. Sullivan responded to Mr. Cohen's unsolicited email or raised any concerns with any manufacturer.

Moreover, the asserted fact constitutes evidence of "other acts" and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Communications regarding manufacturer issues are not relevant to this case; there is no allegation that the cited communication (which appears to be related to intellectual property protection) was anticompetitive; and Mr. Cohen's unsolicited communications about data policies do not establish any pattern or practice of discussing buying groups among the two companies. As such, the asserted fact is inadmissible to show a propensity to conspire about buying groups.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

The cited exhibit is discussing a series of communications from Cohen to Guggenheim and Sullivan that related to end-user data that distributors provide to manufacturers. (CX1054; CX1055). On June 12, 2013, Cohen separately sent e-mails to Sullivan and Guggenheim regarding formalizing industry practice of supplying end-user data to suppliers such as Dentsply, 3M, Hu Friedy, and Ivoclar. (CX1054; CX1055). Cohen's e-mails reflect his concern that "manufacturers receive data feeds from [distributors] about sales of their products to end users" without restrictions. (CX8023 (Guggenheim, Dep. at 81), CX2337, CX1055).

Sullivan did not reply to Cohen's e-mail or ever discuss the issue with Cohen. (Sullivan, Tr. 4080). Guggenheim told Cohen that Patterson had already formalized their end user data sharing in their vendor agreements. (CX1055, CX3070, CX3071, CX3222).

The communications concerning end-user data sharing with suppliers have nothing to do with buying groups. (Sullivan, Tr. 4262). They are not evidence of the alleged buying group conspiracy; nor can they support an inference of such a conspiracy.

309. On June 11, 2013, Paul Jackson wrote to Cohen asking to discuss the issue of manufacturers seeking end user data, noting that "Patterson and or Schein are getting sloppy about giving end user data." (CX1023 at 002). In response, on June 12, 2013, Cohen reported the communications with his competitors in an email to Benco's Paul Jackson, saying, "I sent the email to Tim [Sullivan] & Paul [Guggenheim], will let you know when I hear back... Don't sign without the poison pill." (CX1023 at 001).

Schein's Response:

The asserted fact constitutes evidence of "other acts" and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Communications regarding manufacturer issues are not relevant to this case; there is no allegation that the cited communication (which appears to be related to intellectual property protection) was

anticompetitive; and Mr. Cohen's unsolicited communications about data policies do not establish any pattern or practice of discussing buying groups among the Respondents. As such, the asserted fact is inadmissible to show a propensity to conspire about buying groups.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

The cited exhibit is discussing a series of communications from Cohen to Guggenheim and Sullivan that related to end-user data that distributors provide to manufacturers. (CX1054; CX1055). On June 12, 2013, Cohen separately sent e-mails to Sullivan and Guggenheim regarding formalizing industry practice of supplying end-user data to suppliers such as Dentsply, 3M, Hu Friedy, and Ivoclar. (CX1054; CX1055). Cohen's e-mails reflect his concern that "manufacturers receive data feeds from [distributors] about sales of their products to end users" without restrictions. (CX8023 (Guggenheim, Dep. at 81), CX2337, CX1055).

Sullivan did not reply to Cohen's e-mail or ever discuss the issue with Cohen. (Sullivan, Tr. 4080). Guggenheim told Cohen that Patterson had already formalized their end user data sharing in their vendor agreements. (CX1055, CX3070, CX3071, CX3222).

The communications concerning end-user data sharing with suppliers have nothing to do with buying groups. (Sullivan, Tr. 4262). They are not evidence of the alleged buying group conspiracy; nor can they support an inference of such a conspiracy.

310. Cohen testified that his communications with Schein and Patterson urging them to adopt Benco's policy of insisting on poison pill language in contracts with manufacturers is an example of their open relationship. (Cohen, Tr. 493) (Q. The examples we talked about earlier about the manufacturer poison pill, would that be an example of the open relationship? A. Yes. That would be an example of a relationship where we – I've learned from them, they have learned from us, and we have a relationship where I feel like I can approach them with issues or to learn, so yes, I would say that's the right way to put it.)).

Schein's Response:

The asserted fact is based on a false premise. When asked, "[D]o you believe Benco has an open relationship with Schein and Patterson," Mr. Cohen answered, "No." (Cohen, Tr. 492). While Mr. Cohen did not again correct Ms. Kahn when she later embedded that false premise into her question, that fact does not establish that there was an "open relationship."

Moreover, the asserted fact is irrelevant and inadmissible. Specific instances of conduct (i.e., the data protection communications) are not admissible to prove character (i.e., Benco's "open relationship" attitude), and neither are they admissible to show actions in conformity therewith. Fed. R. Evid. 404, 406. Moreover, communications regarding manufacturer issues are not relevant to this case; there is no allegation that the cited communication (which appears to be related to intellectual property protection) was anticompetitive; and the relationship between the data protection issue and Benco's alleged "open relationship" attitude does not establish any pattern or practice of discussing buying groups among the Respondents. As such, the asserted fact is inadmissible to show a propensity to conspire about buying groups.

Patterson's Response:

Complaint Counsel cites no evidence that Patterson saw the poison pill communications as an example of an "open relationship" with Benco. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, the source of the cited testimony is an e-mail between Chuck Cohen and Rick Cohen regarding a visit that Paul Guggenheim requested and made to Benco's headquarters. (CX1045). The purpose of Guggenheim's visit to Benco was to inquire whether Benco was interested in selling its business to Patterson. (Cohen, Tr. 835-36).

Second, during Chuck Cohen's tenure as managing director of Benco, both Schein and Patterson made multiple attempts to acquire Benco. (Cohen, Tr. 834-36). As a privately-held, family business, Benco and Chuck Cohen "regularly" think about potential exit strategies. (Cohen, Tr. 835 ("As a private business owner, thinking about an exit strategy is always important.")). A sale of Benco to Schein or Patterson is a potential exit strategy that Chuck Cohen has evaluated. (Cohen, Tr. 835).

Third, Benco has a business justification for keeping open the dialogue with Schein and Patterson regarding an acquisition. (Cohen, Tr. 835). Accordingly, the context for Cohen's comment regarding an "open relationship" is the ongoing acquisition communications with Schein and Patterson. (Cohen, Tr. 836).

Fourth, the communications concerning end-user data sharing with suppliers have nothing to do with buying groups. (Sullivan, Tr. 4262). Legitimate interfirm communications about manufacturer issues cannot support the alleged conspiracy regarding buying groups, or an inference that Respondents communicated about buying groups.

311. In 2013, Cohen planned to contact Schein and Patterson when he feared that Amazon was entering the dental distribution industry. Cohen wrote himself a reminder in December 2013, to “[w]ork with Schein & Patterson” to discuss a joint response. (Cohen, Tr. 490-492; CX0065 at 001 (“Subject: Discuss Amazon Response re Distributors . . . start the conversations NOW! Work with Schein & Patterson . . .”); *see also* CX0066 at 001 (January 2014 email from Benco Director Rick Cohen to Chuck Cohen, with the subject line “RE: Amazon Response . . .”, “We could be the glue to make it happen. If we had a schein/patterson/benco response it would be much more effective than a benco only response.”)).

Schein’s Response:

Complaint Counsel does not allege and has no evidence of any actual communication between Benco and Schein or Patterson concerning Amazon. As such, the internal Benco reminder is irrelevant.

Moreover, the asserted fact constitutes evidence of “other acts” and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Communications regarding Amazon are not relevant to this case; there is no allegation that the internal Benco document (concerning some potential undefined cooperative activity that never occurred) was anticompetitive; and Mr. Cohen’s internal musings do not establish any pattern or practice of discussing buying groups among the Respondents. As such, the asserted fact is inadmissible to show a propensity to conspire about buying groups.

Patterson’s Response:

There is no evidence showing Cohen reached out to Patterson about Amazon. This finding is also not “supported by specific references to the evidentiary record” in violation of the Court’s February 21, 2019 Order on Post-Trial Briefs. Cohen testified that he “did not” reach out to Schein or Patterson about Amazon. (Cohen, Tr. 491-492). Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, Amazon is not a buying group. (Cohen, Tr. 834; RX2952 (Mauer, Dep. at 127)). Communications about Amazon do not support Complaint Counsel's alleged buying group conspiracy, or an inference of such a conspiracy.

Second, Chuck Cohen never contacted Schein or Patterson to discuss any response to Amazon. (Cohen, Tr. 491-92, 834). Complaint Counsel examined Chuck Cohen at trial regarding the cited exhibit. (Cohen, Tr. 490-92). In response to Complaint Counsel's questioning, Cohen clearly testified that he never contacted Schein or Patterson regarding any joint response to Amazon. (Cohen, Tr. 491-92 ("I did not.")).

312. On January 18, 2014, Benco's co-owner, Rick Cohen, suggested getting together with Schein and Patterson to discuss Amazon entering the dental supply distribution market. Rick Cohen wrote, "Schein won't talk to Patterson about it. They hate each other too much. We could be the glue to make it happen." (CX0066 at 001). Chuck Cohen's reply to his brother's suggestion about coordinating with Patterson and Schein was: "Good call." (CX0066 at 001).

Schein's Response:

Complaint Counsel does not allege and has no evidence of any actual communication between Benco and Schein or Patterson concerning Amazon. As such, the internal Benco document is irrelevant.

Moreover, the asserted fact constitutes evidence of "other acts" and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Communications regarding Amazon are not relevant to this case; there is no allegation that the internal Benco document (concerning some potential undefined cooperative activity that never occurred) was anticompetitive; and Mr. Cohen's internal musings do not establish any pattern or

practice of discussing buying groups among the Respondents. As such, the asserted fact is inadmissible to show a propensity to conspire about buying groups.

Patterson's Response:

There is no evidence showing Cohen reached out to Patterson about Amazon. This finding is also not “supported by specific references to the evidentiary record” in violation of the Court’s February 21, 2019 Order on Post-Trial Briefs. Further, Cohen testified that he “did not” reach out to Schein or Patterson about Amazon. (Cohen, Tr. 491-492). Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, Amazon is not a buying group. (Cohen, Tr. 834; RX2952 (Mauer, Dep. at 127)). Communications about Amazon do not support Complaint Counsel’s alleged buying group conspiracy, or an inference of such a conspiracy.

Second, Chuck Cohen never contacted Schein or Patterson to discuss any response to Amazon. (Cohen, Tr. 491-92, 834). Complaint Counsel examined Chuck Cohen at trial regarding Amazon. (Cohen, Tr. 490-92). In response to Complaint Counsel’s questioning, Cohen clearly testified that he never contacted Schein or Patterson regarding any joint response to Amazon. (Cohen, Tr. 491-92 (“I did not.”)).

313. Schein and Benco signed a hiring agreement between the two companies. (Sullivan, Tr. 3893; Ryan, Tr. 1054). The hiring agreement between Benco and Schein, signed by Sullivan and Cohen, was in effect for seven years, from March 2009 until it terminated on March 31, 2016. (CX2450 at 001-010; Sullivan, Tr. 3921; Cohen, Tr. 646).

Schein's Response:

The asserted fact constitutes evidence of “other acts” and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. The agreement at issue was entered into as a settlement of ongoing litigation, and was designed to resolve that dispute as well as other related disputes concerning tortious interference, breach of non-compete agreements, misappropriation of trade secrets, and corporate raiding. The agreement facilitated hiring, and thus, was procompetitive. Complaint Counsel has not challenged the legality of the agreement, or established that communications concerning that agreement had anything to do with buying groups. As such, the asserted fact is inadmissible to show a propensity to conspire about buying groups.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, the proposed finding is incorrect on the time period during which the Competitive Hiring Agreement was in place between Benco and Schein. The Competitive Hiring Agreement was formed in connection with the settlement of a 1998 lawsuit between Benco and Schein. (BFF ¶¶ 71-89). The Competitive Hiring Agreement was in place from 1998 until 2016 – 18 years; not 7 years, as the proposed finding incorrectly states. (BFF ¶¶ 71-89).

Second, the Competitive Hiring Agreement was procompetitive. The Competitive Hiring Agreement was integral and essential to Benco's rapid national expansion. Without the Competitive Hiring Agreement, Benco could not have hired experienced sales

employees from Schein and would have had to have grown much more slowly. (Cohen, Tr. 643-644). Due to the Competitive Hiring Agreement, Benco would often hire Schein employees in areas and new markets where Benco was seeking to open or expand. (RX1127-477). The predictability and certainty provided by the Competitive Hiring Agreement, allowed Benco to compete better against Schein, Patterson and other dental distributors. As the primary enabler of Benco's rapid national expansion, the Competitive Hiring Agreement allowed Benco to offer customers greater choice and price competition in new markets against Schein, Patterson and other distributors already entrenched in those markets. (RX1127-478).

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

314. The hiring agreement between Benco and Schein, signed in 2009, placed limitations on the number of certain types of hires that could be made between the companies. (Sullivan, Tr. 3894 (“Q. And does this confirm that the number – the limit on the number of hires between Benco and Schein was three per zone per half a year? A. Yes, it does.”); Ryan, Tr. 1057-1058).

Schein's Response:

There is no evidence that any provision of the agreement actually caused either Benco or Schein to forego hiring any candidates, as would be required of any challenge to the agreement under the rule of reason.⁸

Moreover, the asserted fact constitutes evidence of “other acts” and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Complaint Counsel

⁸ While Complaint Counsel argues that the agreement would be analyzed under the *per se* rule, rather than the rule of reason (*see* CC Br. 27 n.221), that is not an issue the Court must address, as Complaint Counsel did not assert *any* challenge to the agreement. Moreover, Complaint Counsel is simply wrong. This agreement was designed specifically to settle litigation and potential litigation, and thus, the rule of reason applies. *FTC v. Actavis*, 570 U.S. 136 (2013).

has not challenged the legality of the agreement, or established that communications concerning that agreement had anything to do with buying groups. As such, the asserted fact is inadmissible to show a propensity to conspire about buying groups.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, the proposed finding is incorrect on the time period during which the Competitive Hiring Agreement was in place between Benco and Schein. The Competitive Hiring Agreement was formed in connection with the settlement of a 1998 lawsuit between Benco and Schein. (BFF ¶¶ 71-89). The Competitive Hiring Agreement was in place from 1998 until 2016 – 18 years; not 7 years, as the proposed finding incorrectly states. (BFF ¶¶ 71-89).

Second, the Competitive Hiring Agreement was procompetitive. The Competitive Hiring Agreement was integral and essential to Benco's rapid national expansion. Without the Competitive Hiring Agreement, Benco could not have hired experienced sales employees from Schein and would have had to have grown much more slowly. (Cohen, Tr. 643-644). Due to the Competitive Hiring Agreement, Benco would often hire Schein employees in areas and new markets where Benco was seeking to open or expand. (RX1127-477). The predictability and certainty provided by the Competitive Hiring Agreement, allowed Benco to compete better against Schein, Patterson and other dental distributors. As the primary enabler of Benco's rapid national expansion, the Competitive Hiring Agreement allowed Benco to offer customers greater choice and price competition

in new markets against Schein, Patterson and other distributors already entrenched in those markets. (RX1127-478).

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

315. By 2011, Cohen and Sullivan negotiated changes in the hiring agreement between Schein and Benco to increase the length of time of the hiring limitation period to six months. (CX1420 at 001 (November 2011 email from Ryan, “. . . effective immediately 3 hired from HSI per Schein ZONE (map to be provided) every 6 MONTHS”) (emphasis in original); Ryan, Tr. 1057 (“Q. And if I’m understanding you correctly, before November 2011, the time period piece of this [hiring agreement] was shorter than six months. A. That’s my recollection.”)).

Schein’s Response:

The asserted fact constitutes evidence of “other acts” and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Complaint Counsel has not challenged the legality of the agreement, or established that modifications of the agreement had anything to do with buying groups. As such, the asserted fact is inadmissible to show a propensity to conspire about buying groups.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

The terms of the Competitive Hiring Agreement changed over time, leading to frequent negotiations between Chuck Cohen and Tim Sullivan. Chuck Cohen and Tim Sullivan had frequent calls and communications regarding the Competitive Hiring Agreement. (Sullivan, Tr. 4267-68; Ryan, Tr. 1152-53). Chuck Cohen and Tim Sullivan

communicated several times a year regarding discrepancies in the way that the two sides were interpreting the Competitive Hiring Agreement and its application to certain employees or employee groups. (Cohen, Tr. 737).

Chuck Cohen believed it to be one of Benco's highest priorities to maintain the Competitive Hiring Agreement with Schein for as long as possible. (Cohen, Tr. 737). Chuck Cohen was regularly concerned that Schein might terminate the Competitive Hiring Agreement. It was important for Benco to maintain the Competitive Hiring Agreement with Schein. (Cohen, Tr. 736).

Pat Ryan became aware of the existence of the Competitive Hiring Agreement shortly after its formation. In opening new markets for Benco, and leading Benco's hiring of Schein sales employees, Ryan became familiar with the terms of the Competitive Hiring Agreement and its application to Benco's national expansion. (Ryan, Tr. 1148-54).

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

316. Both Cohen and Sullivan enforced the terms of the hiring agreement. For example, Sullivan texted Cohen that "We should chat soon. Rick Rietman makes 4th recent hire in Central Atlantic zone." (CX6027 at 025 (Row 209); Sullivan, Tr. 3893-3894). Cohen responded that he would check on the hiring concern from Sullivan. (CX6027 at 025 (Row 220)). Cohen ultimately informed Sullivan there had been only three hires and the agreement was not violated. (CX6027 at 025 (Row 221); Sullivan, Tr. 3894); *see also* Cohen, Tr., at 737, 747 (maintaining the hiring agreement with Schein was a high priority)).

Schein's Response:

The asserted fact constitutes evidence of "other acts" and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Complaint Counsel has not challenged the legality of the agreement, or established that communications concerning that agreement had anything to do with buying groups. Nor does the enforcement of an

otherwise lawful, or unchallenged, agreement have any relevance to this case. As such, the asserted fact is inadmissible to show a propensity to conspire about buying groups.

Patterson's Response:

The first sentence of this finding is not “supported by specific references to the evidentiary record” in violation of the Court’s February 21, 2019 Order on Post-Trial Briefs. The correct citation for the second sentence in this finding is: (CX6027 at 025 (Row 219)). Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

The terms of the Competitive Hiring Agreement changed over time, leading to frequent negotiations between Chuck Cohen and Tim Sullivan. Chuck Cohen and Tim Sullivan had frequent calls and communications regarding the Competitive Hiring Agreement. (Sullivan, Tr. 4267-68; Ryan, Tr. 1152-53). Chuck Cohen and Tim Sullivan communicated several times a year regarding discrepancies in the way that the two sides were interpreting the Competitive Hiring Agreement and its application to certain employees or employee groups. (Cohen, Tr. 737).

Chuck Cohen believed it to be one of Benco’s highest priorities to maintain the Competitive Hiring Agreement with Schein for as long as possible. (Cohen, Tr. 737). Chuck Cohen was regularly concerned that Schein might terminate the Competitive Hiring Agreement. It was important for Benco to maintain the Competitive Hiring Agreement with Schein. (Cohen, Tr. 736).

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

317. Schein and Benco expanded the hiring agreement by agreeing to apply its limits to a specific employee not covered in the original 2009 contract. (CX6027 at 025 (Row 223); Sullivan, Tr. 3895 (“Q. And Chuck Cohen wrote in that message in row 223, ‘We agreed that [the former Schein employee] would sit even though she didn’t have a contract.’ Do you see that? A. I do. Q. And ‘sit’ there, that refers to this employee not contacting the former Schein customers that she had worked with. A. That’s correct.”)).

Schein’s Response:

The asserted fact mischaracterizes the evidence. There was a dispute under the 2009 agreement about whether the former employee was subject to the cooling-off period (the limited period in which the former employee could be employed, but could not actually call on her former Schein customers). The testimony cited relates to a resolution of that dispute. It does not establish that the 2009 agreement was “expanded.”

Moreover, the asserted fact constitutes evidence of “other acts” and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Complaint Counsel has not challenged the legality of the agreement, or established that communications to resolve disputes about the interpretation or application of that agreement have anything to do with buying groups. As such, the asserted fact is inadmissible to show a propensity to conspire about buying groups.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

The terms of the Competitive Hiring Agreement changed over time, leading to frequent negotiations between Chuck Cohen and Tim Sullivan. Chuck Cohen and Tim

Sullivan had frequent calls and communications regarding the Competitive Hiring Agreement. (Sullivan, Tr. 4267-68; Ryan, Tr. 1152-53). Chuck Cohen and Tim Sullivan communicated several times a year regarding discrepancies in the way that the two sides were interpreting the Competitive Hiring Agreement and its application to certain employees or employee groups. (Cohen, Tr. 737).

Chuck Cohen believed it to be one of Benco's highest priorities to maintain the Competitive Hiring Agreement with Schein for as long as possible. (Cohen, Tr. 737). Chuck Cohen was regularly concerned that Schein might terminate the Competitive Hiring Agreement. It was important for Benco to maintain the Competitive Hiring Agreement with Schein. (Cohen, Tr. 736).

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

318. Patrick Ryan had responsibility for enforcing the hiring agreement between Schein and Benco on behalf of Benco. (Ryan, Tr. 1055-1056). For example, Ryan disseminated information about the 2011 changes in the hiring agreement negotiated by Sullivan and Cohen to other directors at Benco so that they could follow through on the terms of the agreement. (Ryan, Tr. 1054-1057; CX1420 at 001). Chuck Cohen reported his conversations with Tim Sullivan to Patrick Ryan. (Ryan, Tr. 1055; Cohen, Tr. 747).

Schein's Response:

The asserted fact constitutes evidence of "other acts" and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Complaint Counsel has not challenged the legality of the agreement, or established that communications concerning that agreement had anything to do with buying groups. The implementation of a lawful or otherwise unchallenged agreement concerning settlement of hiring disputes has nothing to

do with buying groups. As such, the asserted fact is inadmissible to show a propensity to conspire about buying groups.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the testimony.

The terms of the Competitive Hiring Agreement changed over time, leading to frequent negotiations between Chuck Cohen and Tim Sullivan. Chuck Cohen and Tim Sullivan had frequent calls and communications regarding the Competitive Hiring Agreement. (Sullivan, Tr. 4267-68; Ryan, Tr. 1152-53). Chuck Cohen and Tim Sullivan communicated several times a year regarding discrepancies in the way that the two sides were interpreting the Competitive Hiring Agreement and its application to certain employees or employee groups. (Cohen, Tr. 737).

Chuck Cohen believed it to be one of Benco's highest priorities to maintain the Competitive Hiring Agreement with Schein for as long as possible. (Cohen, Tr. 737). Chuck Cohen was regularly concerned that Schein might terminate the Competitive Hiring Agreement. It was important for Benco to maintain the Competitive Hiring Agreement with Schein. (Cohen, Tr. 736).

Pat Ryan became aware of the existence of the Competitive Hiring Agreement shortly after its formation. In opening new markets for Benco, and leading Benco's hiring of Schein sales employees, Ryan became familiar with the terms of the Competitive Hiring Agreement and its application to Benco's national expansion. (Ryan, Tr. 1148-54).

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

319. Ryan suggested additional changes to the hiring agreement between Schein and Benco, and explicitly asked Cohen to negotiate those changes directly with Sullivan. (Ryan, Tr. 1058-1060; CX1420 at 001 (“I have asked [Cohen] to go back to Tim [Sullivan] and try to eliminate service techs from this, or at the very worst, make it 3 sales, 3 service per zone per 6 months”)).

Schein’s Response:

The asserted fact constitutes evidence of “other acts” and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Complaint Counsel has not challenged the legality of the agreement, or established that communications concerning that agreement had anything to do with buying groups. Internal Benco documents discussing potential modifications of a lawful or otherwise unchallenged agreement concerning settlement of hiring disputes have nothing to do with buying groups. As such, the asserted fact is inadmissible to show a propensity to conspire about buying groups.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

The terms of the Competitive Hiring Agreement changed over time, leading to frequent negotiations between Chuck Cohen and Tim Sullivan. Chuck Cohen and Tim Sullivan had frequent calls and communications regarding the Competitive Hiring Agreement. (Sullivan, Tr. 4267-68; Ryan, Tr. 1152-53). Chuck Cohen and Tim Sullivan communicated several times a year regarding discrepancies in the way that the two sides

were interpreting the Competitive Hiring Agreement and its application to certain employees or employee groups. (Cohen, Tr. 737).

Chuck Cohen believed it to be one of Benco's highest priorities to maintain the Competitive Hiring Agreement with Schein for as long as possible. (Cohen, Tr. 737). Chuck Cohen was regularly concerned that Schein might terminate the Competitive Hiring Agreement. It was important for Benco to maintain the Competitive Hiring Agreement with Schein. (Cohen, Tr. 736).

Pat Ryan became aware of the existence of the Competitive Hiring Agreement shortly after its formation. In opening new markets for Benco, and leading Benco's hiring of Schein sales employees, Ryan became familiar with the terms of the Competitive Hiring Agreement and its application to Benco's national expansion. (Ryan, Tr. 1148-54).

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

320. In 2012, Benco also invited Burkhart to enter a hiring agreement. (Reece, Tr. 4391-4392; CX4263 at 001-007; CX4261 at 001).

Schein's Response:

The asserted fact constitutes evidence of "other acts" and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Complaint Counsel has not challenged the proposed agreement or communications relating to it. Moreover, communications between Benco and Burkhart about a proposed agreement (that was never reached) concerning hiring of employees have nothing to do with buying groups. As such, the asserted fact is inadmissible to show a propensity to conspire about buying groups.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Benco had an initial discussion with Burkhart to explore a potential competitive hiring agreement between the two companies. After reviewing a draft proposed agreement, Burkhart decided that it did not want to pursue a competitive hiring agreement with Benco. (McElaney, Dep. at 165-66).

321. Benco invited Burkhart to sign a hiring, non-solicitation, agreement on "just how we were going to handle these things going forward." (Reece, Tr. 4391-4392; CX4262 at 001-003 ("Proposed Protocol for New Hires"); CX4263 at 001-007 (proposed hiring agreement)). Benco's Mike McElaney informed Burkhart that it had hiring agreements with Patterson and Schein. (Reece, Tr. 4392).

Schein's Response:

The asserted fact constitutes evidence of "other acts" and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Complaint Counsel has not challenged the proposed agreement or communications relating to it. Moreover, communications between Benco and Burkhart about a proposed agreement (that was never reached) concerning hiring of employees have nothing to do with buying groups. As such, the asserted fact is inadmissible to show a propensity to conspire about buying groups.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, Benco had an initial discussion with Burkhart to explore a potential competitive hiring agreement between the two companies. After reviewing a draft proposed agreement, Burkhart decided that it did not want to pursue a competitive hiring agreement with Benco. (McElaney, Dep. at 165-66).

Second, Jeff Reece's testimony has been proven to be unreliable, as it has changed throughout his investigational hearing, his deposition, and trial in this matter, as well as a deposition in another matter. Here, Reece is simply incorrect that Benco and Patterson ever had any competitive hiring agreement. (Cohen, Tr. 637-642, 646 (describing Benco's competitive hiring agreement with Schein)).

322. McElaney reported to Ryan on the status of his attempts to get Burkhart to sign a hiring agreement. (CX0080 at 001 ("FYI, Burkhart may be close to signing the agreement. Have Troy hold off on Lane for another week.")).

Schein's Response:

The asserted fact constitutes evidence of "other acts" and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Complaint Counsel has not challenged the proposed agreement or communications relating to it. Moreover, communications between Benco and Burkhart about a proposed agreement (that was never reached) concerning hiring of employees have nothing to do with buying groups. As such, the asserted fact is inadmissible to show a propensity to conspire about buying groups.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Benco had an initial discussion with Burkhart to explore a potential competitive hiring agreement between the two companies. After reviewing a draft proposed agreement, Burkhart decided that it did not want to pursue a competitive hiring agreement with Benco. (McElaney, Dep. at 165-66).

323. The employment agreement proposed by Benco to Burkhart limited the ability of sales representatives recruited by one company from the other to compete for certain business for a period of time. (CX4263 at 002-007; Reece, Tr. 4392).

Schein's Response:

The asserted fact constitutes evidence of "other acts" and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Complaint Counsel has not challenged the proposed agreement or communications relating to it. Moreover, communications between Benco and Burkhart about a proposed agreement (that was never reached) concerning hiring of employees have nothing to do with buying groups. As such, the asserted fact is inadmissible to show a propensity to conspire about buying groups.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Benco had an initial discussion with Burkhart to explore a potential competitive hiring agreement between the two companies. After reviewing a draft proposed agreement,

Burkhart decided that it did not want to pursue a competitive hiring agreement with Benco. (McElaney, Dep. at 165-66).

324. Burkhart declined Benco's offer to enter into a hiring agreement with Benco. (Reece, Tr. 4392; CX4260 at 001 (Burkhart turned down proposed agreement); CX0303 (McElaney, IHT at 100, 165); *see also* CX4261 (internal Burkhart email raising antitrust concerns about the proposed agreement)).

Schein's Response:

The asserted fact constitutes evidence of "other acts" and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Complaint Counsel has not challenged the proposed agreement or communications relating to it. Moreover, communications between Benco and Burkhart about a proposed agreement (that was never reached) concerning hiring of employees have nothing to do with buying groups. As such, the asserted fact is inadmissible to show a propensity to conspire about buying groups.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, Benco had an initial discussion with Burkhart to explore a potential competitive hiring agreement between the two companies. After reviewing a draft proposed agreement, Burkhart decided that it did not want to pursue a competitive hiring agreement with Benco. (McElaney, Dep. at 165-66).

325. Henry Schein executives suggested entering into agreements with its competitors as a way to solve competitive issues. For example, in 2010, when Schein CEO Stanley Bergman wanted to

relieve pressure from Benco expanding through a “national roleout [*sic*],” he suggested to Schein executives that Schein should be “aggressive” in going after Benco sales representatives. If that didn’t work, “Tim [Sullivan] should call Chuck [Cohen] to tell him ‘we can have a full blown war’ or we can have a ceasefire.” (CX2331 at 001).

Schein’s Response:

False.

Henry Schein executives did not suggest entering into agreements with competitors as a way to solve competitive issues. Nor does the cited document support Complaint Counsel’s characterization.

CX 2331 simply reflects some “brainstorming” about responses to Benco’s plan. There is no evidence of any communications between Schein and Benco related to this email. Nor was there any testimony concerning what Mr. Bergman was suggesting, or what he meant by “full blown war.” Litigation over non-compete, tortious interference, and corporate raiding issues is common. Regardless, Complaint Counsel has not established that any musings about potential communications concerning FSC hiring would be anticompetitive.

Moreover, the asserted fact constitutes evidence of “other acts” and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. Complaint Counsel has not challenged any communications (let alone hypothetical communications, as reflected in CX 2331) concerning hiring practices, nor do any such communications have anything to do with buying groups. As such, the asserted fact is inadmissible to show a propensity to conspire about buying groups.

Patterson’s Response:

Complaint Counsel’s proposed finding is not “supported by specific references to the evidentiary record” in violation of the Court’s February 21, 2019 Order on Post-Trial

Briefs. Otherwise, this proposed finding refers only to an internal Schein email, thus Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Schein e-mail.

326. A Schein executive recommended responding to a competitive threat to distributors by acting jointly with its competing distributors, rather than individually. In an email to other Schein executives, Dave Steck suggested that Schein “get together with a group of other dealers and manufacturers and send [TDA] a petition. A few individual letters have already gone to them.” (CX0179 at 001).

Schein's Response:

Complaint Counsel's quotation from CX 0179 is incomplete and misleading. While Mr. Steck wrote the quoted language, his boss, Mr. Sullivan, immediately rejected the idea: “Don't think we can do the petition idea ... lawyers call that collusion.” (CX 0179-001). To the extent Complaint Counsel seeks to use this email as evidence of a habit, pattern, or practice, it would only evidence Schein's, and Mr. Sullivan's, pattern of studiously avoiding antitrust issues. (SF 1330, 1461-63, 1491-92, 1509, 1565).

Nor is the asserted fact relevant, as Complaint Counsel “do[es] not allege a group boycott of the [TDA] trade show.” (Kahn, Tr. 52). Moreover, the evidence shows that Schein acted unilaterally regarding the TDA trade show. (SF 1557-78).

Patterson's Response:

This finding is not “supported by specific references to the evidentiary record” in violation of the Court's February 21, 2019 Order on Post-Trial Briefs. Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to an internal Schein e-mail.

C. Summary of Communications Between the Big Three Executives.

327. On January 31, 2011 at 23:55 (UTC), Sullivan called Cohen. The call lasted 20 seconds. (CX6027 at 003 (Row35)).

Schein's Response:

The asserted fact is irrelevant and the citation to it in Complaint Counsel's Post-Trial Brief is misleading. Complaint Counsel cites no evidence that would support an inference that the 20-second phone call involved a substantive communication or pertained to buying groups. In fact, Rows 35, 36, 37, 38, and 40 of CX 6027 appear to involve phone/text tag, with all calls under 1 minute. (CX 6027-003). Nor does Complaint Counsel cite any documents leading up to, memorializing, or post-dating the call – or any other evidence – that would bear on the substance or purpose of the call. Complaint Counsel's citation to the call in its Post-Trial Brief as evidence that "Cohen, Guggenheim, and Sullivan ... had opportunities to meet and discuss buying groups" is, therefore, misleading. (See CC Br. 67 & n.548).

Patterson's Response:

No specific response.

Benco's Response:

The vast majority of communications between Chuck Cohen and Tim Sullivan between 2011 and 2016 were about the Competitive Hiring Agreement. (Sullivan, Tr. 4268). Chuck Cohen testified that there were pro-competitive, business reasons for

communicating with Tim Sullivan during this time period. (Cohen, Tr. 735-779). As part of the 1998 settlement of the lawsuit between Benco and Schein, Benco and Schein entered into a Competitive Hiring Agreement that allowed for the orderly movement of sales personnel subject to non-compete agreements without the need for expensive litigation. (Cohen, Tr. 735). Maintaining the Competitive Hiring Agreement over the long-term was critical to Benco's growth and success from 1998 through 2016. (Cohen, Tr. 735). Chuck Cohen unequivocally believes that the Competitive Hiring Agreement benefitted Benco dramatically more than it benefitted Schein. (Cohen, Tr. 735-36). Chuck Cohen was regularly concerned that Schein might terminate the Competitive Hiring Agreement. It was important for Benco to maintain the Competitive Hiring Agreement with Schein. (Cohen, Tr. 736). The terms of the Competitive Hiring Agreement changed over time, leading to frequent negotiations between Chuck Cohen and Tim Sullivan. Chuck Cohen and Tim Sullivan had frequent calls and communications regarding the Competitive Hiring Agreement. (Sullivan, Tr. 4267-68; Ryan, Tr. 1152-53). The Competitive Hiring Agreement required frequent negotiation and regular communications between Benco and Schein. Chuck Cohen and Tim Sullivan were the primary points of contact for the other regarding the Competitive Hiring Agreement. (Cohen, Tr. 736-37; Sullivan, Tr. 4267-68). Chuck Cohen and Tim Sullivan communicated several times a year regarding discrepancies in the way that the two sides were interpreting the Competitive Hiring Agreement and its application to certain employees or employee groups. (Cohen, Tr. 737). Chuck Cohen believed it to be one of Benco's highest priorities to maintain the Competitive Hiring Agreement with Schein for as long as possible. (Cohen, Tr. 737). Chuck Cohen wanted to maintain a positive, professional relationship with Tim Sullivan, including maintaining his

credibility with Tim Sullivan, for purposes of maintaining the Competitive Hiring Agreement with Schein for as long as possible. (Cohen, Tr. 550; 737-38). Because Chuck Cohen was frequently negotiating different issues with Tim Sullivan under the Competitive Hiring Agreement, he believed that it was critical for Tim Sullivan to regard him as honest and able to deliver on his word. If not, Chuck Cohen believes that Tim Sullivan would have cancelled the Competitive Hiring Agreement. (Cohen, Tr. 738).

Mr. Cohen and Mr. Sullivan also frequently discussed charity work. Such discussions are not evidence of an alleged buying group conspiracy—nor do they support any inference of one—yet Complaint Counsel introduced numerous communications related to charitable work and organizations. (Cohen, Tr. 773-774; Sullivan, Tr. 4280; CX6027-010 (“the Sullivan Foundation/DTAF joint scholarship”); CX6027-012 (“DTAF fund”), CX6027-043 (“[Sullivan] family foundation”)). Similarly, banter about sports and jokes cannot support Complaint Counsel alleged conspiracy, or an inference of it. Yet, Complaint Counsel introduced numerous of these communications as well. (CX6027-038 (“Good pick, #2 seed. They’ll have to get past Creighton & McDermott, will be tough.”); CX6027-007 (“I’m going to Yankee Stadium for game 5 tomorrow nite. Go Yanks!”); CX6027-043 (“Weekend lacrosse tourney here at St. Thomas academy...”); CX6027-027 (“Problem with this joke is if Stan says 'Great!' It's a risk...”); CX6027-051 (“Teasing and jokes are always welcome!! :-))”). Complaint Counsel has put forth no evidence that any of the phone calls or communications between Mr. Cohen and Mr. Sullivan contained discussion of a conspiracy to boycott buying groups. Rather, the evidence overwhelmingly demonstrates that nearly all of the communications between Mr. Cohen and Mr. Sullivan were jokes, discussions of sports, or discussions of other topics unrelated to buying groups.

(Sullivan, Tr. 4290-4312). Complaint Counsel has failed to establish that any of Mr. Cohen or Mr. Sullivan's communications with each other related to sports or other non-buying group topics was, in fact, coded discussion of an anti-competitive agreement, despite swearing under penalty of perjury that such communications demonstrated a conspiracy. (Sullivan, Tr. 4307-10).

328. On February 1, 2011 at 00:18 (UTC), Cohen called Sullivan. The call lasted 49 seconds. (CX6027 at 003 (Row37)).

Schein's Response:

The asserted fact is irrelevant and the citation to it in Complaint Counsel's Post-Trial Brief is misleading. Complaint Counsel cites no evidence that would support an inference that the 49-second phone call involved a substantive communication or pertained to buying groups. In fact, Rows 35, 36, 37, 38, and 40 of CX 6027 appear to involve phone/text tag, with all calls under 1 minute. (CX 6027-003). Nor does Complaint Counsel cite any documents leading up to, memorializing, or post-dating the call – or any evidence – that would bear on the substance or purpose of the call. Complaint Counsel's citation to the call in its Post-Trial Brief as evidence that "Cohen, Guggenheim, and Sullivan ... had opportunities to meet and discuss buying groups" is, therefore, misleading. (*See* CC Br. 67 & n.548).

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

329. On February 1, 2011 at 14:14 (UTC), Sullivan called Cohen. The call lasted 35 seconds. (CX6027 at 003 (Row40)).

Schein's Response:

The asserted fact is irrelevant and the citation to it in Complaint Counsel's Post-Trial Brief is misleading. Complaint Counsel cites no evidence that would support an inference that the 35-second phone call involved a substantive communication or pertained to buying groups. In fact, Rows 35, 36, 37, 38, and 40 of CX 6027 appear to involve phone/text tag, with all calls under 1 minute. (CX 6027-003). Nor does Complaint Counsel cite any documents leading up to, memorializing, or post-dating the call – or any evidence – that would bear on the substance or purpose of the call. Complaint Counsel's citation to the call in its Post-Trial Brief as evidence that "Cohen, Guggenheim, and Sullivan ... had opportunities to meet and discuss buying groups" is, therefore, misleading. (*See* CC Br. 67 & n.548).

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

330. On February 1, 2011 at 14:19 (UTC), Cohen called Sullivan. The call lasted 17 minutes 14 seconds. (CX6027 at 003 (Row 39)).

Schein's Response:

The asserted fact is irrelevant and the citation to it in Complaint Counsel's Post-Trial Brief is misleading. Complaint Counsel cites no evidence that would support an

inference that the phone call pertained to buying groups. In fact, Complaint Counsel questioned Mr. Cohen about this call at trial. (Cohen, Tr. 759-60). Mr. Cohen testified:

This conversation was several days before the Super Bowl between the Packers and the Steelers.... He's a Packers fan and I'm a Steelers fan. We made a bet. I lost. I had to wear a Cheesehead in a video. It was not pretty.... Internally I had to show it. That was the bet. I still have it. I'd be happy to produce it for the record -- well, not happy, but I will.

JUDGE CHAPPELL: Is there a leather headband or anything inside that Cheesehead or is it just plastic?

THE WITNESS: I put it out of my memory quickly. It's a big spongy thing, and it didn't fit very well and it was quite embarrassing. I had to wear a poncho kind of thing, too. It was ugly.

JUDGE CHAPPELL: This one that appears to be cheddar cheese orange, yet it has holes in it like Swiss cheese?

THE WITNESS: It's yellow I think and it does have holes like Swiss cheese. Tim sent it to me, and then he wanted the video, and what he did with the video I don't know.

(Cohen, Tr. 759-60).

Nor does Complaint Counsel cite any documents leading up to, memorializing, or post-dating the call – or any other evidence – that would bear on the substance or purpose of the call beyond Mr. Cohen's testimony. Complaint Counsel's citation to the call in its Post-Trial Brief as evidence that "Cohen, Guggenheim, and Sullivan ... had opportunities to meet and discuss buying groups" is, therefore, misleading. (*See* CC Br. 67 & n.548).

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

331. On February 14, 2011 at 20:30 (UTC), Sullivan called Cohen. The call lasted 49 seconds. (CX6027 at 004 (Row50)).

Schein's Response:

The asserted fact is irrelevant and the citation to it in Complaint Counsel's Post-Trial Brief is misleading. Complaint Counsel cites no evidence that would support an inference that the 49-second phone call involved a substantive communication or pertained to buying groups. In fact, Rows 48 through 56 of CX 6027 appear to involve phone/text tag, with all calls under 1 minute. (CX 6027-004). Nor does Complaint Counsel cite any documents leading up to, memorializing, or post-dating the call – or any evidence – that would bear on the substance or purpose of the call. Complaint Counsel's citation to the call in its Post-Trial Brief as evidence that "Cohen, Guggenheim, and Sullivan ... had opportunities to meet and discuss buying groups" is, therefore, misleading. (*See* CC Br. 67 & n.548).

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

332. On February 14, 2011 at 20:43 (UTC), Cohen called Sullivan. The call lasted 31 seconds. (CX6027 at 004 (Row51)).

Schein's Response:

The asserted fact is irrelevant and the citation to it in Complaint Counsel's Post-Trial Brief is misleading. Complaint Counsel cites no evidence that would support an inference that the 49-second phone call involved a substantive communication or pertained to buying groups. In fact, Rows 48 through 56 of CX 6027 appear to involve phone/text tag, with all calls under 1 minute. (CX 6027-004). Nor does Complaint Counsel cite any documents leading up to, memorializing, or post-dating the call – or any evidence – that would bear on the substance or purpose of the call. Complaint Counsel's citation to the call in its Post-Trial Brief as evidence that "Cohen, Guggenheim, and Sullivan ... had opportunities to meet and discuss buying groups" is, therefore, misleading. (*See* CC Br. 67 & n.548).

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

333. On February 14, 2011 at 21:04 (UTC), Sullivan called Cohen. The call lasted 8 seconds. (CX6027 at 004 (Row54)).

Schein's Response:

The asserted fact is irrelevant and the citation to it in Complaint Counsel's Post-Trial Brief is misleading. Complaint Counsel cites no evidence that would support an inference that the 8-second phone call involved a substantive communication or pertained to buying groups. In fact, Rows 48 through 56 of CX 6027 appear to involve phone/text

tag, with all calls under 1 minute. (CX 6027-004). Nor does Complaint Counsel cite any documents leading up to, memorializing, or post-dating the call – or any evidence – that would bear on the substance or purpose of the call. Complaint Counsel’s citation to the call in its Post-Trial Brief as evidence that “Cohen, Guggenheim, and Sullivan ... had opportunities to meet and discuss buying groups” is, therefore, misleading. (See CC Br. 67 & n.548).

Patterson’s Response:

No specific response.

Benco’s Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

334. On February 14, 2011 at 21:23 (UTC), Sullivan called Cohen. The call lasted 18 seconds. (CX6027 at 004 (Row56)).

Schein’s Response:

The asserted fact is irrelevant and the citation to it in Complaint Counsel’s Post-Trial Brief is misleading. Complaint Counsel cites no evidence that would support an inference that the 18-second phone call involved a substantive communication or pertained to buying groups. In fact, Rows 48 through 56 of CX 6027 appear to involve phone/text tag, with all calls under 1 minute. (CX 6027-004). Nor does Complaint Counsel cite any internal documents leading up to, memorializing, or post-dating the call that would bear on the substance or purpose of the call. Complaint Counsel’s citation to the call in its Post-Trial Brief as evidence that “Cohen, Guggenheim, and Sullivan ... had opportunities to meet and discuss buying groups” is, therefore, misleading. (See CC Br. 67 & n.548).

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

335. On October 14, 2011 at 20:34 (UTC), Sullivan called Cohen. The call lasted 21 minutes 30 seconds. (CX6027 at 012 (Row120)).

Schein's Response:

The asserted fact is irrelevant and the citation to it in Complaint Counsel's Post-Trial Brief is misleading. Complaint Counsel cites no evidence that would support an inference that the phone call was related to buying groups. Quite the opposite, Mr. Cohen testified that he did not recall "talking to Mr. Sullivan about buying groups in general in October of 2011." (CX 8015 (Cohen, Dep. at 179)). Complaint Counsel does not cite any internal documents leading up to, memorializing, or post-dating the call that would bear on the substance or purpose of the call.

Testimony and contemporaneous communications indicate that the call was related to Mr. Rotert and a group of Schein employees leaving for Benco and/or philanthropic activities with the DTAF. (Sullivan, Tr. 4270-72; Cohen, Tr. 970; CX 6027-012 (Row 122)) Both Mr. Cohen and Mr. Sullivan testified that the "Rotert issue" – a group of Schein employees moving to Benco over a number of months – began in October 2011 leading to communications between Mr. Sullivan and Mr. Cohen. (Sullivan, Tr. 4270-72 ("Mr. Rotert and his group leaving, was unique under the competitive hiring agreement... idiosyncrasies of California employment law... I think one or two others left with him... then a few

months later, another one and two, and then some service techs... It could have been maybe five or six if you include the service techs, but the service technicians were outside our agreement really...issues regarding the Rotert group joining Benco caus[ed Mr. Sullivan] to have discussions with Mr. Cohen”); Cohen, Tr. 970; *see also* Ryan, Tr. 1174-76).

There is also a text message less than an hour after the call indicating that philanthropic activities were discussed. The text notes Mr. Cohen’s intention to “do[] something similar” to what they had discussed on the call with the DTAF fund. (CX 6027-012 (Row 122) (“Good to talk today, forgot to mention that I talked to Larry this week & he's excited about doing something similar with the DTAF fund”)). Complaint Counsel’s citation to the call in its Post-Trial Brief as evidence that “Cohen, Guggenheim, and Sullivan ... had opportunities to meet and discuss buying groups” is, therefore, misleading. (*See* CC Br. 67 & n.548).

Patterson’s Response:

No specific response.

Benco’s Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

336. On October 14, 2011 at 20:56 (UTC), Sullivan called Cohen. The call lasted 59 seconds. (CX6027 at 012 (Row 121)).

Schein’s Response:

The asserted fact is irrelevant and the citation to it in Complaint Counsel’s Post-Trial Brief is misleading. Complaint Counsel cites no evidence that would support an inference that the 59-second phone call involved a substantive communication or pertained

to buying groups or anything else that is relevant to this matter. Quite the opposite, Mr. Cohen testified that he did not recall “talking to Mr. Sullivan about buying groups in general in October of 2011.” (CX 8015 (Cohen, Dep. at 179)). Complaint Counsel does not cite any internal documents leading up to, memorializing, or post-dating the call that would bear on the substance or purpose of the call. Complaint Counsel’s citation to the call in its Post-Trial Brief as evidence that “Cohen, Guggenheim, and Sullivan ... had opportunities to meet and discuss buying groups” is, therefore, misleading and unfounded. (See CC Br. 67 & n.548).

Patterson’s Response:

No specific response.

Benco’s Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

337. On November 3, 2011 at 20:04 (UTC), Sullivan called Cohen. The call lasted 33 seconds. (CX6027 at 016 (Row 143)).

Schein’s Response:

The asserted fact is irrelevant and its citation in Complaint Counsel’s Post-Trial Brief is misleading. Complaint Counsel cites no evidence that would support an inference that the 33-second phone call involved a substantive communication or pertained to buying groups or anything else that is relevant to this matter. In fact, Rows 122 through 145 of CX 6027 appear to involve phone/text tag, with all calls under 1 minute. Nor does Complaint Counsel cite any internal documents leading up to, memorializing, or post-dating the call that would bear on the substance or purpose of the call. Complaint Counsel’s

citation to the call in its Post-Trial Brief as evidence that “Cohen, Guggenheim, and Sullivan ... had opportunities to meet and discuss buying groups” is, therefore, misleading and unfounded. (*See* CC Br. 67 & n.548).

Patterson’s Response:

No specific response.

Benco’s Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

338. On November 3, 2011 at 20:05 (UTC), Sullivan called Cohen. The call lasted 36 seconds. (CX6027 at 016 (Row 144)).

Schein’s Response:

The asserted fact is irrelevant and the citation to it in Complaint Counsel’s Post-Trial Brief is misleading. Complaint Counsel cites no evidence that would support an inference that the 36-second phone call involved a substantive communication or pertained to buying groups or anything else that is relevant to this matter. In fact, Rows 122 through 145 of CX 6027 appear to involve phone/text tag, with all calls under 1 minute. Nor does Complaint Counsel cite any internal documents leading up to, memorializing, or post-dating the call that would bear on the substance or purpose of the call. Complaint Counsel’s citation of the call in its Post-Trial Brief as evidence that “Cohen, Guggenheim, and Sullivan ... had opportunities to meet and discuss buying groups” is, therefore, misleading and unfounded. (*See* CC Br. 67 & n.548).

Patterson’s Response:

No specific response.

Benco's Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

339. On November 4, 2011 at 21:05 (UTC), Cohen called Sullivan. The call lasted 18 minutes 41 seconds. (CX6027 at 016 (Row 146)).

Schein's Response:

The asserted fact is irrelevant and the citation to it in Complaint Counsel's Post-Trial Brief is misleading. Complaint Counsel ignores internal documents leading up to the call that would bear on the substance or purpose of the call. (RX 2010). RX 2010 is an email exchange between Mr. Sullivan and Mr. Cohen scheduling a call for after 5 pm EST/4 pm CST on November 4, 2011 to discuss Benco "routinely reach[ing] out to [Schein's] reps" through LinkedIn. (RX 2010-002). The call occurred at 5:05 pm EST/4:05 pm CST consistent with the email exchange. (RX 2010; CX 6027-016 (Row 146)). Both Mr. Sullivan and Mr. Cohen testified at trial about the LinkedIn recruitment call. (Cohen, Tr. 762-63; Sullivan, Tr. 4278). Complaint Counsel's citation to the call in its Post-Trial Brief as evidence that "Cohen, Guggenheim, and Sullivan ... had opportunities to meet and discuss buying groups" is, therefore, misleading and contrary to the record evidence. (*See* CC Br. 67 & n.548).

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

340. On November 7, 2011 at 17:29 (UTC), Sullivan called Cohen. The call lasted 31 seconds. (CX6027 at 016 (Row 147)).

Schein's Response:

The asserted fact is irrelevant and the citation to it in Complaint Counsel's Post-Trial Brief is misleading. Complaint Counsel cites no evidence that would support an inference that the 31-second phone call involved a substantive communication or pertained to buying groups or anything else that is relevant to this matter. In fact, Rows 147 through 154 of CX 6027 appear to involve phone/text tag, with all calls under 1 minute. Nor does Complaint Counsel cite any internal documents leading up to, memorializing, or post-dating the call that would bear on the substance or purpose of the call. Complaint Counsel's citation to the call in its Post-Trial Brief as evidence that "Cohen, Guggenheim, and Sullivan ... had opportunities to meet and discuss buying groups" is, therefore, misleading and unfounded. (*See* CC Br. 67 & n.548).

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

341. On November 8, 2011 at 23:37 (UTC), Cohen called Sullivan. The call lasted 13 seconds. (CX6027 at 017 (Row 152)).

Schein's Response:

The asserted fact is irrelevant and the citation to it in Complaint Counsel's Post-Trial Brief is misleading. Complaint Counsel cites no evidence that would support an

inference that the 13-second phone call involved a substantive communication or pertained to buying groups or anything else that is relevant to this matter. In fact, Rows 147 through 154 of CX 6027 appear to involve phone/text tag, with all calls under 1 minute. Nor does Complaint Counsel cite any internal documents leading up to, memorializing, or post-dating the call that would bear on the substance or purpose of the call. Complaint Counsel's citation to the call in its Post-Trial Brief as evidence that "Cohen, Guggenheim, and Sullivan ... had opportunities to meet and discuss buying groups" is, therefore, misleading and unfounded. (*See* CC Br. 67 & n.548).

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

342. On November 8, 2011 at 23:45 (UTC), Sullivan called Cohen. The call lasted 5 minutes 51 seconds. (CX6027 at 017 (Row 155)).

Schein's Response:

The asserted fact is irrelevant and the citation to it in Complaint Counsel's Post-Trial Brief is misleading. Complaint Counsel cites no evidence that would support an inference that the phone call was related to buying groups or anything else that is relevant to this matter. To the contrary, Mr. Cohen testified that the telephone calls, based on the text messages that followed, concerned Benco's hiring of former Schein employees in Fresno, CA generally, and Kent Hayes specifically. (Cohen, Tr. 765). Complaint Counsel does not cite any internal documents leading up to, memorializing, or post-dating the call

that indicate that the call was not related to Kent Hayes and Benco's hiring of former Schein employees in Fresno. Complaint Counsel's citation to the call in its Post-Trial Brief as evidence that "Cohen, Guggenheim, and Sullivan ... had opportunities to meet and discuss buying groups" is, therefore, misleading and contrary to the record evidence. (*See* CC Br. 67 & n.548).

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

343. On November 9, 2011 at 00:02 (UTC), Sullivan called Cohen. The call lasted 4 seconds. (CX6027 at 017 (Row 156)).

Schein's Response:

The asserted fact is irrelevant and the citation to it in Complaint Counsel's Post-Trial Brief is misleading. Complaint Counsel cites no evidence that would support an inference that the 4-second phone call involved a substantive communication or pertained to buying groups or anything else that is relevant to this matter. Nor does Complaint Counsel cite any internal documents leading up to, memorializing, or post-dating the call that would bear on the substance or purpose of the call. Complaint Counsel's citation to the call in its Post-Trial Brief as evidence that "Cohen, Guggenheim, and Sullivan ... had opportunities to meet and discuss buying groups" is, therefore, misleading and unfounded. (*See* CC Br. 67 & n.548).

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

344. On November 9, 2011 at 00:44 (UTC), Sullivan called Cohen. The call lasted 1 minute 16 seconds. (CX6027 at 017 (Row 157)).

Schein's Response:

The asserted fact is irrelevant and the citation to it in Complaint Counsel's Post-Trial Brief is misleading. Complaint Counsel cites no evidence that would support an inference that the 1 minute and a 16-second phone call was related to buying groups or anything else that is relevant to this matter. Mr. Cohen testified that the telephone calls, based on the text messages that followed, concerned Benco's hiring of former Schein employees in Fresno, CA generally, and Kent Hayes specifically. (Cohen, Tr. 765). Complaint Counsel does not cite any internal documents leading up to, memorializing, or post-dating the call that indicate that the call was not related to Kent Hayes and Benco's hiring of former Schein employees in Fresno. Complaint Counsel's citation to the call in its Post-Trial Brief as evidence that "Cohen, Guggenheim, and Sullivan ... had opportunities to meet and discuss buying groups" is, therefore, misleading and contrary to the record evidence. (See CC Br. 67 & n.548).

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

345. In 2011, Sullivan called Cohen at least 16 times. (CX6027 at 003-004, 012, 016-017).

Schein's Response:

The asserted fact is irrelevant and the citation to it in Complaint Counsel's Post-Trial Brief is misleading.

Three of the calls are "0 sec" in duration, and another 11 calls are under 1 minute each. (CX 6027 (0 Sec: Rows 145, 153, 154; Under 1 min: Rows 35, 50, 54, 56, 121, 143, 144, 147, 152, 156)). Complaint Counsel cites no evidence that any of these calls involved any substantive communication, as opposed to phone tag.

Of the three remaining calls, there is no evidence that they pertained to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the calls that would bear on the substance or purpose of the calls. To the contrary, for each of these calls, there is evidence demonstrating that the calls did not relate to buying groups. (SRF 335, 342, 344). Complaint Counsel's citation to these calls in its Post-Trial Brief as evidence that "Cohen, Guggenheim, and Sullivan ... had opportunities to meet and discuss buying groups" is, therefore, misleading and contrary to the record evidence. (*See* CC Br. 67 & n.548).

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

346. In 2011, Cohen called Sullivan at least 7 times. (CX6027 at 003-004, 016-017).

Schein's Response:

The asserted fact is irrelevant and the citation to it in Complaint Counsel's Post-Trial Brief is misleading.

Five of the calls are under 1 minute each. CX 6027 (0 Sec: Rows 36, 55; Under 1 min: Rows 37, 51, 152). Complaint Counsel cites no evidence that any of these calls involved any substantive communication, as opposed to phone tag.

Of the 2 remaining calls, there is no evidence that they pertained to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the call that would bear on the substance or purpose of the calls. To the contrary, for each of these calls there is evidence demonstrating that the calls did not relate to buying groups. (SRF 330, 339). Complaint Counsel's citation to the calls as evidence that "Cohen, Guggenheim, and Sullivan ... had opportunities to meet and discuss buying groups" is, therefore, misleading and contrary to the record evidence. (*See* CC Br. 67 & n.548).

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

347. Between March and December 2011, Cohen and Sullivan called each other at least 13 times. The total duration for the 13 calls shown in CX6027 (Communications Log Summary) between Cohen and Sullivan was 50 minutes and 14 seconds. (CX6027 at 012, 016-017).

Schein's Response:

The asserted fact is irrelevant and the citation to it in Complaint Counsel's Post-Trial Brief is misleading. Only three calls account for 46 minutes and 2 seconds, or 90% of the "50 minutes and 14 seconds" of communication between Mr. Sullivan and Mr. Cohen. (CX 6027-012 (Row 120), -016 (Row 146), -017 (Row 155)). For the first of these calls, Complaint Counsel has no evidence to support a claim that the 21-minute and 30-second call was about buying groups or anything else that is relevant to this matter. Testimony and contemporaneous evidence suggest the call was not related to buying groups but was about Mr. Rotert moving to Benco and/or the DTAF. (*See* SRF 335). The next longest call, 18 minutes and 41 seconds, was a scheduled call between Mr. Sullivan and Mr. Cohen about Benco recruiting Schein sales reps through LinkedIn. (*See* SRF 339). The third call, 5 minutes and 51 seconds long, related to Benco's hiring former Schein Employees in Fresno generally, and Kent Hayes specifically. (*See* SRF 342). For the remaining ten calls, Complaint Counsel cites no evidence that would support an inference that any of the calls involved a substantive communication or pertained to buying groups. Complaint Counsel also fails to cite any internal documents leading up to, memorializing, or post-dating the remaining calls that would bear on their substance or purpose. (*See* CX 6027-017 (Rows 153-54 (0 second duration)), -016 (Row 146 (0 second duration))); SRF 336-38, 340-41, 343, 345-46). Complaint Counsel's citation to the calls in its Post-Trial Brief as evidence that "Cohen, Guggenheim, and Sullivan ... had opportunities to meet and

discuss buying groups” is, therefore, misleading and unfounded. (*See* CC Br. 67 & n.548; *see also* CC Br. 45 & n.387).

Patterson’s Response:

No specific response.

Benco’s Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

348. In 2011, Cohen and Sullivan called each other at least 23 times. The total duration for the 23 calls shown in CX6027 (Communications Log Summary) between Cohen and Sullivan was 1 hour 10 minutes and 58 seconds. (CX6027 at 003-004, 012, 016-017).

Schein’s Response:

The asserted fact is irrelevant and the citation to it in Complaint Counsel’s Post-Trial Brief is misleading. None of the 50 minutes and 14 seconds of calls from March to December 2011 between Cohen and Sullivan are relevant. (*See* SRF 347). The remaining ten calls are from January and February 2011. (CX 6027-003-04). The longest of those calls, 17 minutes and 14 seconds, was about Mr. Cohen making a video while wearing a Wisconsin Cheesehead because of a lost bet. (*See* SRF 330). None of the remaining nine calls exceeded 50 seconds, and Complaint Counsel cites no evidence that would support an inference that any of these calls involved a substantive communication or pertained to buying groups or anything else that is relevant to this matter. Complaint Counsel lacks any citations to any internal documents leading up to, memorializing, or post-dating the remaining calls that would bear on their substance or purpose. (*See* SRF 327, 328, 329, 331-34; CX 6027-003 (Row 36) (0 second duration), -004 (Row 55) (0 second duration)). Complaint Counsel’s citation to the calls in its Post-Trial Brief as evidence that “Cohen,

Guggenheim, and Sullivan ... had opportunities to meet and discuss buying groups” is, therefore, misleading and unfounded. (*See* CC Br. 67 & n. 548, *see also* CC Br. 45 & n.387).

Patterson’s Response:

No specific response.

Benco’s Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

349. Cohen and Sullivan exchanged a total of 89 text messages in 2011. (CX6027 at 003-018).

Schein’s Response:

The asserted fact is irrelevant and the citation to it in Complaint Counsel’s Post-Trial Brief is misleading. There is no evidence that would support an inference that any of the text messages exchanged in 2011 pertained to buying groups or anything else that is relevant to this matter. (CX 6027-003-18). Complaint Counsel does not cite any internal documents leading up to, memorializing, or post-dating the texts that would bear on the substance or purpose of the texts. Complaint Counsel’s citation to the texts in its Post-Trial Brief as evidence that “Cohen, Guggenheim, and Sullivan ... had opportunities to meet and discuss buying groups” is, therefore, misleading and unfounded. (*See* CC Br. 67 & n.548; *see also* CC Br. 45 & n.387).

Patterson’s Response:

No specific response.

Benco's Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

350. Of the 89 text messages exchanged between Cohen and Sullivan in 2011, there are 23 text messages with no content available. (CX6027 at 003-005, 010-011, 014).

Schein's Response:

Schein does not dispute that content is not available for text messages prior to October 2011. Complaint Counsel, however, has not shown that any such messages related to buying groups or anything else that is relevant to this matter, and thus, any inference that buying groups were discussed would be pure speculation. Importantly, Complaint Counsel has not identified any internal documents leading up to, memorializing, or post-dating the texts that would bear on the substance or purpose of the texts. Complaint Counsel's citation to the texts in its Post-Trial Brief as evidence that "Cohen, Guggenheim, and Sullivan ... had opportunities to meet and discuss buying groups" is, therefore, misleading. (*See* CC Br. 67 & n.548; *see also* CC Br. 45 & n.387). Further, the remaining texts with content had nothing to do with buying groups.

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

351. Between 2011 and 2015, Cohen and Sullivan exchanged at least 56 calls and 225 text messages. (CX6027 at 003-057).

Schein's Response:

The asserted fact is irrelevant, and there is no support for Complaint Counsel's requested inference that Mr. Sullivan participated in or "[e]xchanged [a]ssurances" about the alleged conspiracy. (CC Br. 25-26 & n.213; *see also* Attachment A).

As to the phone calls, Complaint Counsel claims only two of them had something to do with the alleged conspiracy. (CC Br. 25 n.213; CCFF 679). The rest are irrelevant; and as to the two, Complaint Counsel is wrong. Schein addresses Complaint Counsel's inaccurate characterizations of those calls in SRF 1032, 1034, 1039-1040, and 1009-1011 and incorporates those responses here.

The text messages speak for themselves. Complaint Counsel claims two of them – both unsolicited texts from Mr. Cohen – related to the alleged conspiracy. (CC Br. 25 n.213; *see also* CCFF 679). The remaining 223 text messages are irrelevant; and as to the two, Complaint Counsel is wrong. Schein addresses each of those texts in SRF 994-1004 and 1061-1071 and incorporates those responses here.

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

352. Between 2011 and 2015, Cohen and Guggenheim exchanged at least 18 calls and 31 text messages. (CX6027 at 003-057).

Schein's Response:

No response.

Patterson's Response:

Complaint Counsel's proposed finding is misleading. Complaint Counsel presented zero evidence that any of the calls or texts had anything to do with buying groups. (CX6027 at 003-057). To the contrary, Complaint Counsel only presented evidence of two inter-firm communications between Patterson and Benco regarding buying groups in the entire case, both of which on their face did not contain a commitment to do anything. The remaining communications cited here are irrelevant to Complaint Counsel's claims.

Benco's Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

353. Tim Sullivan exchanged additional communications with Chuck Cohen, including written notes and voicemail messages, that are not reflected in CX6027. (*See* Sullivan, Tr. 3885 (Sullivan produced all cell phone records; could have called Cohen from a land line); Cohen, Tr. 526 (Cohen sent Sullivan notes by mail from time to time); Sullivan, Tr. 3886 ("Q. And you didn't keep all of the notes that Chuck Cohen sent you over the years, right? A. No.")).

Schein's Response:

The asserted fact is irrelevant and the citation to it in Complaint Counsel's Post-Trial Brief is misleading. As an initial matter, there are no voicemails or notes in evidence. There is also no evidence that would support an inference that any such written notes or voicemail messages pertained to buying groups or anything else that is relevant to this matter. (*See* SRF 354). To the contrary, Mr. Sullivan testified that Mr. Cohen's notes did not relate to business, did not relate to buying groups, and were just personal in nature. (Sullivan, Tr. 4253). Complaint Counsel does not cite any internal documents leading up to, memorializing, or post-dating the alleged notes or messages that would otherwise bear

on their substance or purpose. Complaint Counsel's citation to the "additional communications" in its Post-Trial Brief as evidence that "Cohen, Guggenheim, and Sullivan ... had opportunities to meet and discuss buying groups" is, therefore, misleading and unfounded. (*See* CC Br. 67 & n.548).

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

354. Sullivan produced his cell phone records to the Federal Trade Commission but acknowledged that he could have called Cohen from his office land line. (Sullivan, Tr. 3885).

Schein's Response:

The asserted fact is not supported by the evidence cited, and the citation to it in Complaint Counsel's Post-Trial Brief is misleading. The testimony cited pertains to a specific message left by Mr. Sullivan:

Q. If we can turn to page 44, row 364, do you see your text -- do you see a text message from Chuck Cohen's phone to your mobile phone saying, "Got your message, out with my kid this morning, will call later"? Do you see that?

A. I do...

Q. Do you have any reason to dispute that you left a message for Chuck Cohen around this time?

A. No.

Q. But if you look at the communication log, you'll see that there is no record of an attempted phone call from you to Chuck Cohen, right, around the date of this?

A. I don't see one, no.

Q. And you're aware that you produced your cell phone records to the FTC?

A. Yes.

Q. In addition to your cell phone, you also have an office land line?

A. Yes.

Q. You could have used your office land line to call Chuck Cohen?

A. It's possible, yes.

(Sullivan, Tr. 3884-85).

There is no evidence to support an inference that Mr. Sullivan used his office land line to communicate with Mr. Cohen beyond the voicemail referenced in the text message, and no evidence to suggest that the communication related to buying groups or anything else that is relevant to this matter. Complaint Counsel did not seek phone records from Mr. Sullivan's office land line. Complaint Counsel's use of this fact as "evidence of opportunity to conspire as supportive of an inference of agreement" is, therefore, misleading and unfounded. (CC Br. 25 n.213, 67 n.548).

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco refers the Court to its response to proposed finding ¶ 327.

355. Cohen, Sullivan and Guggenheim saw each other at multiple industry events each year during the conspiracy period. (CCFF ¶¶ 358-380, 384-389; *see also* Cohen, Tr. 595-597 (Guggenheim and Cohen regularly attended the DTA, "it's not that big a meeting" and they typically saw each other); Guggenheim, Tr. 1678-1679 (Guggenheim attended DTA meetings

regularly); CX8023 (Guggenheim, Dep. at 373); CX8015 (Cohen, Dep at 359-360); Sullivan, Tr. 3878 (Sullivan attends the DTA annual meeting every year, and typically sees and would see Cohen at the meeting); Sullivan, Tr. 3879 (Sullivan attended the Chicago Midwinter Meeting and sometimes saw Chuck Cohen there); Sullivan, Tr. 3879-3880 (Sullivan typically attended five to six dental industry conventions each year and “might run into” Chuck Cohen at those meetings)).

Schein’s Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel’s Post-Trial Brief are misleading. There is no evidence that would support an inference that, where Mr. Sullivan and either Mr. Cohen or Mr. Guggenheim attended an industry event, such attendance precipitated a meeting or even a communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would support an inference that any such alleged industry event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the industry events that would bear on the substance or purpose of any alleged event communications. Complaint Counsel’s citations in its Post-Trial Brief to industry event attendance as circumstantial evidence of an agreement require inferences that there were discussions about buying groups at such events, which is nothing more than pure speculation. (See CC Br. 25 & n.213, 27 & n.221, 45 & n.387).

Patterson’s Response:

Patterson joins the responses of Schein and Benco.

Benco’s Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any

communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

356. Cohen, Sullivan, and Guggenheim all registered to attend at least 20 trade shows between 2011 and 2015. (CCFF ¶¶ 358-364, 367-375, 377; Attachment B to Complaint Counsel's Post-Trial Brief).

Schein's Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference that, where Mr. Sullivan and either Mr. Cohen or Mr. Guggenheim registered for an industry event, such registration precipitated attendance, let alone a meeting or communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would support an inference that any such alleged industry event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the industry events that would bear on the substance or purpose of any alleged industry event communications. Complaint Counsel's citations in its Post-Trial Brief to industry event registration as circumstantial evidence of an agreement require inferences that there were discussions about buying groups at such events, which is nothing more than pure speculation. (*See* CC Br. 25 & n.213, 27 & n.221, 45 & n.387).

Patterson's Response:

Patterson joins the responses of Schein and Benco, and notes that Complaint Counsel's proposed finding is also inaccurate: the cited documents show that Cohen, Sullivan, and Guggenheim were registered to attend 18 trade shows between 2011 and

2015. (CCFF ¶¶ 358-364, 367-375, 377; Attachment B to Complaint Counsel’s Post-Trial Brief).

Benco’s Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

357. The executives of Schein, Patterson, and Benco have visited each other at their companies’ corporate offices. (CX1045 (October 2011 email from Chuck Cohen to Rick Cohen “I’ve personally visited both Schein’s & Patterson’s corporate offices” and discussing accommodating Sullivan and Guggenheim visiting Benco)).

Schein’s Response:

Irrelevant, and the cited email does not indicate that Mr. Sullivan, or any Schein executive, visited Benco. (CX 1045-001). In addition, the October 2011 email that references some past visit to Schein does not identify what year, or even what decade, that visit occurred. Complaint Counsel does not contend that there was any substantive communication about buying groups or any other topic at any alleged visit, nor is there evidence indicating any such communication.

Patterson’s Response:

Patterson joins the responses of Schein and Benco and notes that October 2011 is almost a year and a half before Complaint Counsel claims Patterson joined the alleged conspiracy in February 2013. (Compl. ¶ 36). Otherwise, Patterson has no specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

358. In 2011, Cohen, Sullivan, and Guggenheim all registered to attend Chicago Dental Society Midwinter Meeting, held February 24-26, 2011 in Chicago, IL. (CX4360 at 007-013; CX4443-a at 001). Documents show that Sullivan attended the 2011 Chicago Dental Society Midwinter Meeting. (CX6580 at 058, 065-067).

Schein's Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel's Post-Trial Brief are misleading. Complaint Counsel does not cite any evidence that Mr. Cohen or Mr. Guggenheim attended the 2011 Chicago Midwinter Meeting. Nor is there evidence that would support an inference that, where Mr. Sullivan attended and either Mr. Cohen or Mr. Guggenheim registered for an industry event, such attendance precipitated a meeting or communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would support an inference that any such alleged industry event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the industry events that would bear on the substance or purpose of any alleged event communications. Complaint Counsel's citations in its Post-Trial Brief to industry event attendance as circumstantial evidence of an agreement require inferences that there were discussions about buying groups at such

events, which is nothing more than pure speculation. (*See* CC Br. 25 & n.213, 27 & n.221, 45 & n.387).

Patterson's Response:

Patterson has no specific response but notes that the 2011 Chicago Dental Society Midwinter Meeting took place two years before Complaint Counsel alleges Patterson joined the conspiracy in February 2013. (Compl. ¶ 36).

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

359. In 2012, Cohen, Sullivan, and Guggenheim all registered to attend the Chicago Dental Society Midwinter Meeting, held February 23-25, 2012 in Chicago, IL. (CX4360 at 014-020; CX4444-a at 001). Documents show that Sullivan attended the 2012 Chicago Dental Society Midwinter Meeting. (CX6580 at 097-100).

Schein's Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference that, where Mr. Sullivan attended and either Mr. Cohen or Mr. Guggenheim registered for an industry event, such attendance precipitated a meeting or communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would support an inference that any such alleged industry event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to

this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the industry events that would bear on the substance or purpose of any alleged event communications. Complaint Counsel's citations in its Post-Trial Brief to industry event attendance as circumstantial evidence of an agreement, requires inferences that there were discussions about buying groups at such events, which is nothing more than pure speculation. (*See* CC Br. 25 & n.213, 27 & n. 221, 45 & n.387).

Patterson's Response:

Patterson has no specific response but notes that the 2012 Chicago Dental Society Midwinter Meeting took place a year before Complaint Counsel alleges Patterson joined a conspiracy in February 2013. (Compl. ¶ 36).

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

360. In 2013, Cohen, Ryan, Sullivan, Guggenheim, Misiak, and Rogan all registered to attend the Chicago Dental Society Midwinter Meeting, held February 21-23, 2013 in Chicago, IL. (CX4360 at 021-027; CX4445-a at 001). Documents show that Cohen and Sullivan attended the 2013 Chicago Dental Society Midwinter Meeting. (CX1507 at 001-002 (Cohen); CX6580 at 149-156 (Sullivan)).

Schein's Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference that where Mr. Sullivan and either Mr. Cohen or Mr. Guggenheim attended an industry event that such

attendance precipitated a meeting or communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would support an inference that any such alleged industry event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the industry events that would bear on the substance or purpose of any alleged event communications. Complaint Counsel's citations in its Post-Trial Brief to industry event attendance as circumstantial evidence of an agreement, require inferences that there were discussions about buying groups at such events, which is nothing more than pure speculation. (*See* CC Br. 25 & n.213, 27 & n.221, 45 & n.387).

Patterson's Response:

Evidence that individuals from Respondents registered for a trade association meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel failed to provide evidence of any agreement. Otherwise, Patterson has no specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

361. In 2014, Cohen, Sullivan, and Guggenheim all registered to attend the Chicago Dental Society Midwinter Meeting, held February 20-22, 2014 in Chicago, IL. (CX4360 at 028-035;

CX4446-a at 001). Documents show that Cohen and Sullivan attended the 2014 Chicago Dental Society Midwinter Meeting. (CX1060 at 001-002 (Cohen); CX6582 at 002 (Sullivan)).

Schein's Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference that, where Mr. Sullivan and either Mr. Cohen or Mr. Guggenheim attended an industry event, such attendance precipitated a meeting or communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would support an inference that any such alleged industry event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the industry events that would bear on the substance or purpose of any alleged event communications. Complaint Counsel's citations in its Post-Trial Brief to industry event attendance as circumstantial evidence of an agreement, require inferences that there were discussions about buying groups at such events, which is nothing more than pure speculation. (*See* CC Br. 25 & n.213, 27 & n.221, 45 & n.387).

Patterson's Response:

Evidence that individuals from Respondents registered for a trade association meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel failed to provide evidence of any agreement. Otherwise, Patterson has no specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would

attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

362. In 2015, Cohen, Sullivan, and Guggenheim all registered to attend the Chicago Dental Society Midwinter Meeting, held February 26-28, 2015 in Chicago, IL. (CX4360 at 036-042; CX4447-a at 001). Documents show that Cohen and Sullivan attended the 2015 Chicago Dental Society Midwinter Meeting. [REDACTED] CX6582 at 075-076 (Sullivan)).

Schein's Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference that, where Mr. Sullivan and either Mr. Cohen or Mr. Guggenheim attended an industry event, such attendance precipitated a meeting or communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would support an inference that any such alleged industry event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the industry events that would bear on the substance or purpose of any alleged event communications. Complaint Counsel's citations in its Post-Trial Brief to industry event attendance as circumstantial evidence of an agreement require inferences that there were discussions about buying groups at such events, which is nothing more than pure speculation. (*See* CC Br. 25 & n.213, 27 & n. 221, 45 & n.387).

Patterson's Response:

Evidence that individuals from Respondents registered for a trade association meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel

failed to provide evidence of any agreement. Otherwise, Patterson has no specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

363. Cohen, Sullivan, and Guggenheim all registered to attend the Dental Trade Alliance annual meeting, held November 1-3, 2011 in Washington, DC. (CX4373; CX4374 at 001). Documents show that Cohen and Sullivan attended the November 2011 Dental Trade Alliance annual meeting. (CX1420 at 001 (November 2011 email referencing Cohen speaking with Sullivan at DTA meeting); CX1443 at 001-002 (Cohen); CX6580 at 090-091 (Sullivan)).

Schein's Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference that, where Mr. Sullivan and either Mr. Cohen or Mr. Guggenheim attended an industry event, such attendance precipitated a communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim about buying groups. Complaint Counsel cites no evidence that would support an inference that any communication pertained to buying groups or anything else that is relevant to this matter. Complaint Counsel cites to CX 1420 and CX 1443 which clearly indicate that the communication between Mr. Cohen and Mr. Sullivan pertained to the hiring agreement. (CX 1420 ("I just heard from Chuck at the DTA regarding his conversation with Tim Sullivan about changes Tim wanted to the Global."); CX 1443-002 ("Resolved Benco/Schein Global Agreement discussion with Tim Sullivan.")). Complaint

Counsel's citations in its Post-Trial Brief to industry event attendance as circumstantial evidence of an agreement require inferences that there were discussions about buying groups at such events, which is nothing more than pure speculation. (*See* CC Br. 25 & n.213, 27 & n.221, at 45 & n.387).

Patterson's Response:

Evidence that individuals from Respondents registered for a trade association meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel failed to provide evidence of any agreement. Otherwise, Patterson has no specific response. Patterson also notes that the 2011 Dental Trade Alliance meeting took place a year and a half before Complaint Counsel alleges Patterson joined a conspiracy in February 2013. (Compl. ¶ 36). Otherwise, Patterson has no specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

364. Cohen, Sullivan, and Guggenheim all registered to attend the Dental Trade Alliance annual meeting, held October 15-18, 2013 in Ponte Vedra Beach, FL. (CX4378; CX4449-a at 001-008; CX4145 at 002-003; CX4336 at 002). Documents and testimony show that Guggenheim, Cohen and Sullivan attended the October 2013 Dental Trade Alliance annual meeting. (Guggenheim, Tr. 1679; Cohen, Tr. 590-591; Sullivan, Tr. 3878-3879; *see also* CX6581 at 002-003 (Sullivan)).

Schein's Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference that,

where Mr. Sullivan and either Mr. Cohen or Mr. Guggenheim attended an industry event, such attendance precipitated a meeting or communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would support an inference that any such alleged industry event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the industry events that would bear on the substance or purpose of any alleged event communications. Complaint Counsel's citations in its Post-Trial Brief to industry event attendance as circumstantial evidence of an agreement require inferences that there were discussions about buying groups at such events, which is nothing more than pure speculation. (*See* CC Br. 25 & n.213, 27 & n. 221, 45 & n.387).

Patterson's Response:

Evidence that individuals from Respondents registered for a trade association meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel failed to provide evidence of any agreement. Otherwise, Patterson has no specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

365. Benco, Schein, and Patterson are all members of the Dental Trade Alliance. (Cohen, Tr. 595; Guggenheim, Tr. 1678-1679). Cohen “regularly attended the DTA meeting” as did Sullivan and Guggenheim. (Cohen, Tr. 595-596). Cohen reported typically seeing Guggenheim and Sullivan at the DTA annual meeting as “[i]t’s not that big a meeting.” (Cohen, Tr. 596).

Schein’s Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel’s Post-Trial Brief are misleading. There is no evidence that would support an inference that DTA membership or attendance precipitated a communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would support an inference that any such alleged industry event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the industry events that would bear on the substance or purpose of any alleged event communications. Complaint Counsel’s citations in its Post-Trial Brief to industry event attendance as circumstantial evidence of an agreement require inferences that there were discussions about buying groups at such events, which is nothing more than pure speculation. (*See* CC Br. 25 & n.213, 27 & n.221, 45 & n.387).

Patterson’s Response:

Evidence that individuals from Respondents registered for a trade association meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel failed to provide evidence of any agreement. The cited testimony for the second sentence also does not support the assertion that Sullivan and Guggenheim “regularly attended the DTA meeting.” Otherwise, Patterson has no specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

366. Cohen, Guggenheim, and Sullivan all attended the Dental Trade Alliance meeting in October of 2013. (Cohen, Tr. 590-591; Sullivan, Tr. 3878-3879; Guggenheim, Tr. 1678-1679; CX1112 at 028-029 (Answer of Benco ¶59)).

Schein's Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference that DTA membership or attendance precipitated a communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would support an inference that any such alleged industry event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the industry events that would bear on the substance or purpose of any alleged event communications. Complaint Counsel's citations in its Post-Trial Brief to industry event attendance as circumstantial evidence of an agreement require inferences that there were discussions about buying groups at such events, which is nothing more than pure speculation. (*See* CC Br. 25 & n.213, 27 & n.221, 45 & n.387).

Patterson's Response:

Evidence that individuals from Respondents registered for a trade association meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel failed to provide evidence of any agreement. Otherwise, Patterson has no specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

367. Cohen, Sullivan, and Guggenheim all registered to attend the Dental Trade Alliance annual meeting, held November 4-7, 2014 in Indian Wells, CA. (CX4381; CX4382 at 001). Documents show that Sullivan attended the November 2014 Dental Trade Alliance annual meeting. (CX6582 at 056-065 (Sullivan)).

Schein's Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference that DTA membership, registration, or attendance precipitated a communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would support an inference that any such alleged industry event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the industry events that would bear on the substance or

purpose of any alleged event communications. Complaint Counsel's citations in its Post-Trial Brief to industry event attendance as circumstantial evidence of an agreement require inferences that there were discussions about buying groups at such events, which is nothing more than pure speculation. (*See* CC Br. 25 & n.213, 27 & n.221, 45 & n.387).

Patterson's Response:

Evidence that individuals from Respondents registered for a trade association meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel failed to provide evidence of any agreement. Otherwise, Patterson has no specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

368. Cohen, Sullivan, and Guggenheim all registered to attend the Dental Trade Alliance annual meeting, held October 20-23, 2015 in Bonita Springs, FL. (CX4308 at 002-007; CX4386 at 001). Documents show that Cohen and Sullivan attended the October 2015 Dental Trade Alliance annual meeting. (CX1502 at 001-003 (Cohen); CX6582 at 104-105 (Sullivan)).

Schein's Response:

The asserted fact is irrelevant and the citation to it in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference that DTA membership or attendance precipitated a communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would support an

inference that any such alleged industry event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the industry events that would bear on the substance or purpose of any alleged event communications. Complaint Counsel's citations in its Post-Trial Brief to industry event attendance as circumstantial evidence of an agreement require inferences that there were discussions about buying groups at such events, which is nothing more than pure speculation. (*See* CC Br. 25 & n.213, 27 & n.21, 45 & n.387).

Patterson's Response:

Evidence that individuals from Respondents registered for a trade association meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel failed to provide evidence of any agreement. Otherwise, Patterson has no specific response. Patterson also notes that the 2015 Dental Trade Alliance meeting took place five months after the alleged conspiracy ended in April 2015. (Kahn, Tr. 19). Otherwise, Patterson has no specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

369. Cohen, Sullivan, and Guggenheim all registered to attend the Greater New York Dental Meeting held November 23-28, 2012 in New York, NY. (CX4431 at 016; CX4432 at 005; CX4433 at 003; CX1448 at 002; *see also* CX6580 at 132-134, 139 (Sullivan)).

Schein's Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference that registration for an industry event precipitated attendance or a communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would support an inference that any such alleged industry event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the industry events that would bear on the substance or purpose of any alleged event communications. Complaint Counsel's citations in its Post-Trial Brief to industry event registration as circumstantial evidence of an agreement require inferences that there were discussions about buying groups at such events, which is nothing more than pure speculation. (*See* CC Br. 25 & n.213, 27 & n.221, 45 & n.387).

Patterson's Response:

Evidence that individuals from Respondents registered for a trade association meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel failed to provide evidence of any agreement. Otherwise, Patterson has no specific response. Also, none of the cited documents support the dates or location of the meeting. Additionally, the 2012 Greater New York Dental Meeting took place months before Complaint Counsel alleges Patterson joined a conspiracy in February 2013. (Compl. ¶ 36).

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any

communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

370. Cohen, Sullivan, and Guggenheim all registered to attend the Greater New York Dental Meeting held November 29 to December 4, 2013 in New York, NY. (CX4431 at 024; CX4432 at 007; CX4433 at 006; CX4451-a at 001).

Schein's Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference that registration for an industry event precipitated attendance or a communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would support an inference that any such alleged industry event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the industry events that would bear on the substance or purpose of any alleged event communications. Complaint Counsel's citations in its Post-Trial Brief to industry event registration as circumstantial evidence of an agreement require inferences that there were discussions about buying groups at such events, which is nothing more than pure speculation. (*See* CC Br. 25 & n.213, 27 & n.221, 45 & n.387).

Patterson's Response:

Evidence that individuals from Respondents registered for a trade association meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel failed to provide evidence of any agreement. Otherwise, Patterson has no specific response. Otherwise, Patterson has no specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

371. Cohen, Sullivan, and Guggenheim all registered to attend the Greater New York Dental Meeting held November 28 to December 3, 2014 in New York, NY. (CX4431 at 032; CX4432 at 010; CX4433 at 008; CX4452-a at 001). Documents show that Cohen and Sullivan attended the 2014 Greater New York Dental Meeting. (CX1458 at 001-003 (Cohen); CX6582 at 061-065 (Sullivan)).

Schein's Response:

The asserted fact is irrelevant and the citations to it Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference that where Mr. Sullivan and either Mr. Cohen or Mr. Guggenheim attended an industry event that such attendance precipitated a communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would support an inference that any such alleged industry event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the industry events that would bear on the substance or purpose of any alleged event communications. Complaint Counsel's citations in its Post-Trial Brief to industry event attendance as circumstantial evidence of an agreement require inferences that there were discussions about buying groups at such events, which is nothing more than pure speculation. (*See* CC Br. 25 & n.213, 27 & n.221, 45 & n.387).

Patterson's Response:

Evidence that individuals from Respondents registered for a trade association meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel failed to provide evidence of any agreement. Otherwise, Patterson has no specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

372. Cohen, Sullivan, and Guggenheim all registered to attend the Greater New York Dental Meeting held November 27 to December 2, 2015 in New York, NY. (CX4431 at 041; CX4432 at 013; CX4433 at 012; [REDACTED]). Documents show that Sullivan attended the 2015 Greater New York Dental Meeting. (CX6582 at 120-122).

Schein's Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference that, where Mr. Sullivan attended and either Mr. Cohen or Mr. Guggenheim registered for an industry event, such attendance and registration precipitated a communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would support an inference that any such alleged industry event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to,

memorializing, or post-dating the industry events that would bear on the substance or purpose of any alleged event communications. Complaint Counsel's citations in its Post-Trial Brief to industry event registration or attendance as circumstantial evidence of an agreement require inferences that there were discussions about buying groups at such events, which is nothing more than pure speculation. (*See* CC Br. 25 & n.213, 27 & n.221, 45 & n.387).

Patterson's Response:

Evidence that individuals from Respondents registered for a trade association meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel failed to provide evidence of any agreement. Otherwise, Patterson has no specific response. Patterson also notes that the 2015 Greater New York Dental Meeting took place 6 months after Complaint Counsel's alleged conspiracy ended in April 2015. (Kahn, Tr. 19). Otherwise, Patterson has no specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

373. Cohen, Sullivan, and Guggenheim all registered to attend the American Dental Association Annual Session held October 31 to November 3, 2013 in New Orleans, LA. (CX4400; CX4401; CX4402; CX4403 at 001). Documents show that Cohen and Sullivan attended the 2013 American Dental Association Annual Session. (CX1418 at 001 (Cohen); CX6581 at 005-007 (Sullivan)).

Schein's Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference that, where Mr. Sullivan and either Mr. Cohen or Mr. Guggenheim attended an industry event, such attendance precipitated a communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would support an inference that any such alleged industry event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the industry events that would bear on the substance or purpose of any alleged event communications. Complaint Counsel's citations in its Post-Trial Brief to industry event attendance as circumstantial evidence of an agreement require inferences that there were discussions about buying groups at such events, which is nothing more than pure speculation. (See CC Br. 25 & n.213, 27 & n.221, 45 & n.387).

Patterson's Response:

Evidence that individuals from Respondents registered for a trade association meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel failed to provide evidence of any agreement. Otherwise, Patterson has no specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any

communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

374. Cohen, Sullivan, and Guggenheim all registered to attend the American Dental Association Annual Session held October 9-14, 2014 in San Antonio, TX. (CX4404; CX4405; CX4406; CX4407 at 001). Documents show that Cohen and Sullivan attended the 2014 American Dental Association Annual Session. (CX1457 at 001 (Cohen); CX6582 at 053-055 (Sullivan)).

Schein's Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference that, where Mr. Sullivan and either Mr. Cohen or Mr. Guggenheim attended an industry event, such attendance precipitated a communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would support an inference that any such alleged industry event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the industry events that would bear on the substance or purpose of any alleged event communications. Complaint Counsel's citations in its Post-Trial Brief to industry event attendance as circumstantial evidence of an agreement require inferences that there were discussions about buying groups, which is nothing more than pure speculation. (*See* CC Br. 25 & n.213, 27 & n.221, 45 & n.387).

Patterson's Response:

Evidence that individuals from Respondents registered for a trade association meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel

failed to provide evidence of any agreement. Otherwise, Patterson has no specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

375. Cohen, Sullivan, and Guggenheim all registered to attend the American Dental Association Annual Session held November 5-10, 2015 in Washington, DC. (CX4408; CX4409; CX4410; CX4411 at 001). Documents show that Cohen and Sullivan attended the 2015 American Dental Association Annual Session. (CX1499 at 001 (Cohen); CX6582 at 118 (Sullivan)).

Schein's Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference that, where Mr. Sullivan and either Mr. Cohen or Mr. Guggenheim attended an industry event, such attendance precipitated a communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would support an inference that any such alleged industry event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the industry events that would bear on the substance or purpose of any alleged event communications. Complaint Counsel's citations in its Post-Trial Brief to industry event attendance as circumstantial evidence of an agreement require inferences that there were

discussions about buying groups, which is nothing more than pure speculation. (See CC Br. 25 & n.213, 27 & n.221, 45 & n.387).

Patterson's Response:

Evidence that individuals from Respondents registered for a trade association meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel failed to provide evidence of any agreement. Otherwise, Patterson has no specific response. Otherwise, Patterson has no specific response but notes that the 2015 American Dental Association Annual Session also took place 6 months after the alleged conspiracy ended in April 2015. (Kahn, Tr. 19).

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

376. Cohen, Sullivan, and Guggenheim were all scheduled to make presentations at the Dentsply Industry Trade Show held February 8-10, 2012 in Miami, FL. (CX1504 at 001 (email from Cohen forwarding Dentsply email with schedule for presentations by Cohen, Sullivan and Guggenheim)).

Schein's Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference that, where Mr. Sullivan and either Mr. Cohen or Mr. Guggenheim attended an industry event, such attendance precipitated a communication between Mr. Sullivan and Mr. Cohen or Mr.

Guggenheim. Complaint Counsel cites no evidence that would support an inference that any such alleged industry event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the industry events that would bear on the substance or purpose of any alleged event communications. Complaint Counsel's citations in its Post-Trial Brief to industry event attendance as circumstantial evidence of an agreement require inferences that there were discussions about buying groups at such events, which is nothing more than pure speculation. (*See* CC Br. 25 & n.213, 27 & n.221, 45 & n.387).

Patterson's Response:

Evidence that individuals from Respondents registered for a trade association meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel failed to provide evidence of any agreement. Otherwise, Patterson has no specific response. The cited document also indicates that the event was Dentsply's 2012 National Sales Meeting which took place a year before Complaint Counsel alleges Patterson joined a conspiracy in February 2013. (Compl. ¶ 36). Otherwise, Patterson has no specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

377. Cohen, Sullivan, and Guggenheim all registered to attend the Hinman Dental Meeting held March 27-29, 2014 in Atlanta, GA. (CX4423 at 001; CX4426). Documents show that Sullivan attended the 2014 Hinman Dental Meeting. (CX6582 at 009-010)).

Schein's Response:

The asserted fact is irrelevant and its citations in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference that, where Mr. Sullivan attended and either Mr. Cohen or Mr. Guggenheim registered for an industry event, such attendance and registration precipitated a communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would support an inference that any such alleged industry event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the industry events that would bear on the substance or purpose of any alleged event communications. Complaint Counsel's citations in its Post-Trial Brief to industry event attendance as circumstantial evidence of an agreement require inferences that there were discussions about buying groups at such events, which is nothing more than pure speculation. (*See* CC Br. 25 & n.213, 27 & n.221, 45 & n.387).

Patterson's Response:

Evidence that individuals from Respondents registered for a trade association meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel failed to provide evidence of any agreement. Otherwise, Patterson has no specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would

attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

378. Sullivan and Guggenheim registered to attend the California Dental Association meeting in Anaheim, California held May 12-14, 2011. (CX4350 (Registration data for CDA 2011); CX4340 at 001). Expense reports confirm Sullivan's attendance. (CX6580 at 073-077).

Schein's Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference that, where Mr. Sullivan attended and either Mr. Cohen or Mr. Guggenheim registered for an industry event, such attendance and registration precipitated a communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would support an inference that any such alleged industry event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the industry events that would bear on the substance or purpose of any alleged event communications. Complaint Counsel's citations in its Post-Trial Brief to industry event attendance as circumstantial evidence of an agreement require inferences that there were discussions about buying groups at such events, which is nothing more than pure speculation. (*See* CC Br. 25 & n.213, 27 & n.221, 45 & n.387).

Patterson's Response:

Evidence that individuals from Respondents registered for a trade association meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel failed to provide evidence of any agreement. Otherwise, Patterson has no specific

response. Otherwise, Patterson has no specific response but notes that the 2011 California Dental Association meeting took place a year and a half before Patterson allegedly joined a conspiracy in February 2013. (Compl. ¶ 36).

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

379. Cohen and Sullivan participated in the Dental Trade Alliance Foundation Board Meeting held on October 10, 2011 in Las Vegas, NV. (CX1463 at 002 (Cohen weekly report confirming attendance); CX6580 at 082 (Sullivan expense report)).

Schein's Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference that, where Mr. Sullivan and either Mr. Cohen or Mr. Guggenheim attended an industry event, such attendance precipitated a communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would support an inference that any such alleged industry event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the industry events that would bear on the substance or purpose of any alleged event communications. Complaint Counsel's citations in its Post-Trial Brief to industry event attendance as circumstantial evidence of an agreement require inferences that there were

discussions about buying groups at such events, which is nothing more than pure speculation. (See CC Br. 25 & n.213, 27 & n.221, 45 & n.387).

Patterson's Response:

No specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

380. Cohen and Guggenheim registered to attend the American Dental Association Annual Session, held in Las Vegas, NV from October 10-13, 2011. (CX1463 at 002 (Cohen's weekly report confirming attendance); CX4395 (Patterson registration data for ADA 2011); CX4396 (Schein registration data for ADA 2011); CX4398). Sullivan's expense reports show that he also attended the ADA meeting in Las Vegas in October 2011. (CX6580 at 083-084 (Sullivan expense report)).

Schein's Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference that, where Mr. Sullivan and either Mr. Cohen or Mr. Guggenheim attended an industry event, such attendance precipitated a communication between Mr. Sullivan with Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would support an inference that any such alleged industry event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-

dating the industry events that would bear on the substance or purpose of any alleged event communications. Complaint Counsel's citations in its Post-Trial Brief to industry event attendance as circumstantial evidence of an agreement require inferences that there were discussions about buying groups at such events, which is nothing more than pure speculation. (*See* CC Br. 25 & n.213, 27 & n.221, 45 & n.387).

Patterson's Response:

Evidence that individuals from Respondents registered for a trade association meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel failed to provide evidence of any agreement. Patterson also notes the correct citation for the first sentence is: (CX1463 at 2 (Cohen's weekly report confirming attendance); CX4395 (Benco registration data for ADA 2011); CX4396 (Patterson registration data for ADA 2011); CX4398). Additionally, the 2011 American Dental Association Annual Session took place almost a year and a half before Patterson allegedly joined a conspiracy in February 2013. (Compl. ¶ 36). Otherwise, Patterson has no specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

381. On October 12, 2011, Cohen emailed Sullivan's executive assistance, Carol Pampel, that he saw Tim [Sullivan] yesterday at the GC party and that they will meet by phone later in the week. (CX1044 at 001; *see* CX1043 (meeting between Cohen and Sullivan was originally scheduled to be in person)).

Schein's Response:

Ms. Pampel originally scheduled a time for Mr. Cohen and Mr. Sullivan to get coffee the morning of October 12, 2011 before their flights home from an industry meeting they were both attending. (CX 1043). Mr. Cohen, however, cancelled the meeting because he “had to change [his] ticket.” (CX 6027-008). At a GC [manufacturer] event, Mr. Cohen and Mr. Sullivan agreed to talk by phone later in the week. That call occurred on October 14, 2011. (CX 6027-012). As discussed above, testimony and contemporaneous communications indicate that the call was related to Mr. Rotert and a group of Schein employees leaving for Benco, and/or philanthropic activities with the DTAF. (See SRF 335). As such, neither this meeting nor the subsequent call supports an inference that there were discussions about buying groups or anything else that is relevant to this matter. (See CC Br. 25 & n.213, 27 & n.221, 45 & n.387).

Patterson's Response:

No specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

382. In his “weekly update” for November 28, 2011, Cohen wrote: “unrelated meeting, the CEO of Patterson’s dental division [Guggenheim] . . . visited with us in PA last week.” (CX1444 at 002; CX1403 at 002; *see also* CX1045 at 001).

Schein's Response:

No response.

Patterson's Response:

Two of Complaint Counsel's cited documents, CX1444 at 2 and CX1045 at 1, do not support this proposed finding of fact, and the other document refers to an attempt by Patterson to acquire Benco. Cohen wrote: "In a separate & unrelated meeting, the CEO of Patterson's dental division, an old friend, visited with us in PA last week & made a lame attempt to purchase us. His question: 'Have you guys thought about your exit strategy?' The whole conversation reinforced the idea that Patterson is undermanaged." (CX1403 at 2) (emphasis added). Finally, February 23, 2012 is a year before Patterson allegedly joined a conspiracy in February 2013. (Compl. ¶ 36).

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

383. On November 29, 2011 Cohen and Sullivan attended a "Confidential Breakfast" at the home of Schein executive Stan Bergman in New York City. (CX2300 at 001 (appointment confirming Cohen and Sullivan will attend "confidential breakfast" 11/29); CX1444 at 002 (Cohen weekly report "met with Schein senior management"); CX1403 at 002 (Cohen notes November meeting with key Schein leaders to "explore opportunities for us to work together 'quietly'" and noting "Schein has a long history of covertly aligning with (co-opting?) competitors and vendors, either through partnerships or small ownership stakes"); CX0231 at 001 (December 2011 email following up after the meeting between Benco and Schein executives); CX1462 at 001 (email from October 2011 setting the date for the 11/29 breakfast meeting); CX1464 (November 2011 email Cohen confirming meeting and adding his father Larry Cohen to the meeting; *see also* CX1045 at 001).

Schein's Response:

The asserted fact wholly ignores testimony regarding the specific purpose of this meeting, and the reason for the parties' desire to be "confidential" and "quiet." Stan Bergman (Schein's Chairman and CEO), Larry Cohen (Benco founder) and his sons, and other key executives met to discuss a potential merger. (CX 8025 (Sullivan, Dep. at 373-74); RX 1130 (Cohen, Dep. at 164 ("Schein has always been interested in acquiring Benco Dental, all or in part.))); CX 0308 (Mlotek, IHT at 154-55)). It is not unusual for companies to keep merger discussions confidential; particularly when one of the companies is a public company and rumors can cause significant fluctuations in the price of its publicly traded shares. Complaint Counsel presents no evidence that buying groups were discussed at this meeting. Further, CX 0231, CX 1444, and CX 1403 all provide contemporaneous accounts of the meeting indicating Schein's interest in acquiring Benco – none mention buying groups. Therefore, Complaint Counsel's citations to this meeting in its Post-Trial Brief as circumstantial evidence of an agreement to boycott buying groups are misleading and unsupported by the evidence. (*See* CC Br. 25 & n.213, at 45 & n.387).

Patterson's Response:

No specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. Mr. Cohen testified that he would, from time to time, meet Mr. Bergman and Mr. Sullivan at Mr. Bergman's apartment to discuss potential business deals, including joint ventures between the companies. (Cohen, Tr. 893, 895-96). Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

384. Cohen and Guggenheim registered for the California Dental Association meeting held in Anaheim, CA on May 3-5, 2012. (CX4353 (Registration data for CDA 2012 Annual Meeting); CX1441 at 001 (Cohen May 6 Weekly Report confirming attendance at CDA); CX4342 at 001).

Schein's Response:

No response.

Patterson's Response:

Evidence that individuals from Respondents registered for a trade association meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel failed to provide evidence of any agreement. Otherwise, Patterson has no specific response but notes that the 2012 California Dental Association meeting occurred more than 6 months before Patterson allegedly joined a conspiracy in February 2013. (Compl. ¶ 36).

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

385. Cohen and Sullivan registered to attend the Dental Trade Alliance Annual Meeting held in Napa, CA on October 30 to November 2, 2012 and documents confirm their attendance. (CX4304 at 006-007 (Sullivan and Cohen registrations reflected in DTA program); CX1440 at 002 (Cohen weekly report confirming attendance at DTA 2012); CX6580 at 124-129 (Sullivan expense report for attendance at DTA, Napa 2012); CX4375 (Registration data for DTA 2012)).

Schein's Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference of any

communication between or among Mr. Sullivan, Mr. Cohen, and/or Mr. Guggenheim, or that any such discussions – if they occurred – pertained to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the events that would bear on the substance or purpose of any industry event communications. Complaint Counsel’s citations in its Post-Trial Brief to industry event attendance as circumstantial evidence of an agreement to boycott buying groups are therefore misleading and unsupported. (*See* CC Br. 67 & n.549, Attachment B).

Patterson’s Response:

No specific response.

Benco’s Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

386. Cohen and Sullivan attended the Dental Trade Alliance CRET breakfast meeting in Napa, CA on November 2, 2012. (CX1440 at 002 (Cohen weekly report confirming meeting with DTA leadership on CRET); CX3450 at 001 (email from Cohen to Sullivan and others coordinating breakfast meeting at DTA)).

Schein’s Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel’s Post-Trial Brief are misleading. There is no evidence that would support an inference of any communication between or among Mr. Sullivan, Mr. Cohen, and/or Mr. Guggenheim, or

that any such discussions – if they occurred – pertained to buying groups or anything else that is relevant to this matter. To the contrary, Mr. Cohen’s weekly report makes no indication that he spoke with Mr. Sullivan. (CX 1440). Complaint Counsel’s citations to industry event attendance in its Post-Trial Brief as circumstantial evidence of an agreement to boycott buying groups are therefore misleading and unsupported. (See CC Br. 67 & n.549, Attachment B).

Patterson’s Response:

No specific response.

Benco’s Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

387. Cohen and Sullivan attended the Hinman Dental Meeting, including a team dinner, held in Atlanta, GA on March 21-23, 2013. (CX1422 at 002 (Cohen weekly report confirming attendance); CX6580 at 149-156 (Sullivan expense report)).

Schein’s Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel’s Post-Trial Brief are misleading. There is no evidence that would support an inference of any communication between or among Mr. Sullivan, Mr. Cohen, and/or Mr. Guggenheim, or that any such discussions – if they occurred – pertained to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the events that would bear on the substance or

purpose of any industry event communications. To the contrary, Mr. Cohen's weekly report makes no indication that he spoke with Mr. Sullivan. (CX 1422). Complaint Counsel's citations to industry event attendance in its Post-Trial Brief as circumstantial evidence of an agreement to boycott buying groups are therefore misleading and unsupported. (*See* CC Br. 67 & n.549, Attachment B).

Patterson's Response:

No specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

388. Cohen and Guggenheim registered to attend the California Dental Association meeting in Anaheim, CA held April 11-13, 2013 and documents confirm Cohen's attendance. (CX4351 (Registration data for CDA 2013); CX4343 at 001; CX1423 at 002 (Cohen weekly report confirms attendance)).

Schein's Response:

No response.

Patterson's Response:

Evidence that individuals from Respondents registered for a trade association meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel failed to provide evidence of any agreement. Otherwise, Patterson has no specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

389. Sullivan and Guggenheim registered for the California Dental Association meeting held in Anaheim, CA on May 15-17, 2014 and documents confirm Sullivan attended. (CX4352; CX6582 at 020-023 (Sullivan expense reports); CX4345 at 001).

Schein's Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference of any communication between or among Mr. Sullivan, Mr. Cohen, and/or Mr. Guggenheim, or that any such discussions – if they occurred – pertained to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the events that would bear on the substance or purpose of any industry event communications. Complaint Counsel's citations to industry event attendance in its Post-Trial Brief as circumstantial evidence of an agreement to boycott buying groups are therefore misleading and unsupported. (*See* CC Br. 67 & n.549, Attachment B).

Patterson's Response:

Evidence that individuals from Respondents registered for a trade association meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel

failed to provide evidence of any agreement. Otherwise, Patterson has no specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

390. Sullivan and Guggenheim registered to attend the California Dental Association meeting in San Francisco, CA on September 4-6, 2014. (CX4356; CX4346 at 001).

Schein's Response:

The asserted fact is irrelevant and the citations to it in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference of any communication between or among Mr. Sullivan, Mr. Cohen, and/or Mr. Guggenheim, or that any such discussions – if they occurred – pertained to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the events that would bear on the substance or purpose of any industry event communications. Complaint Counsel's citations to industry event attendance in its Post-Trial Brief as circumstantial evidence of an agreement to boycott buying groups are therefore misleading and unsupported. (*See* CC Br. 67 & n.549, Attachment B).

Patterson's Response:

No specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

391. Cohen and Guggenheim arranged a lunch meeting on December 2, 2014. (CX1458 at 001 (Cohen Weekly Report December 6, 2014 confirming he met with Guggenheim); CX1349 at 001; CX1348 at 001).

Schein's Response:

No response.

Patterson's Response:

Evidence that individuals from Respondents arranged a lunch meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel not only failed to provide evidence of any agreement, but it also failed to produce any evidence of improper communications at any industry association event. Moreover, there are a variety of legitimate business topics that individuals from Respondents could have discussed, including potential acquisition or merger opportunities. (Cohen, Tr. 756; see also Cohen, Tr. 835 (there is a “business justification” for Benco “keeping open the dialogue with Schein and Patterson about an acquisition”). Otherwise, Patterson has no specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. Complaint Counsel has failed to provide evidence that any

communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

392. Cohen and Guggenheim met during the week of March 9, 2015. (CX1117 at 001 (Cohen Weekly Report for March 9-15, 2015 reporting meeting with Guggenheim to discuss supply chain initiative)).

Schein's Response:

No response.

Patterson's Response:

Cohen's weekly report states: "Meeting with Scott Anderson and Paul Guggenheim of Patterson, discussed their new 'secure supply chain' initiative." (CX1117 at 1). Evidence that individuals from Respondents met to discuss other legitimate business topics is not evidence of an agreement to boycott buying groups. Complaint Counsel failed to provide evidence of any agreement. Otherwise, Patterson has no specific respons.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

393. Cohen and Guggenheim registered to attend the California Dental Association meeting held in Anaheim, CA on April 30 to May 2, 2015. (CX4354; CX4347 at 001).

Schein's Response:

No response.

Patterson's Response:

Evidence that individuals from Respondents registered for a trade association meeting is not evidence of an agreement to boycott buying groups. Complaint Counsel failed to provide evidence of any agreement. Otherwise, Patterson has no specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups.

VII. BENCO WAS FIRST TO ADOPT A NO BUYING GROUP POLICY.

394. Benco had a longstanding no buying group policy, which it instituted when buying groups were merely a nascent customer segment. (See CCFF ¶¶ 132, 395).

Schein's Response:

Schein agrees that Benco's "policy has been unchanged since 1996." (CX 0301 (Cohen, IHT at 290)). Benco described its policy as a no-middleman policy, and its approach to buying groups is a manifestation of that policy. (Cohen, Tr. 863).

However, Complaint Counsel's claim that in 1996 "buying groups were merely a nascent customer segment" lacks support. Complaint Counsel does not cite to any evidence concerning the existence or prevalence of buying groups in 1996.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding.

Benco has a policy, going back to mid-1990's that it does not recognize or work with middlemen that come between it and its customers. Among the middlemen that Benco does not recognize or work with are buying groups. (Cohen, Tr. 445). Before groups of independent dentists started to approach Benco, other companies, such as dental insurance companies and dental laboratories, would call and ask if Benco would offer a discount on supplies to dental practices that accepted their insurance or used their laboratory services. Benco would decline, because it did not put anyone between Benco and its customer. (Cohen, Tr. 693-694; RX1127-486).

The policy determines who Benco considers its customer and which entities Benco will sell to as a single customer. It is important for Benco to determine who the customer is because Benco's belief is that no one should come between Benco and its customers. (Cohen, Tr. 679). Benco considers buying groups to be middlemen between Benco and its customers, and therefore, pursuant to its policy, it has turned down opportunities to recognize buying groups as a single customer. (Cohen, Tr. 446).

Benco concluded that buying groups were inconsistent with Benco's value proposition and its business model. (BFF ¶¶ 903-928). Benco's business strategy is that it does not participate in buying groups. Benco believes its business strategy is in its own unilateral economic interest. (Ryan, Tr. 1216-17).

Benco's business strategy not to participate in buying groups has been consistent from 1996 to present, including before, during, and after the alleged conspiracy period. (BFF ¶¶ 1285-91).

395. Starting in the mid-1990s, Benco had a policy of not recognizing or selling to buying groups. (Cohen, Tr. 444-445; Ryan, Tr. 1027-1028; *see also* CX8015 (Cohen, Dep. at 138)).

Schein's Response:

Schein agrees that Benco's "policy has been unchanged since 1996." (CX 0301 (Cohen, IHT at 290)). Benco described its policy as a no-middleman policy, and its approach to buying groups is a manifestation of that policy. (Cohen, Tr. 863).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Benco has a policy, going back to mid-1990's that it does not recognize or work with middlemen that come between it and its customers. Among the middlemen that Benco does not recognize or work with are buying groups. (Cohen, Tr. 445). Before groups of independent dentists started to approach Benco, other companies, such as dental insurance companies and dental laboratories, would call and ask if Benco would offer a discount on supplies to dental practices that accepted their insurance or used their laboratory services. Benco would decline, because it did not put anyone between Benco and its customer. (Cohen, Tr. 693-694; RX1127-486).

The policy determines who Benco considers its customer and which entities Benco will sell to as a single customer. It is important for Benco to determine who the customer is because Benco's belief is that no one should come between Benco and its customers. (Cohen, Tr. 679). Benco considers buying groups to be middlemen between Benco and its customers, and therefore, pursuant to its policy, it has turned down opportunities to recognize buying groups as a single customer. (Cohen, Tr. 446).

Benco concluded that buying groups were inconsistent with Benco's value proposition and its business model. (BFF ¶¶ 903-928). Benco's business strategy is that it does not participate in buying groups. Benco believes its business strategy is in its own unilateral economic interest. (Ryan, Tr. 1216-17).

Benco's business strategy not to participate in buying groups has been consistent from 1996 to present, including before, during, and after the alleged conspiracy period. (BFF ¶¶ 1285-91).

396. Benco's no buying group policy applied to all buying groups, regardless of the services the group provided. (CX1372 at 002 (Statement of Cohen: "Benco does NOT currently recognize as a single customer . . . Any kind of GPO whether they provide additional services or not.") (emphasis in original); Ryan, Tr. 1029 (Q. And it is fair to say that once you found out a group was a buying group, the answer was no from Benco, meaning no, Benco wouldn't work with them? A. Correct. We would tell them what our policy is and move on."))).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Benco has a policy, going back to mid-1990's that it does not recognize or work with middlemen that come between it and its customers. Among the middlemen that Benco does not recognize or work with are buying groups. (Cohen, Tr. 445). Before groups of independent dentists started to approach Benco, other companies, such as dental insurance companies and dental laboratories, would call and ask if Benco would offer a discount on supplies to dental practices that accepted their insurance or used their laboratory services. Benco would decline, because it did not put anyone between Benco and its customer. (Cohen, Tr. 693-694; RX1127-486).

The policy determines who Benco considers its customer and which entities Benco will sell to as a single customer. It is important for Benco to determine who the customer is because Benco's belief is that no one should come between Benco and its customers. (Cohen, Tr. 679). Benco considers buying groups to be middlemen between Benco and its customers, and therefore, pursuant to its policy, it has turned down opportunities to recognize buying groups as a single customer. (Cohen, Tr. 446).

Benco concluded that buying groups were inconsistent with Benco's value proposition and its business model. (BFF ¶¶ 903-928). Benco's business strategy is that it does not participate in buying groups. Benco believes its business strategy is in its own unilateral economic interest. (Ryan, Tr. 1216-17).

Benco's business strategy not to participate in buying groups has been consistent from 1996 to present, including before, during, and after the alleged conspiracy period. (BFF ¶¶ 1285-91).

397. Benco always had the ability to sell to buying groups. (Ryan, Tr. 1031).

Schein's Response:

The asserted fact is vague. Otherwise, no response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Benco concluded that buying groups were inconsistent with Benco's value proposition and its business model. (BFF ¶¶ 903-928).

Benco believed that buying groups interfered with Benco's relations with its individual dentist customers. (Cohen, Tr. 444-45). Buying groups did nothing to permit Benco to reduce its costs to serve buying group members. (Ryan, Tr. 1082; J. Johnson, Tr. 4836-4837; RX2834 at 35, ¶ 55). Benco believed that buying groups could not ensure compliance by their members. (Ryan, Tr. 1166-67, 1179-80; J. Johnson, Tr. 4834-4835). Buying groups could not guarantee that their members would change their purchasing behavior. (Ryan, Tr. 1166-67, 1179-80; Meadows, Tr. 2491-92; J. Johnson, Tr. 4834-4835; see also RX2832 at 41-42, ¶ 59; RX2833 at 21-22, ¶ 39). Buying groups could not guarantee that their members would buy any particular volume of products from Benco. (Ryan, Tr. 1166-67, 1179-80; Meadows, Tr. 2491-92; J. Johnson, Tr. 4834-4835; see also RX2832 at 41-42, ¶ 59; RX2833 at 21-22, ¶ 39).

Benco concluded that buying groups demanded lower prices but gave nothing in return. (Cohen, Tr. 685; J. Johnson, Tr. 4834-4835; J. Johnson, Tr. 4836-4837). Without

the ability to achieve cost savings, it wouldn't make business sense to offer discounts to a buying group. (Cohen, Tr. 685; J. Johnson, Tr. 4836-4837; RX2834 at 35, ¶ 55; RX2833 at 24, ¶ 45).

Benco acted consistently with its unilateral economic self-interest by pursuing its existing strategy and its own business opportunities rather than offering discounts to buying groups. (BFF ¶¶ 1186-93).

398. Cohen relied on Patrick Ryan to disseminate Benco's no buying group policy. (Cohen, Tr. 515).

Schein's Response:

The asserted fact is not supported by the evidence. The cited testimony does not establish that Mr. Cohen relied on Mr. Ryan to disseminate Benco's no-buying-group policy. The testimony relates to Mr. Cohen requesting that Mr. Ryan ask Mr. McElaney to set aside time to review the document that Mr. Ryan and Mr. Cohen drafted. (Cohen, Tr. 514-15). This hardly establishes a protocol in which Mr. Ryan was responsible for disseminating information about the policy.

Patterson's Response:

Complaint Counsel's proposed finding is not supported by anything in the record.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Nowhere in the cited testimony does Chuck Cohen testify that he "relied on Patrick Ryan to disseminate Benco's no buying group policy." (Cohen, Tr. 515). Cohen's testimony is actually describing an exhibit. (Cohen, Tr. 515; CX1051). In particular,

Complaint Counsel directed Cohen's attention to the second sentence of CX1051. First, that sentence is not discussing Benco's policy, but rather ensuring that Benco's sales management team "understands the difference between a Buying Group & an LG [Large Group or DSO]." (CX1051). Second, the sentence is asking Mike McElaney – not Pat Ryan – to review the above issue with Benco's sales management team. (CX1051).

Complaint Counsel's casual misstatement and distortion of the evidentiary record is endemic of their entire case.

399. Benco's no buying group policy was "always communicated" to the sales team, as well as "up and down the company." (Ryan, Tr. 1031-1032; CX1146 (Ryan explaining no buying group policy to regional managers); CX8037 (Ryan, Dep. at 46-50); *see also* CX0090 at 001 (Statement of Cohen to Guggenheim: "Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups . . . and our team understands that policy.")).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Benco has a policy, going back to mid-1990's that it does not recognize or work with middlemen that come between it and its customers. Among the middlemen that Benco does not recognize or work with are buying groups. (Cohen, Tr. 445). Before groups of independent dentists started to approach Benco, other companies, such as dental insurance companies and dental laboratories, would call and ask if Benco would offer a discount on supplies to dental practices that accepted their insurance or used their laboratory services.

Benco would decline, because it did not put anyone between Benco and its customer. (Cohen, Tr. 693-694; RX1127-486).

The policy determines who Benco considers its customer and which entities Benco will sell to as a single customer. It is important for Benco to determine who the customer is because Benco's belief is that no one should come between Benco and its customers. (Cohen, Tr. 679). Benco considers buying groups to be middlemen between Benco and its customers, and therefore, pursuant to its policy, it has turned down opportunities to recognize buying groups as a single customer. (Cohen, Tr. 446).

Benco concluded that buying groups were inconsistent with Benco's value proposition and its business model. (BFF ¶¶ 903-928). Benco's business strategy is that it does not participate in buying groups. Benco believes its business strategy is in its own unilateral economic interest. (Ryan, Tr. 1216-17).

Benco's business strategy not to participate in buying groups has been consistent from 1996 to present, including before, during, and after the alleged conspiracy period. (BFF ¶¶ 1285-91).

400. Ryan and Cohen were the decision makers about buying groups at Benco. (Cohen, Tr. 717-718, 810).

Schein's Response:

Inaccurate. There is nothing in the record to suggest that Mr. Ryan had the authority to approve a buying group. CCFF 400 also conflicts with CCFF 406, which asserts that Benco's sales team turned down buying groups without informing Mr. Ryan or Mr. Cohen.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, Benco has a policy, going back to mid-1990's that it does not recognize or work with middlemen that come between it and its customers. Among the middlemen that Benco does not recognize or work with are buying groups. (Cohen, Tr. 445). Any "decision" that Benco made with respect to its policy had been made by the company over two decades ago.

Second, the challenge for Benco in applying its policy is determining the ownership and control structure of purported groups that approach Benco seeking a discount. (Ryan, Tr. 717-18).

Third, when a group approaches Benco, Pat Ryan will discuss with the group its ownership structure. In addition to gathering information directly from the group, Pat Ryan would look at the group's website, talk to other Benco sales employees, and conduct other independent research on the group's ownership structure. (Ryan, Tr. 1167). The name of the group or what it may call itself does not impact Benco's evaluation of the group's ownership structure and application of Benco's policy. (Ryan, Tr. 1168-69). In some instances, Benco would ask for documentation or visit some of the locations to verify information the group provided. (Cohen, Tr. 681-682).

Fourth, it is sometimes very difficult to figure out what kind of group it is, because there are a lot of different forms a group may take when aggregating dental practices. (Cohen, Tr. 682). Ultimately, Chuck Cohen has final authority over application of Benco's policy. (Cohen, Tr. 693, 819-821)

401. Cohen was “adamantly against” and “extremely opposed” to buying groups and felt strongly about Benco’s no buying group policy. (CX1234 at 001 (Statement of Don Taylor (Benco Regional Manager): “Chuck Cohen is adamantly against buying groups. He will not let us participate because he doesn’t think everyone should get the same price. It’s one of the only times I have seen him really get fired up.”); CX1040 at 001 (Statement of Mark Rowe (Benco Director of Sales): “Chuck has always been extremely opposed to any hint of a buying group.”); Ryan, Tr. 1031 at 001 (Cohen felt strongly about Benco’s no buying group policy); *see also* CX8037 (Ryan, Dep. at 42-43); CX1048 at 001 (Statement of Mike McElaney (Benco Director of Sales, Northeast): “I spoke with Chuck over the weekend and he fells [sic] this is a buying group which he opposes.”)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Benco has a policy, going back to mid-1990’s that it does not recognize or work with middlemen that come between it and its customers. Among the middlemen that Benco does not recognize or work with are buying groups. (Cohen, Tr. 445). The policy was based upon Cohen’s own experience as a territory representative at Benco and his vision of the kind of company that he wanted Benco to be. (Cohen, Tr. 694:3-15).

The rationale for Benco’s policy is that where Benco can be assured that compliance will happen, Benco can lower its costs to serve and lower pricing to the customer without anyone coming between Benco and the customer. (Cohen, Tr. 692; Ryan, Tr. 1166-67). Benco concluded that buying groups demanded lower prices but gave nothing in return. (Cohen, Tr. 685; J. Johnson, Tr. 4834-4835; J. Johnson, Tr. 4836-4837). Without the ability to achieve cost savings, it wouldn’t make business sense to offer

discounts to a buying group. (Cohen, Tr. 685; J. Johnson, Tr. 4836-4837; RX2834 at 35, ¶ 55; RX2833 at 24, ¶ 45).

Benco concluded that buying groups were inconsistent with Benco's value proposition and its business model. (BFF ¶¶ 903-928). Benco's business strategy is that it does not participate in buying groups. Benco believes its business strategy is in its own unilateral economic interest. (Ryan, Tr. 1216-17). Benco's business strategy not to participate in buying groups has been consistent from 1996 to present, including before, during, and after the alleged conspiracy period. (BFF ¶¶ 1285-91).

402. Ryan was in charge of enforcing Benco's no buying group policy. (Ryan, Tr. 1025; *see also* Cohen, Tr. 472-473).

Schein's Response:

Benco has a no-buying-group policy. It is not clear what the term "enforce" means, other than that Mr. Ryan sometimes fielded questions about it.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

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

Second, the challenge for Benco in applying its policy is determining the ownership and control structure of purported groups that approach Benco seeking a discount. (Ryan, Tr. 717-18).

Third, when a group approaches Benco, Pat Ryan will discuss with the group its ownership structure. In addition to gathering information directly from the group, Pat Ryan would look at the group's website, talk to other Benco sales employees, and conduct other independent research on the group's ownership structure. (Ryan, Tr. 1167). The name of the group or what it may call itself does not impact Benco's evaluation of the group's ownership structure and application of Benco's policy. (Ryan, Tr. 1168-69). In some instances, Benco would ask for documentation or visit some of the locations to verify information the group provided. (Cohen, Tr. 681-682).

Fourth, it is sometimes very difficult to figure out what kind of group it is, because there are a lot of different forms a group may take when aggregating dental practices. (Cohen, Tr. 682). Ultimately, Chuck Cohen has final authority over application of Benco's policy. (Cohen, Tr. 693, 819-821).

403. Cohen explained that buying group "requests would all be routed to Ryan." (Cohen, Tr. 810).

Schein's Response:

Schein does not dispute that Mr. Ryan sometimes fielded questions about buying groups at Benco. Not all requests, however, went through Mr. Ryan. Mr. Cohen also turned down buying group requests, such as those from Smile Source and Kois Buyers Group. (CX 0301 (Cohen, IHT at 122); RX 1039).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

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

Second, the challenge for Benco in applying its policy is determining the ownership and control structure of purported groups that approach Benco seeking a discount. (Ryan, Tr. 717-18).

Third, when a group approaches Benco, Pat Ryan will discuss with the group its ownership structure. In addition to gathering information directly from the group, Pat Ryan would look at the group's website, talk to other Benco sales employees, and conduct other independent research on the group's ownership structure. (Ryan, Tr. 1167). The name of the group or what it may call itself does not impact Benco's evaluation of the group's ownership structure and application of Benco's policy. (Ryan, Tr. 1168-69). In some instances, Benco would ask for documentation or visit some of the locations to verify information the group provided. (Cohen, Tr. 681-682).

Fourth, it is sometimes very difficult to figure out what kind of group it is, because there are a lot of different forms a group may take when aggregating dental practices. (Cohen, Tr. 682). Ultimately, Chuck Cohen has final authority over application of Benco's policy. (Cohen, Tr. 693, 819-821).

404. Benco rejected buying groups that approached it seeking discounts. (Cohen, Tr. 446; CX1120 at 001 (Statement of Cohen: “[W]e don’t offer discounts to buying groups or similar groups of dentists”); CX1372 at 002 (Statement of Cohen: “Benco does NOT currently recognize as a single customer . . . Any kind of GPO whether they provide additional services or not.”); CX1242 at 001 (Mar. 24, 2011 email from Pat Ryan to Regional Manager: “We do not participate in buying groups. Ever.”); Ryan, Tr. 1032-1033 (Benco rejected buying group called Nexus); CX1143; CX0301 (Cohen, IHT at 111-112); *see also* CCFF ¶¶ 408-425).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Benco has a policy, going back to mid-1990’s that it does not recognize or work with middlemen that come between it and its customers. Among the middlemen that Benco does not recognize or work with are buying groups. (Cohen, Tr. 445). The policy was based upon Cohen’s own experience as a territory representative at Benco and his vision of the kind of company that he wanted Benco to be. (Cohen, Tr. 694:3-15).

The rationale for Benco’s policy is that where Benco can be assured that compliance will happen, Benco can lower its costs to serve and lower pricing to the customer without anyone coming between Benco and the customer. (Cohen, Tr. 692; Ryan, Tr. 1166-67). Benco concluded that buying groups demanded lower prices but gave nothing in return. (Cohen, Tr. 685; J. Johnson, Tr. 4834-4835; J. Johnson, Tr. 4836-4837). Without the ability to achieve cost savings, it wouldn’t make business sense to offer discounts to a buying group. (Cohen, Tr. 685; J. Johnson, Tr. 4836-4837; RX2834 at 35, ¶ 55; RX2833 at 24, ¶ 45).

Benco concluded that buying groups were inconsistent with Benco's value proposition and its business model. (BFF ¶¶ 903-928). Benco's business strategy is that it does not participate in buying groups. Benco believes its business strategy is in its own unilateral economic interest. (Ryan, Tr. 1216-17). Benco's business strategy not to participate in buying groups has been consistent from 1996 to present, including before, during, and after the alleged conspiracy period. (BFF ¶¶ 1285-91).

405. Ryan also turned down many buying groups on behalf of Benco. (Cohen, Tr. 811; CX1138 at 001 (Statement of Ryan: "Unfortunately, I don't think we would be able to help you. Your structure meets our definition of GPO, and Benco does not participate in group purchasing organizations."); *see also* CCFF ¶¶ 408-425).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Benco has a policy, going back to mid-1990's that it does not recognize or work with middlemen that come between it and its customers. Among the middlemen that Benco does not recognize or work with are buying groups. (Cohen, Tr. 445). The policy was based upon Cohen's own experience as a territory representative at Benco and his vision of the kind of company that he wanted Benco to be. (Cohen, Tr. 694:3-15).

The rationale for Benco's policy is that where Benco can be assured that compliance will happen, Benco can lower its costs to serve and lower pricing to the

customer without anyone coming between Benco and the customer. (Cohen, Tr. 692; Ryan, Tr. 1166-67). Benco concluded that buying groups demanded lower prices but gave nothing in return. (Cohen, Tr. 685; J. Johnson, Tr. 4834-4835; J. Johnson, Tr. 4836-4837). Without the ability to achieve cost savings, it wouldn't make business sense to offer discounts to a buying group. (Cohen, Tr. 685; J. Johnson, Tr. 4836-4837; RX2834 at 35, ¶ 55; RX2833 at 24, ¶ 45).

Benco concluded that buying groups were inconsistent with Benco's value proposition and its business model. (BFF ¶¶ 903-928). Benco's business strategy is that it does not participate in buying groups. Benco believes its business strategy is in its own unilateral economic interest. (Ryan, Tr. 1216-17). Benco's business strategy not to participate in buying groups has been consistent from 1996 to present, including before, during, and after the alleged conspiracy period. (BFF ¶¶ 1285-91).

406. Ryan instructed his sales team to turn down buying groups, even when the sales team inquired about or expressed an interest in competing for buying group business. (CX1242 at 001-002; Ryan, Tr. 1042-1043). On March 24, 2011, a Regional Manager (Brian Evans) wrote regarding a buying group, "If we can, this would be a great opportunity to win some business from Schein." (CX1242 at 002). In response, Ryan wrote, "We do not participate in buying groups. Ever." (CX1242 at 001).

Schein's Response:

Mr. Ryan turned down buying groups, even when the Benco sales team inquired about them. As the cited document shows, Benco did this even when the evidence shows Schein was working with the buying group. (CX 1242-002). Complaint Counsel also inaccurately describes the email. Mr. Evans was *opposed* to contracting with the buying group, explaining why he believes such groups are "bad" and why Benco should not "play." (CX 1242-001).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Benco has a policy, going back to mid-1990's that it does not recognize or work with middlemen that come between it and its customers. Among the middlemen that Benco does not recognize or work with are buying groups. (Cohen, Tr. 445). The policy was based upon Cohen's own experience as a territory representative at Benco and his vision of the kind of company that he wanted Benco to be. (Cohen, Tr. 694:3-15).

The rationale for Benco's policy is that where Benco can be assured that compliance will happen, Benco can lower its costs to serve and lower pricing to the customer without anyone coming between Benco and the customer. (Cohen, Tr. 692; Ryan, Tr. 1166-67). Benco concluded that buying groups demanded lower prices but gave nothing in return. (Cohen, Tr. 685; J. Johnson, Tr. 4834-4835; J. Johnson, Tr. 4836-4837). Without the ability to achieve cost savings, it wouldn't make business sense to offer discounts to a buying group. (Cohen, Tr. 685; J. Johnson, Tr. 4836-4837; RX2834 at 35, ¶ 55; RX2833 at 24, ¶ 45).

Benco concluded that buying groups were inconsistent with Benco's value proposition and its business model. (BFF ¶¶ 903-928). Benco's business strategy is that it does not participate in buying groups. Benco believes its business strategy is in its own unilateral economic interest. (Ryan, Tr. 1216-17). Benco's business strategy not to participate in buying groups has been consistent from 1996 to present, including before, during, and after the alleged conspiracy period. (BFF ¶¶ 1285-91).

407. On March 24, 2011, Ryan forwarded an email from his sales team regarding the Dental Cooperative buying group to Cohen and other Benco employees and wrote: “We all know the answer here, right? Not no, hell no.” (CX1038 at 001).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Benco has a policy, going back to mid-1990’s that it does not recognize or work with middlemen that come between it and its customers. Among the middlemen that Benco does not recognize or work with are buying groups. (Cohen, Tr. 445). The policy was based upon Cohen’s own experience as a territory representative at Benco and his vision of the kind of company that he wanted Benco to be. (Cohen, Tr. 694:3-15).

The rationale for Benco’s policy is that where Benco can be assured that compliance will happen, Benco can lower its costs to serve and lower pricing to the customer without anyone coming between Benco and the customer. (Cohen, Tr. 692; Ryan, Tr. 1166-67). Benco concluded that buying groups demanded lower prices but gave nothing in return. (Cohen, Tr. 685; J. Johnson, Tr. 4834-4835; J. Johnson, Tr. 4836-4837). Without the ability to achieve cost savings, it wouldn’t make business sense to offer discounts to a buying group. (Cohen, Tr. 685; J. Johnson, Tr. 4836-4837; RX2834 at 35, ¶ 55; RX2833 at 24, ¶ 45).

Benco concluded that buying groups were inconsistent with Benco's value proposition and its business model. (BFF ¶¶ 903-928). Benco's business strategy is that it does not participate in buying groups. Benco believes its business strategy is in its own unilateral economic interest. (Ryan, Tr. 1216-17). Benco's business strategy not to participate in buying groups has been consistent from 1996 to present, including before, during, and after the alleged conspiracy period. (BFF ¶¶ 1285-91).

408. Benco did not bid for Synergy Dental Partners in 2011. (Ryan, Tr. 1131, 1170-1171; CX1133 at 001 ("this group approached every full-service dealer, including us...and were turned down"))).

Schein's Response:

The cited evidence does not support the asserted fact. CX 1133 is an August 2011 email relaying competitive intelligence that Darby (Schein's business affiliate) had contracted with Synergy. The email also notes that Benco turned down Synergy Dental, but does not say *when* that occurred. Mr. Ryan's testimony is also devoid of a time reference. (Ryan, Tr. 1131, 1170-71).

As for Schein, Synergy approached Schein in March 2010, over a year before the start of the alleged conspiracy, and was turned down *at that time*. (CX 2451). There is no evidence that Synergy was looking to change its distribution partner in 2011, or that it asked either Benco or Schein to bid on the business in 2011. As such, the document does not support an inference that there was an agreement to boycott buying groups. Indeed, given the timing, it suggests the opposite, that each company, acting unilaterally, turned down Synergy Dental.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

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

The rationale for Benco's policy is that where Benco can be assured that compliance will happen, Benco can lower its costs to serve and lower pricing to the customer without anyone coming between Benco and the customer. (Cohen, Tr. 692; Ryan, Tr. 1166-67). Benco concluded that buying groups demanded lower prices but gave nothing in return. (Cohen, Tr. 685; J. Johnson, Tr. 4834-4835; J. Johnson, Tr. 4836-4837). Without the ability to achieve cost savings, it wouldn't make business sense to offer discounts to a buying group. (Cohen, Tr. 685; J. Johnson, Tr. 4836-4837; RX2834 at 35, ¶ 55; RX2833 at 24, ¶ 45).

Benco concluded that buying groups were inconsistent with Benco's value proposition and its business model. (BFF ¶¶ 903-928). Benco's business strategy is that it does not participate in buying groups. Benco believes its business strategy is in its own unilateral economic interest. (Ryan, Tr. 1216-17). Benco's business strategy not to participate in buying groups has been consistent from 1996 to present, including before, during, and after the alleged conspiracy period. (BFF ¶¶ 1285-91).

Benco applied its policy to Synergy Dental Partners and determined that it lacked common ownership or control. Therefore, Synergy Dental Partners was not a single customer, but rather a middleman who came between Benco and its actual customers – the

individual dentists. Benco has never stopped competing for the individual dentists who were affiliated with Synergy Dental Partners. (Cohen, Tr. 802).

409. Benco did not bid for Nexus Dental in 2011. (Ryan, Tr. 1032-1033; CX1143 at 001 (“While we realize the supplies are a small part of what you are doing, it still meets our definition of a buying group, as it aggregates the volume of completely unrelated practices, without any centralized services, in order to leverage price. We simply can’t open that door”)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the cited exhibit does not include any request by Nexus that Benco place a “bid.” (CX1143).

Second, the cited exhibit is merely an e-mail from Pat Ryan to Kirk Huntsman, who it appears has some unspecified connection to an entity referred to as Nexus. (CX1143). The cited exhibit simply reflects Pat Ryan advising Kirk Huntsman of “2 scenarios where we [Benco and Nexus] could work together.” (CX1143).

Third, to the extent that Pat Ryan advised Kirk Huntsman of Benco’s no-middlemen policy and criteria for recognition as a single customer, that communication is wholly consistent with Benco’s policy and Benco’s own unilateral economic interest. (BFF ¶¶ 166-189).

Therefore, the proposed finding should be rejected by the court as unsupported by evidence.

410. Benco did not bid for Smile Source when it approached Benco in 2011 and 2012. (Cohen, Tr. 517; CX1138 at 001 (Statement of Ryan to Smile Source in 2011: “Unfortunately, I don’t think we would be able to help you. Your structure meets our definition of GPO, and Benco does not participate in group purchasing organizations”); CX1219 at 002 (Statement of Ryan to Smile Source in 2012: “Benco doesn’t recognize GPOs as a single customer”)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

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

The rationale for Benco’s policy is that where Benco can be assured that compliance will happen, Benco can lower its costs to serve and lower pricing to the customer without anyone coming between Benco and the customer. (Cohen, Tr. 692; Ryan, Tr. 1166-67). Benco concluded that buying groups demanded lower prices but gave nothing in return. (Cohen, Tr. 685; J. Johnson, Tr. 4834-4835; J. Johnson, Tr. 4836-4837). Without the ability to achieve cost savings, it wouldn’t make business sense to offer discounts to a buying group. (Cohen, Tr. 685; J. Johnson, Tr. 4836-4837; RX2834 at 35, ¶ 55; RX2833 at 24, ¶ 45).

Benco concluded that buying groups were inconsistent with Benco's value proposition and its business model. (BFF ¶¶ 903-928). Benco's business strategy is that it does not participate in buying groups. Benco believes its business strategy is in its own unilateral economic interest. (Ryan, Tr. 1216-17). Benco's business strategy not to participate in buying groups has been consistent from 1996 to present, including before, during, and after the alleged conspiracy period. (BFF ¶¶ 1285-91).

Benco applied its policy to Smile Source and determined that it lacked common ownership or control. Therefore, Smile Source was not a single customer, but rather a middleman who came between Benco and its actual customers – the individual dentists. Benco has never stopped competing for the individual dentists who were affiliated with Smile Source. (Cohen, Tr. 802).

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

411. Benco did not bid for a buying group started by a dentist, Dr. David Carter, in 2012. (CX1197 at 001 (Statement of Ryan: "They are trying to start a buying group. Told them we don't recognize buying groups.")).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the cited exhibit itself notes that this so-called “buying group” was not even a group at all, but rather a single dentist trying to get lower prices on dental supplies. (CX1197 (“They are trying to start a buying group.”)).

Second, since there is no evidence that this group ever actually existed, it is simply not accurate to say that “Benco did not bid” for the group. (CX1197).

Third, to the extent that Pat Ryan may have told Dr. Carter that Benco did not “recognize buying groups,” that statement is wholly consistent with Benco’s policy and Benco’s own unilateral economic interest. (BFF ¶¶ 166-189).

Regardless, Benco has never stopped competing for the individual dentists who were affiliated with Dr. Carter. (Cohen, Tr. 802).

412. Benco did not bid for Unified Smiles in 2012. (CX1144 at 001 (Statement of Ryan: “We’ve already spoken to them and turned them down”)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the cited exhibit is an internal Benco e-mail chain that contains no communications between Benco and Unified Smiles at all. (CX1144).

Second – and logically consistent with the first point above – the cited exhibit neither contains any request by Unified Smiles that Benco place a “bid,” nor any request that Benco get involved with Unified Smiles in any way. (CX1119).

Third, to the extent that Pat Ryan may have told Unified Smiles that Benco did not recognize buying groups, that statement would have been wholly consistent with Benco’s policy and Benco’s own unilateral economic interest. (BFF ¶¶ 166-189).

Fourth, to the extent that Pat Ryan may have “turned down” Unified Smiles, it is unclear from the cited exhibit when such communication may have taken place. (CX1144). Therefore, it is factually inaccurate for the proposed finding to posit any such communication conclusively “in 2012” without any other supporting evidence.

The proposed finding should be rejected by the court as unsupported by evidence.

413. Benco did not bid for XYZ Dental in 2012. (CX1198 at 001 (Statement of Ryan: “In order for us to recognize a group of offices as a single customer, they must meet one of the following ownership definitions . . . If this group does not meet one of these ownership models, we would consider them a GPO or “buying club” and Benco does not recognize these types of affiliations”)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the cited exhibit does not include any request by XYZ Dental that Benco place a “bid.” (CX1198). The cited exhibit did not ask Benco to get involved with the XYZ Dental in any way.

Second, the cited exhibit is merely an e-mail from Pat Ryan to billo@xyzdental.com. (CX1198). There is no indication who this person was, who or what XYZ Dental was, or even whether or not XYZ Dental actually existed. (CX1198). The cited exhibit simply reflects Pat Ryan advising billo@xyzdental.com of Benco’s no-middlemen policy and the criteria for Benco “to recognize a group of offices as a single customer.” (CX1198). There is no evidence that there were any further communications between Pat Ryan and billo@xyzdental.com or anyone else at XYZ Dental – if it, in fact, actually existed.

Third, to the extent that Pat Ryan advised billo@xyzdental.com regarding Benco’s policy and criteria for recognition as a single customer, that communication is wholly consistent with Benco’s policy and Benco’s own unilateral economic interest. (BFF ¶¶ 166-189).

Therefore, the proposed finding should be rejected by the court as unsupported by evidence.

414. Benco did not bid for the New Mexico Dental Cooperative in 2013. (Cohen, Tr. 528-530; CX0055 at 001 (Statement of Cohen: “We don’t recognize buying groups . . . I’ll reach out to my counterpart at Patterson to let him know what’s going on in NM”))).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the cited exhibit does not include any request by the New Mexico Dental Cooperative that Benco place a "bid." (CX0055). The cited exhibit did not ask Benco to get involved with the New Mexico Dental Cooperative in any way. (Cohen, Tr. 711).

Second, there is no evidence in the record that the New Mexico Dental Cooperative ever approached Benco seeking discounted dental supplies and recognition as a so-called buying group. (JX0002).

Therefore, the proposed finding should be rejected by the court as unsupported by evidence.

415. Benco did not bid for the DDS Group in 2013. (CX1200 at 001).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the cited exhibit is an internal Benco e-mail chain that contains no communications between Benco and DDS Group at all. (CX1200).

Second – and logically consistent with the first point above – the cited exhibit neither contains any request by DDS Group that Benco place a “bid,” nor any request that Benco get involved with DDS Group in any way. (CX1119).

Third, the cited exhibit actually shows that DDS Group was falsely claiming that Benco was a featured sponsor. (CX1200; Dr. Marshall, Tr. 3386-87).

Therefore, the proposed finding should be rejected by the court as unsupported by evidence.

416. Benco did not bid for WheelSpoke LLC in 2013. (CX1199 at 001 (Statement of Ryan: “Benco does not recognize ‘buying groups’ ... Cannot open this account”)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the cited exhibit is an internal Benco e-mail chain that contains no communications between Benco and WheelSpoke LLC at all. (CX1199).

Second – and logically consistent with the first point above – the cited exhibit neither contains any request by WheelSpoke LLC that Benco place a “bid,” nor any request that Benco get involved with WheelSpoke LLC in any way. (CX1119).

Therefore, the proposed finding should be rejected by the court as unsupported by evidence.

417. Benco did not bid for Erie Family Dental Equipment in 2013. (CX1238 at 001 (Statement of Ryan: “We absolutely positively do NOT participate in GPOs. NO if ands or buts”)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the cited exhibit is an internal Benco e-mail chain that contains no communications between Benco and Erie Family Dental Equipment at all. (CX1238).

Second – and logically consistent with the first point above – the cited exhibit neither contains any request by Erie Family Dental Equipment that Benco place a “bid,” nor any request that Benco get involved with Erie Family Dental Equipment in any way. (CX1238).

Third, to the extent that Pat Ryan may have told his colleagues that Benco did not “participate in GPO’s,” that statement would have been wholly consistent with Benco’s policy and Benco’s own unilateral economic interest. (BFF ¶¶ 166-189).

The proposed finding should be rejected by the court as unsupported by evidence.

418. Benco did not bid for the American Academy of Cosmetic Dentistry’s buying group in 2013. (CX1202 at 001 (Statement of Ryan: “Benco Dental does not participate in GPOs or buying groups”)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the cited exhibit does not include any request by the American Academy of Cosmetic Dentistry that Benco place a "bid." (CX1202). The cited exhibit is simply a cold solicitation to Benco's "Institutions" e-mail account asking to be directed to a contact at Benco. (CX1202).

Second, Benco's response is merely a one line e-mail from Pat Ryan noting that "Benco does not participate in GPOs or buying groups." (CX1202). There is no evidence that there were any further communications between Pat Ryan and the American Academy of Cosmetic Dentistry.

Third, Pat Ryan's statement is wholly consistent with Benco's policy and Benco's own unilateral economic interest. (BFF ¶¶ 166-189).

Therefore, the proposed finding should be rejected by the court as unsupported by evidence.

419. Benco did not bid for Dental Visits LLC in 2014. (CX1226 at 001 (Statement of Ryan: "Benco has a firm policy of non recognition of GPOs as a single customer"))).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the cited exhibit itself clearly indicates that Dental Visits LLC is not a buying group seeking discounted pricing on dental supplies, but rather is "an Electronic Health Record group practice organization." (CX1226).

Second, the cited exhibit neither contains any request by Dental Visits LLC that Benco place a "bid," nor any request that Benco get involved with Dental Visits LLC in any way. (CX1226). It merely contains a vague statement that "[e]very relationship have [sic] to start somewhere." (CX1226).

Third, the cited exhibit is a brief e-mail exchange between Pat Ryan and a Neville S. Coward, whose e-mail signature lists him as Chairman & CEO of SmileMD, Inc. (CX1226). There is no indicated whatsoever what role Neville S. Coward may have with any entity called Dental Visits LLC. (CX1226).

Fourth, in the cited exhibit, Pat Ryan merely advises Neville S. Coward of SmileMD, Inc. that "Benco has a firm policy of non recognition of GPOs as a single customer." (CX1226). Pat Ryan's statement is wholly consistent with Benco's policy and Benco's own unilateral economic interest. (BFF ¶¶ 166-189).

Therefore, the proposed finding should be rejected by the court as unsupported by evidence.

420. Benco did not engage with dentist, Dr. Stephen Sebastian, in 2014, after identifying his efforts were aimed to create a buying group. (CX1167 at 001 (“Talked to him. Buying club. A bunch of military dentists coming out of the Army and want to form a ‘military’ club”)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the cited exhibit is an internal Benco e-mail chain that contains no communications between Benco and Dr. Stephen Sebastian at all. (CX1167).

Second, the cited exhibit itself makes clear that Dr. Stephen Sebastian has not yet even formed any group. (CX1167 (“I asked him how many locations he had, and he said he doesn’t have any yet, but it is something he is looking to start a large group and market and put something together and would like to talk to someone more regarding this.”)).

Third, it is factually incorrect to claim that Benco “did not engage” with Dr. Stephen Sebastian. (CX1167). Despite Dr. Sebastian having not even formed any group, John Klavon of Benco’s Strategic Markets division actually **did** talk to Dr. Sebastian on the phone. (CX1167 (“Talked to him.”)).

The proposed finding should be rejected by the court as unsupported by evidence.

421. Benco did not bid for the Kois Buyers Group in 2014. (CX1240 at 001 (Statement of Cohen to Kois Buyers Group: “At Benco, our policy is that we don’t support, or work with, buying groups, so we’ll decline your request”); Cohen, Tr. 565-566; CX1075 at 001 (Statement of Cohen: “I spoke with the gentleman who’s putting it together, and told him that we don’t work with buying clubs”); *see also* Ryan, Tr. 1131).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit. Moreover, the proposed finding disingenuously ignores the actual evidence presented at trial.

The Kojs Center has been one of Benco's Success Partners. (Cohen, Tr. 567-68; 789; Kojs, Sr., Tr. 270). Chuck Cohen held Dr. Kojs in high regard, believing that Dr. Kojs ran a terrific operation, and considers him a friend from a business perspective. (Cohen, Tr. 568; 788).

Dr. Kojs wrote an e-mail to Chuck Cohen on October 21, 2014, noting that he "had been approached by a company to organize our members for group purchase opportunities," and that he wanted Cohen to "talk to him to see if their [sic] would be an opportunity to work with your company." (RX1039). In this e-mail, Dr. Kojs provided Chuck Cohen with the name of Qadeer Ahmed and an e-mail address for Mr. Ahmed @proequalizerservices.com. (RX1039). Dr. Kojs' October 21, 2014 e-mail is the first and only approach that The Kojs Buyers Club made to Benco. (Kojs, Sr., Tr. 273).

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

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

RX1039). Chuck Cohen responds to Dr. Kois that Benco is confidentially looking at buying club options and should have some ideas to discuss with Dr. Kois in early 2015. (RX1039; Cohen, Tr. 793). Chuck Cohen further responds to Dr. Kois that “whatever we do, I don’t think that we’ll need to involve an outside company like Equalizer Pro Services or anyone else, they’ll just take a cut of the savings.” (RX1039; Cohen, Tr. 793). Chuck Cohen advises Dr. Kois that he will “reconnect on this issue [with Dr. Kois] sometime in early 2015. (RX1039; Cohen, Tr. 794). Consistent with his advice to Dr. Kois that Benco did not need a middleman to blunt any future discounts Benco would offer to Kois Tribe members, Chuck Cohen advises Dr. Kois that he intends to “politely” tell Mr. Ahmed thanks, but no thanks. (RX1039; Cohen, Tr. 793).

Before Chuck Cohen could reconnect with Dr. Kois on the issue, Qadeer Ahmed writes back and advises that “[b]etween my first note to you and your reply, we have introduced our plan and have received, or are about to receive, written offers from various parties.” (RX1042). Qadeer Ahmed further advises Chuck Cohen that he is no longer interested in talking to Benco, writing “I hope we’ll find something in the future we can do together.” (RX1042).

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

Therefore, the court should the proposed finding and Complaint Counsel’s attempt to misconstrue the actual evidence in the case showing that the Kois Buyurs Club rejected Benco.

422. Benco did not bid for the Dental Purchasing Group in 2014. (CX1228 at 001 (Statement of Ryan: “No, thank you”)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the cited exhibit itself clearly indicates that the Dental Purchasing Group is not a buying group seeking discounted pricing on dental supplies, but rather an entity seeking rebates to the third party. (CX1228-002).

Second, the cited exhibit does not contain any request by Dental Purchasing Group that Benco place a "bid." (CX1228). In the cited exhibit, Dental Purchasing Group is merely seeking a conversation with Benco to explore "the possibility of working together." (CX1228).

Therefore, the proposed finding should be rejected by the court as unsupported by evidence.

423. Benco did not bid for Insight Sourcing Group in 2014. (Ryan, Tr. 1133; CX1205 at 001 (Statement of Ryan: "Be polite but tell them we don't participate"))).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the cited exhibit itself clearly indicates that the Insight Sourcing Group is not a buying group seeking discounted pricing on dental supplies, but rather "a consulting firm." (CX1205-002).

Second, the cited exhibit does not contain any request by Insight Sourcing Group that Benco place a "bid." (CX1228). In the cited exhibit, Insight Sourcing Group is merely seeking a conversation with Benco to "discuss Benco's overall capabilities." (CX1205).

Third, the claims made in the e-mail from Insight Sourcing Group were simply not credible. Insight Sourcing Group claimed to represent a "client" that spends \$35m to \$50M per year on dental supplies. (CX1205). As Pat Ryan testified at trial, such a client – if they existed – would be "huge," and would "not go through a third party." (Ryan, Tr. 1233-34). Therefore, Pat Ryan doubted "the accuracy" of the claim being made by Insight Sourcing Group. (Ryan, Tr. 1234).

Therefore, the proposed finding should be rejected by the court as unsupported by evidence.

424. Benco did not bid for Schulman Group in 2014. (CX1207 at 001 (Statement of Ryan: "Buying group. Don't put anything in front of them"); CX1206 at 001 (Statement of Brian Evans (Benco's Director of Sales –West): "The Schulman Group is a buying group (of sorts) and we don't participate in that business"))).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the cited exhibits are an internal Benco e-mail chain that contains no communications between Benco and the Schulman Group at all. (CX1206; CX1207).

Second – and logically consistent with the first point above – the cited exhibit neither contains any request by the Schulman Group that Benco place a “bid,” nor any request that Benco get involved with the Schulman Group in any way. (CX1206; CX1207).

Third, to the extent that Brian Evans may have told his colleagues that Benco did not participate in buying group business, that statement would have been wholly consistent with Benco's policy and Benco's own unilateral economic interest. (BFF ¶¶ 166-189).

The proposed finding should be rejected by the court as unsupported by evidence.

425. Benco did not bid for Dentistry Unchained in 2015. (Ryan, Tr. 1131; CX0012 at 001 (Statement of Ryan: “The best part about calling these guys is I already KNOW that Patterson and Schein have said NO”)).

Schein's Response:

Schein does not disagree that Benco declined to bid on Dentistry Unchained.

Schein addresses Mr. Ryan's email (CX 0012) in SRF 1191 and incorporates that reply here. (SRF 1191). As discussed in SRF 1191 and SF 713-16, Mr. Ryan was mistaken. At the time Mr. Ryan wrote CX 0012, Schein was still in negotiations with Dentistry Unchained and continued those negotiations into 2016. (RX 2457-001; RX 2334-001-02; RX 2115-006; Titus, Tr. 5272-73). Nor is CX 0012 reliable evidence for the truth of the

matter, as Mr. Ryan conceded at trial that he never spoke to anyone at Schein or Patterson about Dentistry Unchained and was just speculating “from [his] experience [that Benco] usually got approached after, after Schein and Patterson.” (Ryan, Tr. 1209-10, 1254-55).

Patterson’s Response:

Patterson joins the responses of Schein and Benco.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the cited exhibit is an internal Benco e-mail chain that contains no communications between Benco and Dentistry Unchained at all. (CX0012).

Second – and logically consistent with the first point above – the cited exhibit neither contains any request by Dentistry Unchained that Benco place a “bid,” nor any request that Benco get involved with Dentistry Unchained in any way. (CX0012).

Third, the claims made by Dentistry Unchained were simply not credible. Dentistry Unchained was claiming to have 226 dental practices in a buying group. (Ryan, Tr. 1210-11). Such a size buying group does not exist. By comparison, of Benco’s approximately 90 DSO customers, only 1 of them is larger than 226 practices. (Ryan, Tr. 1210-11). Accordingly, Pat Ryan was “skeptical” of the veracity of Dentistry Unchained claim. (Ryan, Tr. 1211).

Fourth, Pat Ryan testified that he never spoke to anyone at Schein or Patterson about Dentistry Unchained. (Ryan, Tr. 1209). Ryan’s basis for writing that “I already KNOW that Patterson and Schein have said NO” was his experience that Benco – as the third largest dental distributor – is only approached after Patterson and Schein have been approached already. (Ryan, Tr. 1209-1210).

Fifth, the context for Pat Ryan's quoted statement was two humorous exchanges with his colleagues wherein they were joking regarding the incredibleness of Dentistry Unchained's claim that it had 226 dental practices. (Ryan, Tr. 1211-13).

The proposed finding should be rejected by the court as unsupported by evidence.

426. Cohen testified that Benco was "concerned about any change in the strategy at Schein and Patterson," including partnering with a buying group, which he viewed as a risk of customer loss to Benco. (Cohen, Tr. 470; Cohen, Tr. 467 ("Q. And a change in Schein or Patterson's strategy could be a risk for Benco to lose customers? A. Any time Schein or Patterson changes their strategy there's a risk to Benco that . . . we will lose customers.")).

Schein's Response:

The asserted fact misrepresents the evidence.

Mr. Cohen's testimony is general in nature, simply reflects the nature of oligopolistic competition, and is not focused on buying groups. Mr. Cohen merely testified that "*any change*" by Schein or Patterson could impact Benco. (Cohen, Tr. 470, 467 (emphasis added)).

Patterson's Response:

Complaint Counsel's proposed finding is not supported by the record.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, the cited testimony in the proposed finding relates to a series of questions Complaint Counsel asked Chuck Cohen regarding Benco's alleged concern "that Schein or Patterson would sign up with EDA." (Cohen, Tr. 469-71). Since EDA did not exist until Benco formed EDA with Cain Watters, Cohen was not concerned that Schein or Patterson would sign up with EDA. Since the mid-2000's, long before the formation of

EDA, Cain Watters had been one of Benco's Success Partners. (BFF 235; Cohen, Tr. 815-16). Cohen's concern then, as he clearly explained at trial, was that Benco did not want to lose its relationship with Cain Watters. (Cohen, Tr. 470 ("I was concerned that Cain Watters, who had been a longtime partner of ours, would choose to take their partnership elsewhere.")).

Second, Cohen's quoted testimony was a reference to the potential of competition from Schein and Patterson against EDA. As Chuck Cohen explained at trial, "it's always a risk when we innovate and we're copied by our major competitors. Because it blunts the innovation." (Cohen, Tr. at 466).

427. Cohen identified that one risk of Benco starting a buying group was that Schein or Patterson would follow suit and "blunt the innovation." (Cohen, Tr. 466 ("Q. One of the risks of Benco creating [Elite Dental Alliance] was that other GPOs get started and are recognized by Schein and Patterson; is that right? A. That is one of the risks I wrote. Yes. Q. And why is it a risk to Benco if Schein or Patterson opened up buying groups as well? A. Well, it's always a risk when we innovate and we're copied by our major competitors because it blunts the innovation.")).

Schein's Response:

Schein does not dispute that a distributor starting its own buying group may be considered an innovation, and that copycat distributors starting their own buying groups may blunt that innovation. Schein disputes that the asserted fact and cited testimony applies to any buying group not started by a distributor, or that any buying group not started by a distributor was a business opportunity. As such, Complaint Counsel's claim in their Post-Trial Brief that Benco "recognized buying groups could be an opportunity worth exploring, but it refused to work with them during the conspiracy period" is not supported by the fact asserted here. (See CC Br. 63 & n.514).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit and testimony.

The cited testimony from Chuck Cohen was in response to questions from Complaint Counsel regarding a Cohen OneNote post entitled "Case Study: Elite Dental Alliance." (CX1084). As its title clearly indicates, the exhibit is a case study examining Benco's joint venture with Cain Watters that created EDA. (CX1084). The specific language Cohen is discussing appears under a section entitled "Our Risk" in which Cohen is listing potential risks to the formation and launch of EDA by Benco and Cain Watters. (CX1084-007). It is a reference to the potential of competition from Schein and Patterson against EDA. (CX1084-007). As Chuck Cohen explained at trial, "it's always a risk when we innovate and we're copied by our major competitors. Because it blunts the innovation." (Cohen, Tr. at 466).

428. Ryan testified that he was concerned about Schein and Patterson working with buying groups. (Ryan, Tr. 1116-1117).

Schein's Response:

The fact is duplicative of CCFF 218. Schein incorporates its response to CCFF 218 here. The testimony is not accurately represented by the asserted fact – Mr. Ryan testified that he was concerned about "anything that any competitor does...." (Ryan, Tr. 1116-17). It was not specifically about Patterson, Schein, or buying groups.

Patterson's Response:

Complaint Counsel's proposed finding is misleading—Ryan testified that “anything” a competitor did concerned him. (Ryan, Tr. 1116).

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The proposed finding is misleading because the cited testimony was far more general. Ryan's actual testimony was: “Anything that any competitor does concerns me, but it doesn't – it would never change what Benco does.” (Ryan, Tr. 1116).

429. Ryan was frustrated when he learned that Schein was doing business with Smile Source. (CX8037 (Ryan, Dep. at 116-117) (“Q. And did Dr. Goldsmith's reference to Henry Schein doing business with . . . Smile Source frustrate you? [Objection] Why is that I believe that all distributors should feel like we do.”)).

Schein's Response:

Complaint Counsel's proposed finding misrepresents Mr. Ryan's testimony. Mr. Ryan testified that he believed “all distributors should feel like we do” and that “third parties between us and the customer ... don't bring any value.” (CX 8037 (Ryan, Dep. at 116-17)). While Mr. Ryan agreed, in response to leading questions, that he was “frustrated” (*i.e.*, this was Complaint Counsel's characterization, not his), there is no basis for any inference that any frustration was due to Schein deviating from any alleged conspiracy.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, the proposed finding's citation of only truncated testimony from Pat Ryan is misleading. Ryan's complete answer was: "I believe that all distributors should feel like we do, that our best value is brought directly to the – to the end user." (Ryan, Dep. at 116-17). Ryan went on to explain that "third parties between us and the customer, the end user, don't bring any value and generally mute what we have to offer." (Ryan, Dep. at 117).

Second, Ryan accurately described his testimony on this point as "just a personal – personal opinion." (Ryan, Dep. at 117).

Third, the cited exhibit and testimony contains only the statements and impressions of Pat Ryan, not Benco as a whole.

430. In a July 25, 2012 email, Ryan referred to Schein working with a buying group as "this shit" because he had a "strong opinion on GPOs." (CX0018 at 001; Ryan, Tr. 1065-1066; *see also* CCFF ¶ 982).

Schein's Response:

Mr. Ryan testified that this was just a "flippant" remark. (Ryan, Tr. 1066).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, the proposed finding's citation of only truncated testimony from Pat Ryan is misleading. Ryan began his answer by testifying: "That's a very flippant answer that I made to Chuck. It's just a generally frustrated statement." (Ryan, Tr. 1065-66).

Second, Ryan went on to further explain as follows: "Like I said before, I think it was just a flippant, sarcastic, and frustrated sentence. You know, Chuck and I go back a long way. (Ryan, Tr. 1192).

Third, the cited exhibit and testimony contains only the statements and impressions of Pat Ryan, not Benco as a whole.

431. In a transcript of a conversation between Benco's Patrick Ryan and Mitchell Huber, Ryan stated that Smile Source is "terrifying" and expresses concern about "full service guys get[ting] in to serving buying groups." (CX0015 at 001 (Statement of Ryan: "They are terrifying . . . If it's just Darby, I don't care as much....but when the full service guys get in... Huber: Yeah, the last thing we want is reliable service for these groups"); Ryan, Tr. 1043; CX0304 (Ryan, IHT at 190)).

Schein's Response:

The asserted fact is incomplete and imprecise, and the ellipses in the chat (not a "transcript") omit important context that undermines the inference Complaint Counsel seeks to draw.

Mr. Ryan starts the chat by expressing concerns about Smile Source working with vendors, such as Dentsply, and suggests that Benco "start pressuring vendors." (CX 0015-001). The thought that Dentsply would work with Smile Source was what was "terrifying." (CX 0015-001 (emphasis added)). At that point in the chat, there was no reference to distributors, full-service or otherwise. The chat continues with questions about who is doing fulfillment. At that point, Mr. Ryan make an off-hand remark that he doesn't "care as much" about Darby. As this chat shows, the concerns expressed were primarily about

manufacturers offering “exclusive” discounts to buying group customers, and refusing to give such discounts to a Benco customer – that was the “real problem.” (CX 0015-001).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The cited phrase in the proposed finding is taken from a larger text message exchange between Pat Ryan and Mitch Huber. The initial text message in the conversation, written by Ryan, was: “I think we need to stop talking about Amazon and start talking about Smile Source.” (CX0015). Ryan later writes “[t]hey are terrifying,” about Smile Source to underscore his point that he believed Amazon was being talked about too much and that there should be more discussion regarding Smile Source. (CX0015; Ryan, Tr. 1044 (testifying that in his personal opinion, Amazon was “overblown”)). Beyond that, Ryan testified that he did not know why he would have used the phrase. (Ryan, Dep. at 339-40).

Pat Ryan has led Benco’s Strategic Markets division since he founded it in 2004. (Ryan, Tr. 1155; Cohen, Tr. 803-804). Smile Source is a franchise DSO. (Maurer, Tr. 4935-36; Ryan, Tr. 1250). Amazon, in so far as it relates to the dental supply industry, is an online distributor of dental supplies. (Cohen, Tr. 489-490, 834). Therefore, Smile Source falls within Benco’s Strategic Markets division, whereas Amazon does not. (Cohen, Tr. 802-803). Accordingly, Pat Ryan as the head of Strategic Markets was more focused on Smile Source than on Amazon. (CX0015).

Lastly, the cited exhibit and testimony contains only the statements and impressions of Pat Ryan, not Benco as a whole.

VIII. SCHEIN AND PATTERSON STARTED DIPPING THEIR TOES INTO BUYING GROUP BUSINESS TO GAIN SALES.

A. Schein Sold to Buying Groups Before 2011.

432. In September 2010, Sullivan explained to his boss, Jim Breslawski, that the benefits of working with buying groups outweighed the risks. (*See infra* CCFF ¶¶ 433-439).

Schein's Response:

Complaint Counsel cites no record evidence to support this finding. It only cites other proposed findings, which – as set forth in Schein's specific replies – also fail support its characterization of the evidence.

Substantively, Complaint Counsel's asserted fact is misleading, as Mr. Sullivan did not make a blanket statement that the benefits of working with all buying groups outweighed the risks. Mr. Sullivan's statement in September 2010 was specific to Smile Source, and it was not that the benefits outweighed the risks, but that they *might* "if theory works." (CX 2113-001 (noting they were "still gathering details and having discussions ... about how to manage expectations and risks to our core business," and that "[t]his is risky as they want to push forward, but we need time with them to create a win-win-plan going forward"); Sullivan, Tr. 3923-24 ("Q. You were in favor because even though Schein would get lower margin, Schein would get more gross profit dollars. A. Again, I was in favor to test the model, test the theory.")). As Mr. Sullivan testified, "I have always been and I am today very skeptical about the value that buying groups can bring both to Henry Schein or its members who are our customers, very skeptical." (Sullivan, Tr. 4085). In September 2010, Mr. Sullivan expressed his continued skepticism of working with

buying groups, specifically Smile Source. (CX 2113-001 (2010: “neither of us support concept of buying groups.... [T]he risk to overall HSI ... for margin erosion”)). However, despite Mr. Sullivan’s skepticism of buying groups, he and Mr. Muller decided in 2010 that Smile Source was a buying group worth retaining as it was a “\$1 million and growing” account, noting “we need time with them to create a win-win-plan going forward.” (CX 2113-001).

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

433. On September 15, 2010, Sullivan sent an email to Breslawski, and Hal Muller about Schein supplying to a buying group, Smile Source. (Sullivan, Tr. 3921; CX2113 at 001).

Schein’s Response:

Schein formed a relationship with Smile Source in 2008 through Special Markets and Mr. Sullivan’s email was about Schein continuing to work with Smile Source despite the conflicts the relationship was creating with FSCs. (SF 223-29).

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

434. In Sullivan’s September 15, 2010, email to Breslawski, Sullivan wrote: “Hal [Muller] and I met this morning . . . I think we agreed on the following . . . neither of us support concept of buying groups.” (CX2113 at 001; Sullivan, Tr. 3921).

Schein's Response:

No response, other than to note that the cited email is from before the alleged conspiracy period. See SRF 432 for a fuller discussion of CX 2113.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

435. In Sullivan's September 15, 2010, email to Breslawski, he stated that "neither of us" referred to Sullivan and Muller. (CX2113 at 001; Sullivan, Tr. 3921).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

436. In Sullivan's September 15, 2010, email, he wrote that working with buying groups "may benefit [Special Markets] to some extent" but that it could lead to "margin erosion" for Schein. (CX2113 at 001; Sullivan, Tr. 3921-3922).

Schein's Response:

Mr. Sullivan's complete statement, written before the alleged conspiracy period, noted other legitimate risks in addition to margin erosion, including cannibalization: "Where it may benefit SM to some extent, the risk to overall HSI (due to having 40% share in market) for margin erosion, image, as well as other competitors then following suit and huge price war breaks out." (CX 2113-001; SRF 432).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

437. Sullivan also stated in his September 15, 2010, email that working with buying groups could lead to a "huge price war" if Schein's competitors followed suit and discounted to buying groups. (CX2113 at 001; Sullivan, Tr. 3921-3922).

Schein's Response:

Mr. Sullivan's complete statement, written before the alleged conspiracy period, noted a number of legitimate risks in addition to a price war, including cannibalization: "Where it may benefit SM to some extent, the risk to overall HSI (due to having 40% share in market) for margin erosion, image, as well as other competitors then following suit and huge price war breaks out." (CX 2113-001; SRF 432).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

438. In his September 15, 2010 email to Breslawski, Sullivan told to Breslawski that he was "inclined to 'allow'" a buying group account because that business provided an opportunity to increase overall gross profit for Schein. (CX2113 at 001; Sullivan, Tr. 3923, 3924 ("Q. You were in favor because even though Schein would get lower margin, Schein would get get more gross profit dollars. A. Again, I was in favor to test the model, test the theory.")).

Schein's Response:

This asserted fact is incomplete. Mr. Sullivan told Mr. Breslawski that he was "inclined to 'allow'" a Schein customer to join Smile Source (though, as he noted, it was

not up to him) because Schein was “only [getting] about 30%” of the account’s business, meaning the risk of cannibalization was lower. (CX 2113-001; Sullivan, Tr. 3923-24). Mr. Sullivan did not say that the “business provided an opportunity to increase overall gross profit for Schein.” (See SRF 432). Rather, he hypothesized that “*if theory works*, we would get 100% at lower margins, but all parties win in overall GP \$’s.” (CX 2113-001 (emphasis added)). In fact, as Dr. Marshall’s analysis showed, the theory did *not* work, and Schein lost money by doing business with Smile Source in 2010. (SF 1722-35; RX 3058; Marshall, Tr. 3073-75, 3121-22).

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

439. Despite the risks he identified in working with buying groups, Sullivan wanted to “test the model” of working with a buying group to realize the opportunity of increased gross profits. (Sullivan, Tr. 3923-3924).

Schein’s Response:

Complaint Counsel mischaracterizes Mr. Sullivan’s testimony. Mr. Sullivan testified that Schein wanted to “test the theory” that *Smile Source* (not all buying groups) could bring Schein more business from dentists that were not doing all of their business with Schein. (Sullivan, Tr. 3924). However, as Schein’s experience continued to demonstrate, very few buying groups were able to drive compliance and shift volume. (SF 85-89; RX 2340-005 (“PGMS cannot guarantee that its members will purchase from Schein....”)). In fact, as Dr. Marshall’s analysis showed, the theory did *not* work, and Schein lost money by doing business with Smile Source in 2010. (SF 1722-35; RX 3058;

Marshall, Tr. 3073-75, 3121-22). After Smile Source terminated Schein in 2012, Schein was able to retain most of the [REDACTED]. (See SF 1722-29).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

440. Schein was working with buying groups before 2011. (See *infra* CCFF ¶¶ 441-444).

Schein's Response:

Complaint Counsel's temporal limitation to "before 2011" is artificial, unsupported, and irrelevant, as Schein continued to work with buying groups after 2011 as well. (E.g., SF 1344, 1346-48).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

441. Schein began working with buying group Long Island Dental Forum in 2006. (Cavaretta, Tr. 5576-5577; CX2895 at 013 (Schein's Response to IROG ¶1)).

Schein's Response:

No response. For a fuller explanation of Long Island Dental Forum see SF 937-949.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

442. Schein began working with buying group Dental Co-op of Utah (The Dental Cooperative of Utah) in 2007). (Sullivan, Tr. 3913-3914; CX2895 at 013 (Schein's Response to IROG ¶1)).

Schein's Response:

No response. For a fuller explanation of the Dental Co-Op of Utah see SF 581-633.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

443. Schein began working with buying group Smile Source in 2008. (Sullivan, Tr. 3914; CX2895 at 013 (Schein's Response to IROG ¶1)).

Schein's Response:

No response. For a fuller explanation of Smile Source, see SF 223-233, 1105-1186.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

444. Schein began working with buying group Dentists for a Better Huntington in 2009. (RX2264 at 002; CX2895 at 012 (Schein's Response to IROG ¶1)).

Schein's Response:

No response. For a fuller explanation of Dentists for a Better Huntington, see SF 719, 725.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

445. On January 18, 2006, Cavaretta wrote to Dr. Alan Faber of Long Island Dental Forum and said: "I want to thank you for the opportunity to be part of the Long island Dental Forum. I'm sure that we will experience a mutually beneficial relationship." (Cavaretta, Tr. 5577; CX2724 at 017).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

446. Schein's "business with [Dental Co-op] was growing" when it did business with the buying group in 2009, and by July 2011, Muller recognized the Dental Co-op of Utah as "one of the largest HSD account (over \$1M)." (CX2505 at 002 (July 2011 email from Muller to Steck); CX8033 (Cavaretta, Dep. at 178); *see also* CX2634 at 001).

Schein's Response:

Complaint Counsel's focus on the total volume, rather than the volume per member, is irrelevant. As Ms. Titus explained, by 2014, the Dental Co-Op had over 400 members, but its members were collectively purchasing only about \$2 million, meaning that each members' annual purchases were only around \$5,000, or about 10% of their purchasing requirements. (CX 2239; Titus, Tr. 5240-41).

The Dental Co-Op's inability to deliver incremental volume was recognized by Schein in late 2010 / early 2011 before the start of the alleged conspiracy. (CX 2811; RX

2599). As Mr. Cavaretta wrote on January 28, 2011, “I’m not a fan of this group.” (CX 2811-001). On June 16, 2011 (also before the start of the alleged conspiracy), Schein analyzed the level of “incremental business from the Co-Op in Utah” and concluded that Schein was “not [getting] much ... if any!” (RX 2125-001). At that point, Mr. Cavaretta expressed his frustration, noting that he was “not willing to give additional discounts to the Co-op until we start seeing incremental business from them. This has to be a win/win at some point and I feel like we continue to add ‘value’ via price but I’m not seeing a whole lot in return.” (RX 2125-001).

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

447. Schein’s Special Markets relationship with Smile Source was profitable and resulted in \$3 million in sales, half of which came from Schein’s competitors. (CX2469 at 001 (September 2014 email from Muller to Sullivan and Breslawski, referring to Smile Source: “When they were with us they did \$3M, half from us and half they got us from our competitors”)).

Schein’s Response:

The cited evidence is not reliable support for the asserted fact. To the extent Complaint Counsel cites this evidence (or the proposed finding) for the truth of the matter asserted (*i.e.*, Smile Source did \$3 million in sales with Schein, half coming from Schein’s competitors), such evidence is pure speculation. Complaint Counsel did not lay a foundation necessary to establish that Mr. Muller had sufficient knowledge of the amount of business Smile Source did with Special Markets from 2008 until 2011, when it switched to HSD. Nor did Mr. Muller perform any studies or analysis necessary to determine the

amount of business that Schein received from its competitors through its relationship with Smile Source.

Moreover, Mr. Muller's statement, four-plus years after the fact, that Smile Source did \$3 million in business with Special Markets does not mean that business was profitable, or more profitable than it could have been without Smile Source. Indeed, Dr. Marshall's analysis shows that Schein lost money by doing business with Smile Source. (SF 1722-35; RX 3058; Marshall, Tr. 3073-75, 3121-22). Nor does Mr. Muller's statement in 2014 that some Smile Source business came from competitors mean that Schein would have been unable to win those accounts without Smile Source.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

448. Sullivan identified the Smile Source account as an account he did not "want to lose" because it was "\$1 million and growing." (Sullivan, Tr. 3922-3923; CX2113 at 001 (September 2011 email from Sullivan to Breslawski)).

Schein's Response:

Mr. Sullivan testified that he "was in favor to test the model, test the theory" and that \$1 million was "the potential of what ... their offices could purchase. I don't know that that's what they were doing with Schein at the time." (Sullivan, Tr. 3923-24; SRF 432).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

449. In his September 2010 email regarding Smile Source, Sullivan was pointing out that Smile Source was an opportunity for \$1 million in revenue to Schein. (Sullivan, Tr. 3923; CX2113 at 001).

Schein's Response:

Mr. Sullivan testified that he “was in favor to test the model, test the theory” and that \$1 million was “the potential of what ... their offices could purchase. I don’t know that that’s what they were doing with Schein at the time.” (Sullivan, Tr. 3923-24; SRF 432).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

450. Sullivan saw value in the potential \$1 million revenue opportunity from the Smile Source account. (Sullivan, Tr. 3923 (“Q. And you saw value in the fact the [the Smile Source account] was \$1 million and growing, right? A. Yes.”)).

Schein's Response:

Mr. Sullivan testified that he “was in favor to test the model, test the theory” and that \$1 million was “the potential of what ... their offices could purchase. I don’t know that that’s what they were doing with Schein at the time.” (Sullivan, Tr. 3923-24).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

451. Foley and Muller also viewed the Smile Source relationship as an opportunity or benefit to Schein, and as a profitable customer. (Foley, Tr. 4535 (“Q. What did you think of Smile Source’s plans for growth? A. I was in agreement with their business plan . . . I believe they had a great opportunity for both us and Schein to see some good growth with them.”); CX8005 (Muller, Dep. at 53-54) (through Smile Source, Schein garnered new customers from competitors; Smile Source enabled Schein to grow its customer base); CX8003 (Foley, Dep. at 50) (“Q. Smile Source was a very profitable customer when it belonged to Special Markets? A. Yes. Q. Smile Source was growing its member base when it belonged to Special Markets? A. Yes.”); CX0306 (Foley, IHT at 124-125) (“Q. Was Smile Source a profitable customer when it belonged to special markets? A. Yes, very. Q. How so? A. They were growing . . . Q. Did Smile Source bring new customers to Henry Schein who were previously serviced by other distributors? A. Yes. Q. How do you know? A. I remember them . . . bringing in . . . a bigger customer . . . I remember a big win that was a Patterson account.”); CX0309 (Muller, IHT at 101) (Smile Source relationship was “beneficial” in that it brought customers to Schein that were buying from a competitor)).

Schein's Response:

To the extent Complaint Counsel relies on the cited testimony for the truth of the assertion that Smile Source was a profitable customer, the cited testimony is not reliable evidence of that assertion. There is no evidence that Mr. Foley and Mr. Muller conducted a study of the profitability of the Smile Source business. As Complaint Counsel’s expert, Dr. Marshall found, the Smile Source relationship was not a profitable one for Schein. (SF 1722-35; Marshall, Tr. 3073-75, 3121-22).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

452. Foley testified that Smile Source was “doing approximately \$900,000 in merchandise” when it worked with Schein Special Markets. (Foley, Tr. 4532-4533).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

453. Discounting to buying groups presented revenue and profit opportunities to Schein that it valued. (CCFF ¶¶ 446-452, 693).

Schein's Response:

Complaint Counsel cites no record evidence to support this finding. It only cites other proposed findings, which – as set forth in Schein's specific replies – also fail support its characterization of the evidence.

Substantively, Complaint Counsel's asserted fact is overbroad and vague. Discounting to buying groups *might* present revenue and profit opportunities to Schein, but more often than not, it did not. (SF 90-96, 168-69). Smile Source was not a profitable relationship for Schein (SF 1722-35); MeritDent did not bring added revenue (SF 978); Steadfast affirmatively shifted business away from Schein (SF 1212-19); and the Dental Co-Op shifted business to Schein's competitors (SF 593-95, 601, 613). As such, Schein remained skeptical of buying groups before, during, and after the alleged conspiracy. (Sullivan, Tr. 4085, 4256-57 (confirming he has been skeptical of buying groups from 1997 to present)). Still, Schein remained open to those buying groups that made business sense and "shar[ed] the same values and integrity that we have at Henry Schein, the same reverence and respect for the dentists who we're focused on, those that offer more than just

an opportunity to buy consumables at a discount, someone who shares our vision for developing the productivity and profitability of a dentist and also offers some added value like business solutions as well as education.” (Titus, Tr. 5199-200; SF 161-62).

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

B. Patterson Also Planned to Start Selling to Buying Groups.

454. Patterson began discussing a partnership with buying group New Mexico Dental Cooperative (“NMDC”) between late 2012 and early February 2013. (Mason, Tr. 2335, 2339-2340, 2342-2344; CX0090 at 004).

Schein’s Response:

No response.

Patterson’s Response:

There is no evidence that either NMDC or Patterson referred to NMDC as a “buying group.” Dr. Brenton Mason of NMDC, testified that a buying group is different from a co-op, and that NMDC was a co-op, not a buying group. (Mason, Tr. 2327–2 (“Q. Can you explain the difference then between a dental co-op and a buying group? A. The buying group deals with mostly the insurance -- or I'm sorry -- mostly the dental supplies and the dental equipment. The cooperative deals with the entire business.”); Mason, Tr. 2364–65 (“I take it that you have a view that a dental cooperative is a very different animal from a buying group, so am I correct? A. I do believe that. Q. Now, what you've been talking about is a dental cooperative, not a buying group. A. Correct.”)).

Dr. Mason did not recall the dates when he started having conversations with Patterson about a dental cooperative. (Mason, Tr. 2373). On December 15, 2012 Mason informed his Patterson sales rep Jeff Katt that he and his partner, Dr. Jason Chapman, had affiliated (sold) their practice to Dr Montoya. (Mason, Tr. 2370–71; CX3338 at 1). The purpose of this email was to inform Katt that he and Chapman should now get the pricing that their partner, Dr. Frank Montoya, was receiving from Patterson. (Mason, Tr. 2372-2373). Mason did not mention the idea of a dental cooperative in this December 15, 2012 communication, let alone the idea of a “buying group.” (Mason, Tr. 2373).

Benco’s Response:

Benco has no specific response to the proposed finding.

455. NMDC was established sometime in late 2012 or early 2013 by Dr. Brenton Mason, Dr. Jason Chapman, and Dr. Frank Montoya. (Mason, Tr. 2331, 2333-2337, 2339).

Schein’s Response:

No response.

Patterson’s Response:

NMDC was never established nor did it ever exist. (Mason, Tr. 2368 (“Q. But back in January and February of 2013, there was no entity the New Mexico dental Cooperative A. That is correct.”); *see also* Mason, Tr. 2367 (“At that point in time of the meeting of February 11, there was not a full entity. We were still in the research development and trying to put it together.”)). As of February 4, 2013, Dr. Mason was just “in the process of starting a dental cooperative.” (Mason, Tr. 2374; CX0090 at 2).

Benco’s Response:

Benco has no specific response to the proposed finding.

456. The purpose of the New Mexico Dental Cooperative was to provide services to independent dental practices (dentists who owned fewer than five practices). (Mason, Tr. 2331-2332).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

457. Once Dr. Mason and the founders of NMDC started to put the word out about putting together a buying group, interest from independent dentists in joining the New Mexico buying group was higher than expected. (Mason, Tr. 2342-2343 (original goal was to sign up 50 offices; after putting the word out, they raised their membership goal); CX0090 at 005).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

458. Dr. Mason's job in connection with the development of NMDC was to see if NMDC could negotiate discount pricing with vendors of dental consumables and equipment. (Mason, Tr. 2333 (Mason's job was to "look into vendors to see if we could negotiate pricing for our sundries and equipment.")).

Schein's Response:

No response, other than to note that Dr. Mason did not approach Schein to negotiate supplies and equipment pricing. (RX 2400-001 (asking Schein for "ideas" and clarifying "we are not ... trying to set the price of the distributor"))).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

459. Dr. Mason and Dr. Montoya reached out to distributors to see if they would work with their buying group to lower costs to independent dentist members. (Mason, Tr. 2331-2334).

Schein's Response:

Dr. Mason and Dr. Montoya reached out to Patterson. Only after Patterson rejected NMDC did Dr. Mason send an email to Schein. (Mason, Tr. 2392-93). Dr. Mason did not present any specific proposal to Schein, and affirmatively represented to Schein that NMDC would *not* provide Schein any incremental volume. (Mason, Tr. 2394; RX 2400 ("we have clarified the language to ensure it is understood that we are not moving dentists from one distributor to another or trying to set the price of the distributor")). As Dr. Mason testified,

Q. So you're asking Schein for its *ideas*; correct?

A. Correct....

Q. But just to be clear, you do not say in this e-mail to Schein that Schein is going to be the exclusive distributor for your group.

A. That is correct.

Q. Okay. And you also don't say in this e-mail that Schein is going to be the preferred vendor for your group; correct?

A. That is correct.

Q. And you don't say that your group is going to bring Schein any new customers; correct?

A. That is correct.

Q. In fact, you say the opposite of that. You say, quote, that you are not looking to remove customers from Schein, Patterson or Benco, end quote; right?

A. That is true.

(Mason, Tr. 2396).

Indeed, as Dr. Mason testified, by the time he reached out to Schein, he was not looking to negotiate prices with Schein, but was looking to negotiate prices with *manufacturers*. (Mason, Tr. 2395 ("Q.... So you weren't asking Schein for any differences in price; correct? A. The manufacturer had always done that for us in the past. When I'd work out a deal, for example, I purchased 15,000 toothbrushes at one point, the manufacturer agreed to a price, and then Schein – or Patterson at that point had honored that price, and they work out their commission between themselves. Q. So you were looking for the manufacturers to do something. A. Correct.")).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

460. NMDC preferred to seek the services of a full-service distributor because full-service distributors offered dental supplies, software, sundries, sales representatives, dental equipment installation, and service technicians. (Mason, Tr. 2334-2335).

Schein's Response:

No response, other than to note that Dr. Mason's own testimony indicates he had no qualms switching from a full-service distributor to Darby, a non-full-service distributor. (Mason, Tr. 2334-35).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

461. NMDC reached out to full-service distributors Patterson, Henry Schein, and Benco. (Mason, Tr. 2331, 2334-2335).

Schein's Response:

Schein did business with NMDC when it was set up as a chapter of the Dental Co-Op of Utah. (Mason, Tr. 2391). Prior to that time, Dr. Mason sent an email to FSC Rick Dolk on February 20, 2013, which lacked any proposal, did not offer exclusivity or any preferred status, disclaimed any intention of providing Schein with any incremental volume, and did not seek to negotiate prices with Schein. (Mason, Tr. 2394-96; RX 2400). At some point thereafter, Dr. Mason decided to affiliate with a more established buying group from a different region, and, by July 2013, Schein welcomed NMDC as a chapter of the Dental Co-Op of Utah. (Mason, Tr. 2398-405; SF 1002-25).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

462. Dr. Mason spoke with representatives of Patterson and Schein regarding a potential partnership with NMDC. (Mason, Tr. 2335-2336).

Schein's Response:

Schein did business with NMDC when it was set up as a chapter of the Dental Co-Op of Utah. (Mason, Tr. 2391). Prior to that time, Dr. Mason sent an email to FSC Rick Dolk on February 20, 2013, which lacked any proposal for a partnership, did not offer exclusivity or any preferred status, disclaimed any intention of providing Schein with any incremental volume, and did not seek to negotiate prices with Schein. (Mason, Tr. 2394-96; RX 2400). At some point thereafter, Dr. Mason decided to affiliate with a more established buying group from a different region, and, by July 2013, Schein welcomed NMDC as a chapter of the Dental Co-Op of Utah. (Mason, Tr. 2398-405; SF 1002-25).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

463. Dr. Mason spoke and met with the following Patterson employees: Jeff Katt, sales representative; Scott Belcheff, Katt's boss and Albuquerque Branch Manager; and Dan Reinhardt, Belcheff's boss. (Mason, Tr. 2344-2345).

Schein's Response:

No response.

Patterson's Response:

This proposed finding is vague in that it lacks a timeframe. Dr. Mason recalled virtually nothing about these conversations, including the dates on which they happened.

(Mason, Tr. 2345 (“Did you have the occasion to meet with Mr. Belcheff, Mr. Katt and Mr. Reinhardt about the New Mexico Dental Co-Op? A. Yes. Q. And do you know when that was? A. I don't recall the date.”)). Dr. Mason was subsequently shown an email setting a dinner meeting for Monday, February 11, 2013, but he did not testify that that email refreshed his recollection as to the date of the meeting. (Mason, Tr. 2346 (testifying about CX3333 at 2)). Dr. Mason further explained on cross that he cannot provide a chronology of any in person or telephone conversations he had with either Mr. Katt or Mr. Belcheff. (Mason, Tr. 2369). He has no specific recollection of any conversations he had with Patterson concerning the New Mexico Dental Cooperative. (Mason, Tr. 2365). He does not recall the substance of any conversations with Mr. Katt concerning the New Mexico Dental cooperative (Mason, Tr. 2365–66), and he does not recall the substance of any discussions with Mr. Belcheff concerning the New Mexico Dental Cooperative. (Mason, Tr. 2366). He does not recall and meetings with either Mr. Katt or Mr. Belcheff specific to establishing the New Mexico Dental Cooperative other than a vague recollection of the February 11, 2013 meeting with Katt, Belcheff, and Reinhardt in which Reinhardt informed him that “Patterson would not be participating.” (Mason, Tr. 2366; 2355).

Benco's Response:

Benco has no specific response to the proposed finding.

464. On February 4, 2013, Dr. Mason sent an email to dental industry members, including Belcheff and Katt, informing them that NMDC had “partnered with Patterson Dental.” (CX0090 at 004; Mason, Tr. 2340-2341 (“At that point we felt we had worked out a deal with Patterson...”)).

Schein's Response:

Dr. Mason sent an email to *dental manufacturers* for a “vendors meeting.” (CX 0090-004). Dr. Mason sent the email to a variety of manufacturers “includ[ing]

manufacturers that Patterson does not do business with, and are, in some cases, direct competitors of Patterson Dental.” (CX 4090-002).

Patterson’s Response:

Dr. Mason’s email stated that NMDC had “partnered with Patterson Dental,” but he could not point to any conversation with Patterson that led him to feel that was the case. (Mason, Tr. 2374–76).

Benco’s Response:

Benco has no specific response to the proposed finding.

465. By the time Dr. Mason sent his February 4, 2013 email to dental industry members (CX0090 at 004-006), Dr. Mason believed that NMDC “had a deal” with Patterson. Dr. Mason believed that NMDC and Patterson “still needed to work out some details of pricing, but we had a deal that was considered – that we had a partnership in this.” (Mason, Tr. 2343-2344; *see also* CX0090 at 004). Dr. Mason’s February 4, 2013 email to dental industry members invited them to a meeting that would take place at Patterson’s Albuquerque showroom on March 13, 2013 at 6:00 p.m. (CX0090 at 004-006). Dr. Mason had the permission of a Patterson employee to use the company’s showroom and had set the date and time of the meeting with the employee. (Mason, Tr. 2341-2342).

Schein’s Response:

No response. (*See* SRF 464).

Patterson’s Response:

This proposed finding is compound and contains numerous assertions of fact. As to the first two sentences, again, Dr. Mason’s email stated that NMDC had “partnered with Patterson Dental,” but he could not point to any conversation with Patterson that led him to feel that was the case. (Mason, Tr. 2374–76). Patterson has no specific response to the third sentence. As to the fourth, Dr. Mason did not recall any conversation with anyone at Patterson in which he informed Patterson of the March 13 date (Mason, Tr. 2377), nor did

he recall talking to anyone at Patterson about getting permission to use the Patterson office. (Mason, Tr. 2378). Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

466. On Thursday, February 7, 2013, Belcheff sent an email to Dr. Mason regarding the March 13, 2013 vendor meeting that Dr. Mason had scheduled. Belcheff's email stated that "there was some confusion" on his part and asked Dr. Mason to cancel the meeting. (CX4090 at 001-002; Mason, Tr. 2347).

Schein's Response:

No response.

Patterson's Response:

Patterson's local Albuquerque branch manager, Scott Belcheff, told Dr Mason in his February 7, 2013 e mail that "we need to cancel this meeting." (CX4090 at 2). He explained his position in that email:

First – The email you sent out has greatly confused the dental community, and actually Patterson's role in the dental business community as well. Dan Reinhardt, my regional manager and myself, have been getting calls with questions because manufacturers are confused as to the purpose of the meeting you called. These companies do choose to do business with distributors like Patterson, Schein or Benco, and we handle the bid process. Not the manufactures (unless they are a direct selling manufacturer, such as Brasseler). If Patterson is going to be your preferred vendor then we handle the bid process for you. We make sure you are getting the appropriate pricing on the supplies you use based on volume and commitment. As your partner, we're working to assure you fair pricing, and also anything else the manufacturing company has to offer such, as rebate programs. This is why we are your partner, which is not just verbiage to me. Your schedule is crazy enough with out having to deal with this as well.

Second – The e-mail invitation you sent includes manufacturers that Patterson does not do business with, and are, in some cases, direct competitors of Patterson Dental.

Third – Patterson Dental is a Value-Add distributor, and that’s why you’ve chosen to do business with you over the years. We also extend this to our relations with our manufacturing community, as we value their knowledge, and their investment in Research and Development, and for advancing dental care in general.

(CX4090 at 2).

Dr Mason agreed that his February 4 email “created quite a stir” (Mason, Tr. 2376), and “confused the dental manufacturing world,” (Mason, Tr. 2385; CX3335 at 1).

Benco’s Response:

Benco has no specific response to the proposed finding.

467. Belcheff’s February 7, 2013 email to Dr. Mason, was the first time he reached out to Dr. Mason about Dr. Mason’s February 4, 2013 email to industry members inviting them to a vendor meeting. (Mason, Tr. 2348).

Schein’s Response:

No response. (See SRF 464).

Patterson’s Response:

Belcheff wrote to Dr. Mason on February 7, 2013, “I wanted to take some time to think about this meeting before I reached out to you.” (CX4090 at 1). Otherwise, Patterson has no specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

468. Prior to Belcheff’s February 7, 2013 email to Dr. Mason, Belcheff had not indicated any confusion regarding the March 13, 2013 vendor meeting that Dr. Mason scheduled. (Mason, Tr. 2348).

Schein’s Response:

No response.

Patterson's Response:

There is no record evidence that *Belcheff*—who did not testify—knew of the March 13 meeting at all before Dr. Mason's February 4 email. Dr. Mason did not recall whom he had talked to in setting up the meeting. (Mason, Tr. 2376–73). And Dr. Mason conceded that “some of the manufacturers I'm sure were confused” by his email. (Mason, Tr. 2384). Indeed, on February 12 Dr. Mason wrote to the same group to which he had sent the February 4 e mail that “It is my understanding at this point that my previous email confused the dental manufacturing world.” (CX3335 at 1; *see also* CX2672 at 1 (Dr. Mason referring to his February 4 email as “my email that caused a stir”)).

Benco's Response:

Benco has no specific response to the proposed finding.

469. In *Belcheff's* February 7, 2013, email to Dr. Mason, *Belcheff* wrote, regarding NMDC, “[t]his has the opportunity to be huge” (CX4090 at 002; Mason, Tr. 2349-2350).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

470. The February 7, 2013, email from *Patterson's Belcheff*, to Dr. Mason regarding NMDC referenced an upcoming “dinner Monday night” to “help us get guidelines in place.” (CX4090 at 002). *Belcheff* further stated in his email to Dr. Mason, “I am hoping *Patterson* can be a partner you trust and that will always do the right thing for you.” (CX4090 at 002).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

471. Dr. Mason received a second email from Belcheff later in the day on February 7, 2013, in which Belcheff wrote, "I definitely want to keep this moving forward[.]" (CX4090 at 001; Mason, Tr. 2352-2353).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

472. Following this email (CX4090) from Belcheff, Dr. Mason expected that a dinner meeting with Patterson representatives scheduled for February 11, 2013 would proceed and would allow Patterson and NMDC to "set up the guidelines of how we would proceed." (Mason, Tr. 2350).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

473. Dr. Mason believed that, as of February 7, 2013, his buying group, NMDC, had an agreement with Patterson and that the guidelines of the deal would be “worked out” with Dan Reinhardt. (Mason, Tr. 2352-2353).

Schein’s Response:

No response.

Patterson’s Response:

After receipt of Belcheff’s February 7, 2013, Dr. Mason also understood that Patterson was “walking back” from what he previously believed Patterson was willing to do. (Mason, Tr. 2381). Dr. Mason testified on direct that “it looked to me like [Belcheff] was changing the scope of which Patterson was willing to participate with the New Mexico Dental Co-op.” (Mason, Tr. 2349). Otherwise, Patterson has no specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

IX. BENCO ORCHESTRATED AN AGREEMENT WITH PATTERSON THAT NEITHER WOULD DISCOUNT TO BUYING GROUPS.

A. Benco Discovered Patterson Was On the Cusp of Discounting to a Buying Group.

474. On February 4, 2013, Michael Stanislawki of Midmark, a dental products manufacturer, forwarded a copy of Dr. Mason’s February 4, 2013 email (CX0055) to Brandon Bergman, who was Schein’s Albuquerque Regional Manager. (CX0090 at 002-006; *see also* CX0055 at 002; CX0091 at 003; CX0269 at 001).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco's Response:

Benco has no specific response.

475. Bergman forwarded Stanislawski's email (CX0055) to Schein Zone Manager Dean Kyle two minutes after receiving it, and added a message to Kyle: "Would you take a look at this? I know we spoke about it already but concerning." (CX0269 at 001; CX0307 (Kyle, IHT at 15, 17, 177) (identifying positions for Bergman and Kyle)).

Schein's Response:

Complaint Counsel's assertion in its post-trial brief that Mr. Bergman's "concern" was the announcement of Patterson working with a buying group is unfounded and pure speculation. (CC Br. 17 & n.141). Complaint Counsel did not call Mr. Bergman or Mr. Kyle to testify, and at his IHT, Mr. Kyle testified, "I don't know that I noticed that he was concerned. ... As I read this, I thought he was saying concerning the lower part of the E-mail, here's the E-mail, not that he was necessarily concerned ... I thought that was a broken sentence. So I'm not sure." (CX 0307 (Kyle, IHT at 179-81)).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

476. On February 6, 2013, Bergman forwarded Stanislawski's email (CX0055) to Stewart Hanley of Benco, with the message, "Did you see this? Call me." (CX0055 at 002; *see also* CX0090 at 002; CX0091 at 002-003). Five minutes later, Hanley forwarded the email chain to Mike Trimble at Benco. (CX0055 at 001-002). Within two hours, Trimble forwarded the same email chain (CX0055) to Don Taylor, a Benco Regional Manager. (CX0055 at 001; *see also* CX0090 at 002; CX0091 at 002; Cohen, Tr. 529-530).

Schein's Response:

Mr. Hanley and Mr. Bergman previously worked at Patterson together, and there is nothing in the document or elsewhere indicating that Mr. Bergman's email was anything more than passing on a bit of industry gossip to an old coworker. (*See* CX 0314 (Guggenheim, IHT at 250-51)). Nor is there any evidence of a call between Mr. Bergman and Mr. Hanley. Complaint Counsel's inference that Mr. Bergman forwarded the email because it indicated that Patterson was working with a buying group is pure speculation and has no support in the record. (*See* CC Br. 17 & n.142). Moreover, there are no further communications involving Schein relating to this email chain.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

477. On February 7, 2013, Don Taylor forwarded the email chain (CX0055) containing information regarding NMDC's partnership with Patterson to Cohen for "feedback and coaching." (CX0055 at 001; Cohen, Tr. 529-530; *see also* CX00901 at 002; CX0091 at 001).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Don Taylor forwarded the underlying e-mail chain to Chuck Cohen, Pat Ryan, and Brian Evans of Benco. Brian Evans was Benco's Sales District Manager for the West Region, whose responsibility included the New Mexico market. (CX0056; Cohen, Tr. 710-11). Don Taylor forwarded the e-mail chain with a note that, in part, says: "I'd like to connect for just a couple if [sic] minutes to get your feedback and coaching on this." (CX0056; Cohen, Tr. 711).

478. Cohen learned of Patterson's involvement with NMDC on February 7, 2013 from the email chain (CX0055) forwarded by Taylor, a Benco regional manager in New Mexico, who forwarded an email from a Schein regional manager containing that information. (Cohen, Tr. 528-531; CX0055 at 001; *see also* CX0090 at 002).

Schein's Response:

Schein does not dispute Mr. Cohen's receipt of the email, but does dispute the characterization of Schein's role in the email chain. Schein's employee was merely forwarding local gossip to a former colleague. (*See* SRF 476).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, on February 4, 2013, the New Mexico Dental Cooperative's ("NMDC") Brenton Mason sent a New Mexico industry-wide e-mail blast to dental manufacturers setting a meeting for March 13, 2013 at Patterson's Albuquerque branch office. (CX0090-04). In his e-mail, Dr. Mason wrote "We have partnered with Patterson." (CX0090-04;

Mason, Tr. 2340). Dr Mason cannot recall any specific conversation that supports the statement in CX0090 that NMDC “had partnered with Patterson.” (Mason, Tr. 2374-76).

Second, Dr. Mason’s February 4, 2013 e-mail caused “quite a stir.” (Mason, Tr. 2376 (“Q. You would agree with me that the e-mail you sent out on February 4 to a number of manufacturers and some distributors and others in New Mexico entitled New Mexico Dental Cooperative Purchasing created quite a stir. A. Yes, it did.”)).

Third, Chuck Cohen recalls focusing his attention on the claims in Dr. Mason’s e-mail that the NMDC had “partnered with Patterson” and that the location for the NMDC’s meeting was Patterson’s Albuquerque, New Mexico office. (Cohen, Tr. 707-708). At that time, Chuck Cohen was not aware that Patterson had any Special Markets Division or any business operations focused on DSOs. (Cohen, Tr. 708). At that time, Chuck Cohen had not seen any evidence in the marketplace of Patterson selling to DSOs or any kind of group. (Cohen, Tr. 708). Therefore, Chuck Cohen’s reaction to receiving Dr. Mason’s e-mail was surprise to learn of the suggestion that Patterson was entering the DSO or group market because this would have been a significant shift in Patterson’s business strategy. Accordingly, Chuck Cohen was “skeptical” of the truth of this information. (Cohen, Tr. 708-709).

479. On February 8, 2013, after learning about Patterson’s involvement with NMDC, Cohen informed Taylor that Benco had a no buying group policy, and stated: “We don’t recognize buying groups . . . I’ll reach out to my counterpart at Patterson to let him know what’s going on in NM.” (Cohen, Tr. 528-530; CX0055 at 001).

Schein’s Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, Chuck Cohen recalls focusing his attention on the claims in Dr. Mason's e-mail that the NMDC had "partnered with Patterson" and that the location for the NMDC's meeting was Patterson's Albuquerque, New Mexico office. (Cohen, Tr. 707-708). At that time, Chuck Cohen was not aware that Patterson had any Special Markets Division or any business operations focused on DSOs. (Cohen, Tr. 708). At that time, Chuck Cohen had not seen any evidence in the marketplace of Patterson selling to DSOs or any kind of group. (Cohen, Tr. 708). Therefore, Chuck Cohen's reaction to receiving Dr. Mason's e-mail was surprise to learn of the suggestion that Patterson was entering the DSO or group market because this would have been a significant shift in Patterson's business strategy. Accordingly, Chuck Cohen was "skeptical" of the truth of this information. (Cohen, Tr. 708-709).

Second, Don Taylor forwarded the e-mail chain with a note that, in part, says: "I'd like to connect for just a couple if [sic] minutes to get your feedback and coaching on this." (CX0056; Cohen, Tr. 711). Chuck Cohen understood Don Taylor's request to mean that he was looking for help on what to do to compete in the New Mexico market in light of the new information that Patterson had partnered with the NMDC. (CX0056; Cohen, Tr. 711). Chuck Cohen did not take Don Taylor's e-mail as a question about Benco getting involved with the NMDC. (Cohen, Tr. 711).

Third, Chuck Cohen then forwarded Don Taylor's e-mail and the underlying e-mail starting with Dr. Mason's e-mail to Paul Guggenheim. (CX0056). Chuck Cohen's rationale for forwarding the e-mail chain to Paul Guggenheim was that Cohen wanted to let Guggenheim know about a some noise about one of Patterson's branches that he might not have heard about and might want to know. (Cohen, Tr. 712-15).

Fourth, Chuck Cohen thought that Paul Guggenheim might not have known the information contained in Dr. Mason's e-mail, and if the shoe had been on the other foot, hoped that Guggenheim would have let him know of information about Benco that he might not have known. (Cohen, Tr. 712-13). It was not Chuck Cohen's intent to form any kind of agreement with Paul Guggenheim about anything. (Cohen, Tr. 713).

The February 8, 2013 e-mail from Chuck Cohen to Paul Guggenheim, and Guggenheim's response, is not probative evidence of any alleged conspiracy between Benco and Patterson.

480. On February 8, 2013, five minutes after Cohen had written to Benco's Don Taylor that he would "reach out to my counterpart at Patterson," Cohen forwarded the email chain that he had received from Taylor (CX0055) to his counterpart, Paul Guggenheim. (CX0090 at 001; Cohen, Tr. 532-533; CX0091 at 001; Guggenheim, Tr. 1594; *see also* CX0056 at 001).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, Chuck Cohen forwarded Don Taylor's e-mail and the underlying e-mail starting with Dr. Mason's e-mail to Paul Guggenheim. (CX0056). Chuck Cohen's rationale for forwarding the e-mail chain to Paul Guggenheim was that Cohen wanted to let Guggenheim know about a some noise about one of Patterson's branches that he might not have heard about and might want to know. (Cohen, Tr. 712-15).

Second, Chuck Cohen thought that Paul Guggenheim might not have known the information contained in Dr. Mason's e-mail, and if the shoe had been on the other foot, hoped that Guggenheim would have let him know of information about Benco that he might not have known. (Cohen, Tr. 712-13). It was not Chuck Cohen's intent to form any kind of agreement with Paul Guggenheim about anything. (Cohen, Tr. 713).

Third, Chuck Cohen's e-mail did not ask Paul Guggenheim to do anything. (Cohen, Tr. 714). Chuck Cohen did not expect Paul Guggenheim to do anything. (Cohen, Tr. 714). Chuck Cohen never followed up with Paul Guggenheim about his e-mail. (Cohen, Tr. 714).

The February 8, 2013 e-mail from Chuck Cohen to Paul Guggenheim, and Guggenheim's response, is not probative evidence of any alleged conspiracy between Benco and Patterson.

481. Cohen "found it surprising" that Patterson had partnered with NMDC and thought it "would have been very unusual for Patterson to sell to buying groups" because he thought Patterson did not work with buying groups at the time in February 2013. (Cohen, Tr. 528, 531-532; CX0301 (Cohen, IHT at 236) ("As far as I know, at the time of this e-mail, Patterson never sold to buying groups, never recognized buying groups.")).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Chuck Cohen recalls focusing his attention on the claims in Dr. Mason's e-mail that the NMDC had "partnered with Patterson" and that the location for the NMDC's meeting was Patterson's Albuquerque, New Mexico office. (Cohen, Tr. 707-708). At that time, Chuck Cohen was not aware that Patterson had any Special Markets Division or any business operations focused on DSOs. (Cohen, Tr. 708). At that time, Chuck Cohen had not seen any evidence in the marketplace of Patterson selling to DSOs or any kind of group. (Cohen, Tr. 708). Therefore, Chuck Cohen's reaction to receiving Dr. Mason's e-mail was surprise to learn of the suggestion that Patterson was entering the DSO or group market because this would have been a significant shift in Patterson's business strategy.

Accordingly, Chuck Cohen was "skeptical" of the truth of this information. (Cohen, Tr. 708-709).

482. A change in Patterson's buying group strategy posed a risk to Benco of potential loss of customers. (Cohen, Tr. 466-467).

Schein's Response:

The asserted fact misrepresents Mr. Cohen's testimony. The testimony cited by Complaint Counsel reflects Benco's concerns about Patterson or Schein starting their own buying groups:

Q. One of the risks of Benco creating EDA was that other GPOs get started and are recognized by Schein or Patterson; is that right?

A. That is one of the risks I wrote. Yes.

Q. And why is it a risk to Benco if Schein or Patterson opened up buying groups as well?

A. Well, it's always a risk when we innovate and we're copied by our major competitors. Because it blunts the innovation.

(Cohen, Tr. 466).

The remainder of Cohen's testimony indicates that *any* change to Schein and/or Patterson's strategy or value proposition could be a risk to Benco. (Cohen, Tr. 467 ("Anything that changes the value proposition that Schein or Patterson has impacts our business. ... Any time Schein or Patterson changes their strategy there's a risk to Benco that they -- that we will lose customers.")). The testimony, therefore, does not support the asserted fact.

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, Complaint Counsel's paraphrasing of Cohen's testimony is inaccurate. Contrary to the proposed finding, Cohen never testified that Schein and Patterson opening up buying groups was a risk to Benco. (Cohen, Tr. 466-67). Cohen's actual testimony was: "Any time Schein or Patterson changes their strategy, there's a risk to Benco." (Cohen, Tr. 467).

Second, and more egregiously, Complaint Counsel has taken the cited testimony out of context and attempts to contort it into a different context far beyond its intended meaning.

The cited testimony from Chuck Cohen was in response to questions from Complaint Counsel regarding a Cohen OneNote post entitled “Case Study: Elite Dental Alliance.” (CX1084). As its title clearly indicates, the exhibit is a case study examining Benco’s joint venture with Cain Watters that created EDA. (CX1084). The specific language Cohen is discussing appears under a section entitled “Our Risk” in which Cohen is listing potential risks to the formation and launch of EDA by Benco and Cain Watters. (CX1084-007). It is a reference to the potential of competition from Schein and Patterson against EDA. (CX1084-007). As Chuck Cohen explained at trial, “it’s always a risk when we innovate and we’re copied by our major competitors. Because it blunts the innovation.” (Cohen, Tr. at 466).

Therefore, the proposed finding should be rejected.

483. On February 8, 2013, Cohen forwarded the email chain regarding Patterson’s involvement with NMDC (CX0055) to his competitor, Guggenheim, and he informed Guggenheim of all of the details of Benco’s own no buying group policy, including that Benco’s sales team understood that policy:

Just wanted to let you know about some noise I’ve picked up from New Mexico. FYI: Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups (though we do work with corporate accounts) and our team understands that policy.

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

Schein’s Response:

No response.

Patterson’s Response:

Patterson joins Benco’s response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, Chuck Cohen forwarded Don Taylor's e-mail and the underlying e-mail starting with Dr. Mason's e-mail to Paul Guggenheim. (CX0056). Chuck Cohen's rationale for forwarding the e-mail chain to Paul Guggenheim was that Cohen wanted to let Guggenheim know about a some noise about one of Patterson's branches that he might not have heard about and might want to know. (Cohen, Tr. 712-15).

Second, Chuck Cohen thought that Paul Guggenheim might not have known the information contained in Dr. Mason's e-mail, and if the shoe had been on the other foot, hoped that Guggenheim would have let him know of information about Benco that he might not have known. (Cohen, Tr. 712-13). It was not Chuck Cohen's intent to form any kind of agreement with Paul Guggenheim about anything. (Cohen, Tr. 713).

Third, Chuck Cohen's e-mail did not ask Paul Guggenheim to do anything. (Cohen, Tr. 714). Chuck Cohen did not expect Paul Guggenheim to do anything. (Cohen, Tr. 714). Chuck Cohen never followed up with Paul Guggenheim about his e-mail. (Cohen, Tr. 714).

Fourth, Chuck Cohen did not recall why he included an FYI about Benco's policy in his e-mail to Paul Guggenheim. ("It seemed to be germane to the topic, but no special reason."). (Cohen, Tr. 714). Benco's policy had been in place since 1996. (Cohen, Tr. 714). Benco's policy was not confidential and it was not a secret. (Cohen, Tr. 714). Chuck Cohen believed that Benco's policy was widely known in the dental industry. (Cohen, Tr. 714). Benco had shared its policy with many others in the dental industry. (Cohen, Tr. 714). By sharing an FYI about Benco's policy with Paul Guggenheim, Chuck Cohen was

not telling him anything that Benco had not over the prior two decades already told many others within the dental industry. (Cohen, Tr. 714).

The February 8, 2013 e-mail from Chuck Cohen to Paul Guggenheim, and Guggenheim's response, is not probative evidence of any alleged conspiracy between Benco and Patterson.

484. Cohen communicated Benco's no buying group policy to Guggenheim. (Cohen, Tr. 501 ("Q. You've communicated Benco's no-buying group policy to Mr. Guggenheim? A. . . . [Y]es.")).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, Chuck Cohen did not recall why he included an FYI about Benco's policy in his e-mail to Paul Guggenheim. ("It seemed to be germane to the topic, but no special reason."). (Cohen, Tr. 714). Benco's policy had been in place since 1996. (Cohen, Tr. 714). Benco's policy was not confidential and it was not a secret. (Cohen, Tr. 714). Chuck Cohen believed that Benco's policy was widely known in the dental industry. (Cohen, Tr. 714). Benco had shared its policy with many others in the dental industry. (Cohen, Tr. 714). By sharing an FYI about Benco's policy with Paul Guggenheim, Chuck Cohen was not telling him anything that Benco had not over the prior two decades already told many others within the dental industry. (Cohen, Tr. 714).

The February 8, 2013 e-mail from Chuck Cohen to Paul Guggenheim, and Guggenheim's response, is not probative evidence of any alleged conspiracy between Benco and Patterson.

485. Cohen forwarded the information about Patterson's arrangement with NMDC to Guggenheim because he "wanted to let [Guggenheim] know about a situation in New Mexico that he might not have heard was taking place in one of their locations." (Cohen, Tr. 712).

Schein's Response:

No response.

Patterson's Response:

Patterson joins Benco's response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, Chuck Cohen recalls focusing his attention on the claims in Dr. Mason's e-mail that the NMDC had "partnered with Patterson" and that the location for the NMDC's meeting was Patterson's Albuquerque, New Mexico office. (Cohen, Tr. 707-708). At that time, Chuck Cohen was not aware that Patterson had any Special Markets Division or any business operations focused on DSOs. (Cohen, Tr. 708). At that time, Chuck Cohen had not seen any evidence in the marketplace of Patterson selling to DSOs or any kind of group. (Cohen, Tr. 708). Therefore, Chuck Cohen's reaction to receiving Dr. Mason's e-mail was surprise to learn of the suggestion that Patterson was entering the DSO or group market because this would have been a significant shift in Patterson's business strategy. Accordingly, Chuck Cohen was "skeptical" of the truth of this information. (Cohen, Tr. 708-709).

Second, Chuck Cohen's rationale for forwarding the e-mail chain to Paul Guggenheim was that Cohen wanted to let Guggenheim know about some noise about one of Patterson's branches that he might not have heard about and might want to know. (Cohen, Tr. 712-15). Chuck Cohen thought that Paul Guggenheim might not have known the information contained in Dr. Mason's e-mail, and if the shoe had been on the other foot, hoped that Guggenheim would have let him know of information about Benco that he might not have known. (Cohen, Tr. 712-13). It was not Chuck Cohen's intent to form any kind of agreement with Paul Guggenheim about anything. (Cohen, Tr. 713).

The February 8, 2013 e-mail from Chuck Cohen to Paul Guggenheim, and Guggenheim's response, is not probative evidence of any alleged conspiracy between Benco and Patterson.

486. Cohen forwarded the information about Patterson's arrangement with NMDC to Paul Guggenheim because he thought Guggenheim may not have known about Patterson's involvement with NMDC. (Cohen, Tr. 712).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, Chuck Cohen recalls focusing his attention on the claims in Dr. Mason's e-mail that the NMDC had "partnered with Patterson" and that the location for the NMDC's meeting was Patterson's Albuquerque, New Mexico office. (Cohen, Tr. 707-708). At that

time, Chuck Cohen was not aware that Patterson had any Special Markets Division or any business operations focused on DSOs. (Cohen, Tr. 708). At that time, Chuck Cohen had not seen any evidence in the marketplace of Patterson selling to DSOs or any kind of group. (Cohen, Tr. 708). Therefore, Chuck Cohen's reaction to receiving Dr. Mason's e-mail was surprise to learn of the suggestion that Patterson was entering the DSO or group market because this would have been a significant shift in Patterson's business strategy. Accordingly, Chuck Cohen was "skeptical" of the truth of this information. (Cohen, Tr. 708-709).

Second, Chuck Cohen's rationale for forwarding the e-mail chain to Paul Guggenheim was that Cohen wanted to let Guggenheim know about a some noise about one of Patterson's branches that he might not have heard about and might want to know. (Cohen, Tr. 712-15). Chuck Cohen thought that Paul Guggenheim might not have known the information contained in Dr. Mason's e-mail, and if the shoe had been on the other foot, hoped that Guggenheim would have let him know of information about Benco that he might not have known. (Cohen, Tr. 712-13). It was not Chuck Cohen's intent to form any kind of agreement with Paul Guggenheim about anything. (Cohen, Tr. 713).

The February 8, 2013 e-mail from Chuck Cohen to Paul Guggenheim, and Guggenheim's response, is not probative evidence of any alleged conspiracy between Benco and Patterson.

487. Cohen shared the information about Patterson's arrangement with NMDC with Guggenheim because he hoped that Guggenheim would also share information with him. (Cohen, Tr. 712-713 ("I like to give information to get information. I like to be useful [to Guggenheim]. If the shoe was on the other foot, I would have liked to have known the same information . . . I like to maintain good relationships with my competitors.")).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, Chuck Cohen recalls focusing his attention on the claims in Dr. Mason's e-mail that the NMDC had "partnered with Patterson" and that the location for the NMDC's meeting was Patterson's Albuquerque, New Mexico office. (Cohen, Tr. 707-708). At that time, Chuck Cohen was not aware that Patterson had any Special Markets Division or any business operations focused on DSOs. (Cohen, Tr. 708). At that time, Chuck Cohen had not seen any evidence in the marketplace of Patterson selling to DSOs or any kind of group. (Cohen, Tr. 708). Therefore, Chuck Cohen's reaction to receiving Dr. Mason's e-mail was surprise to learn of the suggestion that Patterson was entering the DSO or group market because this would have been a significant shift in Patterson's business strategy. Accordingly, Chuck Cohen was "skeptical" of the truth of this information. (Cohen, Tr. 708-709).

Second, Chuck Cohen's rationale for forwarding the e-mail chain to Paul Guggenheim was that Cohen wanted to let Guggenheim know about a some noise about one of Patterson's branches that he might not have heard about and might want to know. (Cohen, Tr. 712-15). Chuck Cohen thought that Paul Guggenheim might not have known the information contained in Dr. Mason's e-mail, and if the shoe had been on the other foot, hoped that Guggenheim would have let him know of information about Benco that he

might not have known. (Cohen, Tr. 712-13). It was not Chuck Cohen's intent to form any kind of agreement with Paul Guggenheim about anything. (Cohen, Tr. 713).

The February 8, 2013 e-mail from Chuck Cohen to Paul Guggenheim, and Guggenheim's response, is not probative evidence of any alleged conspiracy between Benco and Patterson.

488. Cohen could not identify any procompetitive justifications for his February 2013 communications with Guggenheim about Benco's no buying group policy. (CX0301 (Cohen, IHT at 243) ("Q. Can you think of any business reason for you to tell Mr. Guggenheim of Benco's no-GPO policy? A. I don't think [there] is a business reason.")).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, the proposed finding is misleading because the cited testimony was more expansive than the small snippet that Complaint Counsel chose to quote here. Chuck Cohen's complete testimony in response to Complaint Counsel's questions was:

A: "I don't think this is a business reason. I think it's more of a, hey, here's what we're doing. Here's what's going on. I don't view it as a business reason one way or the other. Our policy was the same. It didn't change one way or the other. And I don't think it affected the business at all, our business or Patterson's business." (Cohen, IHT at 243).

Second, Chuck Cohen did not recall why he included an FYI about Benco's policy in his e-mail to Paul Guggenheim. ("It seemed to be germane to the topic, but no special reason."). (Cohen, Tr. 714). Benco's policy had been in place since 1996. (Cohen, Tr.

714). Benco's policy was not confidential and it was not a secret. (Cohen, Tr. 714). Chuck Cohen believed that Benco's policy was widely known in the dental industry. (Cohen, Tr. 714). Benco had shared its policy with many others in the dental industry. (Cohen, Tr. 714). By sharing an FYI about Benco's policy with Paul Guggenheim, Chuck Cohen was not telling him anything that Benco had not over the prior two decades already told many others within the dental industry. (Cohen, Tr. 714).

489. Cohen's February 8, 2013 email regarding NMDC (CX0056) was the first time Guggenheim became aware of Benco's no buying group policy. (Guggenheim, Tr. 1596; *see also* CX0314 (Guggenheim, IHT at 237, 238)).

Schein's Response:

No response.

Patterson's Response:

Patterson joins Benco's response.

Benco's Response:

Benco has no specific response regarding Paul Guggenheim's testimony or whether Guggenheim's memory may, or may not, be accurate as to the information in the proposed finding.

But, Benco's policy had been in place since 1996. (Cohen, Tr. 714). Benco's policy was not confidential and it was not a secret. (Cohen, Tr. 714). Chuck Cohen believed that Benco's policy was widely known in the dental industry. (Cohen, Tr. 714). Benco had shared its policy with many others in the dental industry. (Cohen, Tr. 714). By sharing an FYI about Benco's policy with Paul Guggenheim, Chuck Cohen was not telling him anything that Benco had not over the prior two decades already told many others within the dental industry. (Cohen, Tr. 714).

490. As of February 8, 2013, Guggenheim did not believe that Benco's policy of not selling to buying groups was public information. (Guggenheim, Tr. 1596-1597 ("Q. Did you believe that Benco's policy of not selling to buying groups was public information? A. No. I don't – I didn't think so."); *see also* CX0314 (Guggenheim, IHT at 239)).

Schein's Response:

No response, other than to note that Mr. Guggenheim's belief about the extent to which Benco disseminated its no-buying-group policy is irrelevant.

Patterson's Response:

Patterson joins Benco's response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, Paul Guggenheim's testimony regarding to whom Benco communicated its policy has absolutely no probative evidentiary value whatsoever. Guggenheim has no personal knowledge regarding to whom Benco communicated its policy. (Guggenheim, Tr. 1869). Benco, instead, is the authority on persons and entities to whom it communicated its policy. And Benco's testimony on this point could not be more clear.

Second, Benco's policy had been in place since 1996. (Cohen, Tr. 714). Benco's policy was not confidential and it was not a secret. (Cohen, Tr. 714). Chuck Cohen believed that Benco's policy was widely known in the dental industry. (Cohen, Tr. 714). Benco had shared its policy with many others in the dental industry. (Cohen, Tr. 714). By sharing an FYI about Benco's policy with Paul Guggenheim, Chuck Cohen was not telling him anything that Benco had not over the prior two decades already told many others within the dental industry. (Cohen, Tr. 714).

B. Benco and Patterson Exchanged Assurances that Neither Would Discount to Buying Groups.

491. On February 8, 2013, approximately 20 minutes after receiving an email from Cohen regarding its no buying group policy, Guggenheim forwarded it to Misiak and Rogan, and let them know of Benco's policy of not working with buying groups. (Misiak, Tr. 1329, 1331; Guggenheim, Tr. 1606-1607; CX0091 at 001).

Schein's Response:

No response.

Patterson's Response:

At trial, Guggenheim testified that he forwarded Cohen's email without any commentary and without any instructions. (Guggenheim, Tr. 1700-01 (Q. And then up at the top, you forwarded this to Mr. Misiak and Mr. Rogan about a half an hour later; is that right? A. Right. Q. I noticed you didn't put anything in the forward, you just forwarded it. A. Yeah. As you can see in my e-mail, I do that a lot, just informationally distributed stuff to people. Q. Did you instruct them to do anything? A. No. Q. Did you tell them, go instruct Mr. Misiak's organization, the region managers and the branch managers and the 800-plus territory reps -- did you tell them go tell all those people to go do anything? A. No. Q. You just forwarded it? A. Right. Q. And I think you said you don't recall ever communicating with them again about this. Did I get that right? A. Yeah. I don't have any recollection of anything -- that was five years ago. I don't think there was anything further.")).

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Guggenheim forwarded Cohen's e-mail to Misiak and Rogan with no text at all in the body of the e-mail. (CX0091). Guggenheim did not "let them know of Benco's policy." (CX0091). The proposed finding is nothing more than Complaint Counsel's narrative commentary and is not based in fact or supported by the cited exhibit.

The proposed finding should be rejected.

492. In February 2013, Dave Misiak was in charge of Patterson's U.S. sales organization, and Tim Rogan was in charge of Patterson's pricing department. (CCFF ¶¶ 1944, 1945, 1947, 1952).

Schein's Response:

No response.

Patterson's Response:

Patterson refers to its responses to CCFF ¶¶ 1944, 1945, 1947, 1952. Otherwise, it had no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

493. Moreover, Misiak and Rogan were senior executives within the company who dealt with buying groups. (CCFF ¶ 1938).

Schein's Response:

No response.

Patterson's Response:

Patterson refers to its response to CCFF ¶ 1938. Otherwise, it had no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

494. Guggenheim forwarded Cohen's February 8, 2013 email to Misiak and Rogan because they were his direct reports. (Guggenheim, Tr. 1607).

Schein's Response:

No response.

Patterson's Response:

At trial, Guggenheim testified that he forwarded the email for informational purposes. (Guggenheim, Tr. 1607) ("I forward lots and -- whenever I see something come across my e-mail, I forward a lot of e-mails, so yeah, it's informational.").

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only testimony of a Patterson witness discussing Patterson's business.

495. A few hours after Guggenheim received the February 8, 2013 email from Cohen about Patterson's involvement with NMDC and Benco's no buying group policy, Guggenheim responded to Cohen:

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

(CX0090 at 001; Guggenheim, Tr. 1607-1608).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only testimony of a Patterson witness discussing Patterson's business.

496. In testimony, Guggenheim confirmed that his response to Cohen's February 8, 2013, email about Patterson's involvement with NMDC and Benco's no buying group policy (CX0090) meant that Patterson felt the same way about buying groups. (Guggenheim, Tr. 1611-1612).

Schein's Response:

No response.

Patterson's Response:

At trial, Guggenheim testified that he "banged out a quick response [to Cohen], probably took [] 10-15 seconds, fired it off to Chuck and moved on to the next e-mail." (Guggenheim, Tr. 1706). Guggenheim did not commit himself or Patterson to any particular action with respect to buying groups. (Guggenheim, Tr. 1706-07) (Q. Why did you say "feel"? A. Just my general sense is that, you know, we've always felt that way, you know, but "feel" means it's just a -- a simple way of saying how I feel, we feel, no specific science behind it. Q. Mr. Guggenheim, let's be clear. Did you commit in any way in this e-mail to Mr. Cohen that Patterson was not going to sell to buying groups? A. Absolutely not. Q. Did you commit in any way to Mr. Cohen in this e-mail that Patterson was not going to discount to buying groups? A. Absolutely not. Q. Did you commit in any way to do anything going forward with regard to buying groups? A. Never.").

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only testimony of a Patterson witness discussing Patterson's business.

497. On other occasion where Cohen raised issues about Patterson's business conduct, Guggenheim "investigated" and looked into those issues and responded to Cohen to inform him of what he learned. (CCFF ¶¶ 297-298, 307).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only testimony of a Patterson witness discussing Patterson's business.

498. When Guggenheim was Patterson's Southwest Regional Manager, years before he exchanged assurances with Cohen about buying groups in 2013, he did not receive any guidance from Patterson corporate about whether to do business with GPOs. (CX8023 (Guggenheim, Dep. at 38) ("Q. While you were southwest regional manager, did you receive any guidance from Patterson corporate on whether to do business with GPOs? A. Not directly, no. Q. What about indirectly? A. No.")). At trial, Guggenheim changed his testimony, and stated that Patterson had provided guidance since 2000 not to do business with buying groups. (Guggenheim, Tr. 1573-1574).

Schein's Response:

No response.

Patterson's Response:

Paul Guggenheim did not change his testimony in any way, and this proposed finding is deeply misleading. Guggenheim testified again and again during the quoted line of questioning that Patterson did not have a written policy against working with buying groups, but that its general direction or guidance has been to avoid involving third parties in its relationships with its customers.

Q. At the time that you received Chuck Cohen's e-mail on February 8, 2013, **did Patterson have a company policy with respect to buying groups?**

A. **We hadn't done business with -- yeah. We weren't doing business with buying groups to any great degree that I was aware.**

Q. **You did have a company policy?**

A. **That was our -- when you define "policy," that was our -- our history and our perspective. I don't know if there was a written policy. There wasn't anything like that. But we generally -- we didn't do business with buying groups.**

Q. And do you recall that I asked you this question in your deposition and you gave a different answer?

A. I don't recall that.

Q. Would it help to refresh your recollection to take a look at that?

A. Sure.

Q. Let's go to your deposition, CX 8023, page 134, lines 13 to 19.

And you see there I asked you:

"QUESTION: At the time that you received Mr. Cohen's e-mail on February 8th, 2013, did Patterson have a company policy with respect to buying groups?"

And do you see your answer there?

A. Yeah.

....

Q. Mr. Guggenheim, at your deposition I asked you, "At the time that you received Mr. Cohen's e-mail on February 8th, 2013, did Patterson have a company policy with respect to buying groups?"

Do you see that?

A. I do.

Q. And your answer there was "No"?

A. Correct.

Q. And that was your testimony under oath?

A. It was.

I think the confusion here is around the word "policy," and maybe I should restate what I'm saying here. We don't have a company policy -- when we talk about policies, we're talking about written policies in our policies and procedures manual. We go to painstaking degrees to document policies in the organization. There is no written policy about this. And branches are decentralized. They could do business with whomever they -- you know, largely whoever they want to do business with.

So I think the concern I had here was, you know, if you asked me in 2013 were we doing business with a buying group, I can't tell you absolutely no. I don't know. I don't know how branches would look at that, so we don't have -- we didn't have a policy about it. **We don't today have policies around this sort of thing. Largely, it's left to the branches, but I would say the directive -- guidance has always been**

we don't do business with these people, so we're defining the difference between guidance, how we've operated in the past going back to 2000.

The guidance has always been that while we give our branches and our general managers tremendous leeway to evaluate customers individually, the guidance has always been that we don't do business with buying groups. We don't like third parties in between us and our customers. But there isn't a written policy about that, so that's probably why I responded the way I did.

Q. And just following up on that, you had testified that each of these were evaluated individually, largely in the markets with the --

....

Q. At the time of the e-mail with Chuck Cohen on February 8, 2013, had Patterson come up with a uniform way of dealing with buying groups?

A. Had we come up with a?

Q. A uniform way of dealing with buying groups.

A. **Again, these are semantics. I -- we hadn't dealt with buying groups to any degree going back to my start with the company,** so I don't know that your -- I don't know how to answer that question.

Q. Let me ask it differently to see if it helps.

A. Okay.

Q. Is it fair to say that at the time of the e-mail with Chuck Cohen, Patterson had not come up with a uniform way of dealing with buying groups?

A. Generally, we didn't -- as far as my knowledge, we didn't deal with buying groups.

Q. So is your answer that there was a uniform way?

A. Yeah. That we didn't do business with them.

Q. And do you recall I asked you this question in your deposition and you gave a different answer?

A. I don't.

Q. Okay. Would it help to look at that transcript?

A. Sure.

Q. Let's take a look at CX 8023, again your deposition, page 137, lines 3 to 5.

And there I asked you:

"QUESTION: So is it fair to say that at the time of this e-mail Patterson had not come up with a uniform way of dealing with buying groups?"

And do you see your answer there?

A. "I think that's correct."

Yeah, we don't have a -- I mean, I -- the question is confusing. **We don't have a uniform policy, black-and-white approach to this. It's - - it's generally that we've not done business with buying groups, but there isn't a uniform -- I mean, this is all about -- we're locking in on whether or not there's a hard-and-fast policy, and I've answered the**

question to say that there isn't a policy written in our manuals that precludes managers from doing business with anyone they want to.

But generally the direction or the guidance has always been that we don't have third parties involved, i.e., buying groups, with our business going back to as far as I can recall.

Q. And here in the question I didn't ask you about a policy; right? I asked about a uniform way?

A. Uniform way. I guess the word "uniform" --

....

Q. **And at the time that you received Chuck Cohen's e-mail on February 8, 2013, Patterson didn't have a policy like Benco did as Chuck Cohen articulated; right?**

A. **Not a written policy, no.**

(Guggenheim, Tr. 1600-05 (emphasis added)). Otherwise, Patterson has no specific response.

Benco's Response:

Guggenheim never “exchanged assurances with Cohen about buying groups in 2013.” (BFF ¶¶ 421-58). Otherwise, the proposed finding does not pertain to Benco, as it refers only testimony of a Patterson witness discussing Patterson’s business.

499. At the time Guggenheim received Cohen’s February 8, 2013 email (CX0090), Patterson did not have a company policy with respect to buying groups or a uniform way of dealing with buying groups and had done business with buying groups. (CX8023 (Guggenheim, Dep. at 134 (no company policy at time received Cohen’s February 8, 2013 email, and Patterson “evaluated individually” each buying group), 137 (“don’t have . . . a uniform way to deal with [buying groups]”); CX0314 (Guggenheim, IHT. at 220) (“I believe we do [sell to GPOs]”); CX8023 (Guggenheim, Dep. at 141) (“my gut would tell me, yeah, we’ve probably done business with buying groups and that’s probably been done in branches, you know, for many years”))). At trial, Guggenheim changed his testimony and stated that at the time he received Cohen’s February 8, 2013 email (CX0090), Patterson had a policy not to do business with buying groups. (Guggenheim, Tr. 1597-1598).

Schein's Response:

No response.

Patterson's Response:

Paul Guggenheim did not change his testimony in any way, and this proposed finding is deeply misleading. Guggenheim testified again and again during the quoted line

of questioning that Patterson did not have a written policy against working with buying groups, but that its general direction or guidance has been to avoid involving third parties in its relationships with its customers.

Q. At the time that you received Chuck Cohen's e-mail on February 8, 2013, **did Patterson have a company policy with respect to buying groups?**

A. **We hadn't done business with -- yeah. We weren't doing business with buying groups to any great degree that I was aware.**

Q. **You did have a company policy?**

A. **That was our -- when you define "policy," that was our -- our history and our perspective. I don't know if there was a written policy. There wasn't anything like that. But we generally -- we didn't do business with buying groups.**

Q. And do you recall that I asked you this question in your deposition and you gave a different answer?

A. I don't recall that.

Q. Would it help to refresh your recollection to take a look at that?

A. Sure.

Q. Let's go to your deposition, CX 8023, page 134, lines 13 to 19.

And you see there I asked you:

"QUESTION: At the time that you received Mr. Cohen's e-mail on February 8th, 2013, did Patterson have a company policy with respect to buying groups?"

And do you see your answer there?

A. Yeah.

....

Q. Mr. Guggenheim, at your deposition I asked you, "At the time that you received Mr. Cohen's e-mail on February 8th, 2013, did Patterson have a company policy with respect to buying groups?"

Do you see that?

A. I do.

Q. And your answer there was "No"?

A. Correct.

Q. And that was your testimony under oath?

A. It was.

I think the confusion here is around the word "policy," and maybe I should restate what I'm saying here. We don't have a company policy -- when we talk about policies, we're talking about written policies in our policies and procedures manual. We go to painstaking degrees to document policies in the organization. There is no written policy about this. And branches are decentralized. They could do business with whomever they -- you know, largely whoever they want to do business with.

So I think the concern I had here was, you know, if you asked me in 2013 were we doing business with a buying group, I can't tell you absolutely no. I don't know. I don't know how branches would look at that, so we don't have -- we didn't have a policy about it. **We don't today have policies around this sort of thing. Largely, it's left to the branches, but I would say the directive -- guidance has always been we don't do business with these people, so we're defining the difference between guidance, how we've operated in the past going back to 2000.**

The guidance has always been that while we give our branches and our general managers tremendous leeway to evaluate customers individually, the guidance has always been that we don't do business with buying groups. We don't like third parties in between us and our customers. But there isn't a written policy about that, so that's probably why I responded the way I did.

Q. And just following up on that, you had testified that each of these were evaluated individually, largely in the markets with the --

....

Q. At the time of the e-mail with Chuck Cohen on February 8, 2013, had Patterson come up with a uniform way of dealing with buying groups?

A. Had we come up with a?

Q. A uniform way of dealing with buying groups.

A. **Again, these are semantics. I -- we hadn't dealt with buying groups to any degree going back to my start with the company,** so I don't know that your -- I don't know how to answer that question.

Q. Let me ask it differently to see if it helps.

A. Okay.

Q. Is it fair to say that at the time of the e-mail with Chuck Cohen, Patterson had not come up with a uniform way of dealing with buying groups?

A. Generally, we didn't -- as far as my knowledge, we didn't deal with buying groups.

Q. So is your answer that there was a uniform way?

A. Yeah. That we didn't do business with them.

Q. And do you recall I asked you this question in your deposition and you gave a different answer?

A. I don't.

Q. Okay. Would it help to look at that transcript?

A. Sure.

Q. Let's take a look at CX 8023, again your deposition, page 137, lines 3 to 5.

And there I asked you:

"QUESTION: So is it fair to say that at the time of this e-mail Patterson had not come up with a uniform way of dealing with buying groups?"

And do you see your answer there?

A. "I think that's correct."

Yeah, we don't have a -- I mean, I -- the question is confusing. **We don't have a uniform policy, black-and-white approach to this. It's - - it's generally that we've not done business with buying groups, but there isn't a uniform -- I mean, this is all about -- we're locking in on whether or not there's a hard-and-fast policy, and I've answered the question to say that there isn't a policy written in our manuals that precludes managers from doing business with anyone they want to.**

But generally the direction or the guidance has always been that we don't have third parties involved, i.e., buying groups, with our business going back to as far as I can recall.

Q. And here in the question I didn't ask you about a policy; right? I asked about a uniform way?

A. Uniform way. I guess the word "uniform" --

. . . .

Q. **And at the time that you received Chuck Cohen's e-mail on February 8, 2013, Patterson didn't have a policy like Benco did as Chuck Cohen articulated; right?**

A. **Not a written policy, no.**

(Guggenheim, Tr. 1600-05 (emphasis added)). Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only testimony of a Patterson witness discussing Patterson's business.

500. Cohen interpreted Guggenheim's statement in his February 8, 2013 email (CX0090) that "we feel the same way" to mean that Patterson's policy with respect to dealing with buying groups was similar to Benco's policy. (Cohen, Tr. 589-590; CX0090 at 001). Cohen testified: "Q. What did you think Mr. Guggenheim's position was on GPOs at the time of this e-mail? A. I thought -- it goes back to the e-mail exchange that we had several months before in the context of the New Mexico cooperative, and he said, 'We feel the same way about these.' Q. So did you think that his policy was similar to yours? A. That's the way I interpreted that sentence. Yes." (Cohen, Tr. 589-590).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit and testimony.

First, Chuck Cohen had formed his belief regarding Patterson's policy with respect to buying group prior to even sending his February 8, 2013 e-mail to Paul Guggenheim. (BFF ¶¶ 430-33). Cohen recalls focusing his attention on the claims in Dr. Mason's e-mail that the NMDC had "partnered with Patterson" and that the location for the NMDC's meeting was Patterson's Albuquerque, New Mexico office. (Cohen, Tr. 707-708). At that time, Chuck Cohen was not aware that Patterson had any Special Markets Division or any business operations focused on DSOs. (Cohen, Tr. 708). At that time, Chuck Cohen had not seen any evidence in the marketplace of Patterson selling to DSOs or any kind of group. (Cohen, Tr. 708). Chuck Cohen's reaction to receiving Dr. Mason's e-mail was surprise to learn of the suggestion that Patterson was entering the DSO or group market because this would have been a significant shift in Patterson's business strategy. Accordingly, Chuck Cohen was "skeptical" of the truth of this information. (Cohen, Tr. 708-709).

Second, to the extent that Cohen may have interpreted Guggenheim's eight-second e-mail saying only "we feel the same way" to indicate Patterson's policy with respect to buying groups, that is only because Guggenheim's statement was consistent with Cohen's already formed belief and market observations. (BFF ¶¶ 430-33).

Third, Cohen clearly testified that Guggenheim's response as to a "feeling" was not a commitment. (Cohen, Tr. 921-22). Even if Guggenheim and Patterson felt the same way on February 8, 2013, the e-mail contains no assurance or commitment as to any future "feeling." (Cohen, Tr. 921-22). Cohen simply did not know what Patterson was going to do with respect to buying group going forward. (Cohen, Tr. 922).

The February 8, 2013 e-mail from Chuck Cohen to Paul Guggenheim, and Guggenheim's response, is not probative evidence of any alleged conspiracy between Benco and Patterson.

501. Cohen testified that if he himself "had received a similar alert, there's a lot of things about the investigation that [he] might do," and stated that Guggenheim's response (CX0090) could mean that Guggenheim would investigate Patterson's relationship with NMDC. (Cohen, Tr. 536).

Schein's Response:

No response, other than to note that Mr. Cohen's speculation in response to a hypothetical is not relevant or probative.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, when asked by Complaint Counsel what he understood Guggenheim to have meant when he wrote "I'll investigate," Cohen twice replied, "I can't say." (Cohen, Tr. 536). Yet, Complaint Counsel – unsatisfied with Cohen's unequivocal answer – attempts in the proposed finding to distort Cohen's testimony. That attempt, and the proposed finding, should be rejected.

Second, the cited testimony above wherein Cohen speculated about what he might have done to investigate if he were – hypothetically – in Guggenheim's position, was meant only to explain his prior two answers – that he can't say" what Guggenheim himself meant. (Cohen, Tr. 536).

Third, Cohen's hypothetical postulating about what he might have done carries no evidentiary weight as to what Guggenheim actually meant when he wrote, "I'll investigate."

502. Dave Misiak did not recall whether he knew of Benco's practices regarding buying groups prior to February 2013. (Misiak, Tr. 1333).

Schein's Response:

No response.

Patterson's Response:

No specific response

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, Misiak's absence of a recollection cannot be the basis for a proposed finding of fact. He may, or may not, have known – but he did not recall one way or the other.

Second, Benco's policy had been in place since 1996. (Cohen, Tr. 714). Benco's policy was not confidential and it was not a secret. (Cohen, Tr. 714). Chuck Cohen believed that Benco's policy was widely known in the dental industry. (Cohen, Tr. 714). Benco had shared its policy with many others in the dental industry. (Cohen, Tr. 714). By sharing an FYI about Benco's policy with Paul Guggenheim, Chuck Cohen was not telling him anything that Benco had not over the prior two decades already told many others within the dental industry. (Cohen, Tr. 714).

C. Patterson Ended Negotiations With a Buying Group Three Days After Exchange of Assurances with Benco.

503. On February 11, 2013, just three days after the February 8, 2013, communication between Cohen and Guggenheim (CX0090), Patterson communicated to NMDC that it would not bid on NMDC as originally expected. (CX8035 (Mason, Dep. at 54-55); CX4090 at 001-002).

Schein's Response:

No response.

Patterson's Response:

The contemplated NMDC was a cooperative, not a “buying group.” Mason, Tr. 2364:24-2365:1. Dan Reinhardt, the Region manager for Patterson, said Patterson was not going to be participating in the co-op. Mason, Tr. 2237:13-20. There is no record evidence concerning any prospective “bid”, so the statement in this proposed finding that Patterson announced it “would not bid” is unsupported. The statement that such a bid “would have been “as expected” is not supported by the evidence because Dr Mason recalls no specific communications with Patterson concerning its intentions concerning the coop (*see* Replies to CCFF 463-464, *supra*) and has no support for the claim that Patterson was going to partner with his group. (*See* Response to CCFF 464-465).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

504. On February 11, 2013, Dr. Mason and NMDC co-founders Dr. Frank Montoya and Dr. Chapman met with a Patterson sales representative, Jeff Katt, Patterson's Albuquerque Branch Manager Scott Belcheff, and Patterson's Regional Manager Dan Reinhardt at a restaurant to discuss NMDC. (Mason, Tr. 2354).

Schein's Response:

No response.

Patterson's Response:

Stipulated except that Mason, Chapman and Montoya were not “co-founders of NMDC” because NMDC was never formed. (See Response to FOF 455).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

505. At the February 11, 2013 meeting between NMDC founders and Katt, Belcheff, and Reinhardt, Reinhardt informed Dr. Mason that Patterson would not work with NMDC. (Mason, Tr. 2354-355).

Schein's Response:

No response.

Patterson's Response:

Dr. Mason admitted that he does not recall anything other than Dan Reinhardt saying words to the effect that Patterson wasn't going to participate.” (Mason, Tr. 2387:21-25). Dr Mason testified that he had no reason to doubt this was Reinhardt's decision. Mason, Tr. 2388:23-25 (“Q. You have no reason to doubt that this was Mr. Reinhardt's decision, do you? A. No, I don't.).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

506. Patterson's decision to end negotiations with NMDC, communicated to Drs. Mason, Montoya and Chapman on February 11, 2013, surprised Dr. Mason because, until then, he understood that Patterson had agreed to be the preferred vendor for the buying group. (Mason, Tr. 2354-2356; *see also* CX8035 (Mason, Dep. at 86-88)).

Schein's Response:

No response.

Patterson's Response:

There is no admissible evidence that Patterson ever agreed to “be the preferred vendor for the buying group.” (See Responses to FOF 463-465).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

507. Following Patterson's sudden refusal to work with the NMDC buying group, Dr. Mason approached Schein to explore the opportunity. (Mason, Tr. 2358-2359, 2387).

Schein's Response:

Dr. Mason did not explore an “opportunity” with Schein. Rather, he simply invited Schein to offer its ideas in response to Dr. Mason's desire to obtain better manufacturer specials. (SF 1013-18; RX 2400; Mason, Tr. 2393-97). Dr. Mason did not offer any beneficial “opportunity” to Schein – no additional customers, no exclusive relationship, not even preferred vendor status. (RX 2400; Mason Tr. 2394-97).

Patterson's Response:

There is no record evidence that this was a “sudden refusal to work with NMDC” because there is no admissible evidence that Patterson ever agreed to “be the preferred vendor for the buying group.” (See Responses to CCFF 463-465). Mason did approach Schein and ended up working with Schein once the New Mexico chapter of the Utah Dental Cooperative was created. (Mason, Tr. 2391, 2402).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's and Schein's business.

508. Dr. Mason communicated with Schein's Rick (Roderic) Dolk on February 20, 2013. (Mason, Tr. 2358-2359; CX2672 at 001).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

509. After Dr. Mason communicated with Dolk on more than one occasion, Dr. Mason learned that Schein would not be participating in supplying NMDC. (Mason, Tr. 2359).

Schein's Response:

NMDC did not present Schein with any specific offer and explicitly said it was unwilling to try to deliver any incremental volume to Schein. (RX 2400-001; Mason, Tr. 2394-95 ("So what you told Schein was the customers were not going to move from one distributor to another or not move from one distributor to Schein; correct? A. Correct.")). It also did not want to negotiate price. Rather NMDC presented a half-baked idea in which it would negotiate directly with manufacturers and once "the manufacturer agreed to a price[,] ... Schein [would] honor[] that price, and they work out their commission between themselves." (Mason, Tr. 2395; RX 2400 ("Jason and I have had a purchasing style that

allowed us to ‘BID’ ... and see what manufacture would give us the most free goods to effectively lower our per unit cost.”)). As such, NMDC did not want any of Schein’s value-added services – or even Schein’s DSO pricing; they wanted “manufacturer level” prices and for Schein to “honor[] that price.” (Mason, Tr. 2394-95).

NMDC’s proposal included no benefit to Schein. (SF 1013-16; RX 2400; Mason Tr. 2394-97).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

510. Dr. Mason understood that Dr. Montoya, another NMDC co-founder, had spoken with Benco about Benco supplying NMDC. Based on information from Dr. Montoya, Dr. Mason believed that Benco had also refused to work with NMDC. (Mason, Tr. 2360-2361).

Schein’s Response:

No response.

Patterson’s Response:

This proposed finding is based upon hearsay, which should not be given any weight.

Benco’s Response:

The proposed finding should be rejected because the cited testimony was not offered for the truth of the matter. (Mason, Tr. 2360-61).

In response to a specific hearsay objection, Complaint Counsel stated, “I’m not looking to admit it for the truth of the matter.” (Mason, Tr. 2360). Nonetheless, Complaint Counsel has now cited that exact same testimony in the proposed finding.

Dr. Montoya never testified at trial, at a deposition or at an investigational hearing in this matter. Dr. Mason's testimony regarding what Dr. Montoya may have told him, is pure hearsay and should be disregarded.

511. Having no full-service distributor, NMDC's attempt to build a buying group was stymied. (Mason, Tr. 2357-2358; CX3334). Instead, Dr. Chapman, Dr. Mason, and Montoya agreed to join an existing co-op, the Dental Co-op of Utah, as the New Mexico branch. (Mason, Tr. 2361-2362).

Schein's Response:

The cited testimony is not sufficient to support the proposed finding that NMDC was stymied. As noted in SRF 507, NMDC never actually proposed a partnership with Schein, just a request for ideas. (SRF 507, 1013-18; RX 2400; Mason, Tr. 2393-97). NMDC was able to successfully launch as a chapter of the Dental Co-Op of Utah and was served by Schein. (SF 1020-24). Though Dr. Mason joined the New Mexico chapter of the Dental Co-Op, he immediately switched his purchases to another distributor (Darby) through a different buying group (Synergy). (SF 76; Mason, Tr. 2405-06). The fact that Darby was available to serve buying groups and did so for many, including Synergy, shows that a lack of a full-service distributor does not stymie a buying group.

There is no reliable evidence comparing NMDC's growth rate, membership levels, or profitability as a chapter of the Dental Co-Op of Utah to a but-for world where NMDC acted on its own.

Patterson's Response:

There is no record evidence that Mason's "attempt to build a buying group was stymied and this claim is not supported by Complaint Counsel's citations of Mason, Tr. 2357-2358 and CX3334. In fact, Dr Mason testified at his deposition that "we then found

the Utah Group after a period of time, had meetings with them, and it seemed a lot easier to join their group then recreate the wheel.” (CX8035 (Mason, Dep. at 35)).

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, the cited testimony does not support Complaint Counsel’s narrative commentary in the proposed finding. (Mason, Tr. 2357-58. 2361-62). Dr. Mason’s testimony simply does not match up with Complaint Counsel’s proposed finding.

Second, the proposed finding contains Complaint Counsel’s unsupported inferences rather than evidence of Benco’s involvement in any alleged conspiracy. There is no non-hearsay evidence in the record that the NMDC ever even approached Benco. (Mason, Tr. 2360-61). In response to a specific hearsay objection, Complaint Counsel stated, “I’m not looking to admit it for the truth of the matter.” (Mason, Tr. 2360). Nonetheless, Complaint Counsel has now relied upon that exact same testimony in the proposed finding. Dr. Montoya never testified at trial, at a deposition or at an investigational hearing in this matter. Dr. Mason’s testimony regarding what Dr. Montoya may have told him, is pure hearsay and should be disregarded

Third, Dr. Mason never testified as to why the NMDC chose to join the Dental Co-Op of Utah. (Mason, Tr. 2361-62). Therefore, Complaint Counsel’s unsupported speculation that it was tied to Benco in any way is not borne out by the evidence in the record.

512. In fact, after the intra-firm communications, Patterson, Henry Schein, and Benco all turned down the opportunity to work with the dentists setting up a buying group in New Mexico. (Mason,

Tr. 2335 (approached “Patterson, Henry Schein and Benco”), 2361 (“we were declined by the three distributors that we approached”).

Schein’s Response:

False. There is no inter-firm communication involving Schein, other than some local gossip shared by one regional manager with a former colleague of his. Moreover, as noted in SRF 507, NMDC never actually approached Schein with a partnership proposal, just a request for ideas. (SRF 507; SF 1013-18; RX 2400; Mason, Tr. 2393-97). In any event, Schein did do business with NMDC through the Dental Co-Op of Utah. (Mason, Tr. 2391, 2399-400, 2402, 2405; RX 2462).

Patterson’s Response:

The only “intra-firm communications” is the short email exchange between Cohen and Guggenheim on February 4, 2013. That communication had no role in Dan Reinhardt informing Dr. *Mason* on February 11 that Patterson was not participating. See Patterson Findings of Fact #s 291-292. There were no communications between Schein and Patterson relating to NMDC.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, the cited testimony does not support Complaint Counsel’s narrative commentary in the proposed finding. (Mason, Tr. 2357-58. 2361-62). Dr. Mason’s testimony simply does not match up with Complaint Counsel’s proposed finding.

Second, the proposed finding contains Complaint Counsel’s unsupported inferences rather than evidence of Benco’s involvement in any alleged conspiracy. There is no non-hearsay evidence in the record that the NMDC ever even approached Benco.

(Mason, Tr. 2360-61). In response to a specific hearsay objection, Complaint Counsel stated, “I’m not looking to admit it for the truth of the matter.” (Mason, Tr. 2360). Nonetheless, Complaint Counsel has now relied upon that exact same testimony in the proposed finding. Dr. Montoya never testified at trial, at a deposition or at an investigational hearing in this matter. Dr. Mason’s testimony regarding what Dr. Montoya may have told him, is pure hearsay and should be disregarded

The court should reject Complaint Counsel’s proposed finding because it is not based on any actual facts and contains only Complaint Counsel’s unsupported speculation.

D. Benco Worried That Communications With Patterson About Buying Groups Could Lead to Price Fixing Allegations.

513. On February 26, 2013, Benco’s New Mexico Regional Manager Don Taylor contacted Cohen about whether he had communicated with Patterson about NMDC, stating in a text message, “This buying club in Albuquerque is starting to grow legs. Curious if you were able to connect with your Patterson contact and if anything came of it.” (CX0057 (Excel worksheet “Chats” tab row 80); Cohen, Tr. 538-539; *see also* CX0057_EXCERPT at 006). Cohen responded to Taylor in a text: “I just sent [Guggenheim] a note about [NDMC]. Don’t want to call because it might be construed as price fixing.” (Cohen, Tr. 539-540; CX0057(Excel worksheet “Chats” tab row 81); *see also* CX0057_EXCERPT at 006).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, the proposed finding does not include the full text message reply from Chuck Cohen. Cohen first wrote: “I don’t expect to hear anything.” CX0057_EXCERPT at 006).

Cohen's message to Don Taylor is consistent with his testimony in this case. Cohen did not ask Guggenheim to do anything. (Cohen, Tr. 714). Cohen did not expect Guggenheim to do anything. (Cohen, Tr. 714). And Cohen never followed up with Guggenheim about Cohen's February 8, 2013 e-mail. (Cohen, Tr. 714).

Second, Cohen acknowledged that Don Taylor was "the kind of guy that just follows up on things." (Cohen, IHT at 254). Cohen understood Don Taylor's February 26, 2013 to be following up on their prior February 8, 2013 e-mail exchange to see what had happened. (Cohen, IHT at 253-54). Cohen testified that his response to Don Taylor was "trying to convey that I didn't want to talk about this topic any more" with him. (RX1127 at 471-72).

Third, Chuck Cohen has explained at trial and during his investigational hearing what he meant by the the language cited in the proposed finding. (Cohen, Tr. 537-41, 840-41; Cohen, IHT at 254-62). Cohen was concerned that a call might be taken out of context, whereas a written e-mail contains a complete record of the communication. (Cohen, Tr. 540, 840-41 ("I wanted my communication to be at least documented and the extent of that conversation to be documented.")). Cohen further explained the benefits of an e-mail and the potential concerns regarding a call on this topic as follows: "there's two people on the phone, and there's no transcript of the call, and I don't want to -- I don't want to get in any trouble about doing something that's unprofessional or illegal or not correct." (Cohen, IHT at 258).

Fourth, it was particularly important that there be a written record of Cohen's February 8, 2013 communication to Guggenheim because it involved customers. (Cohen, Tr. 540-41). Cohen further explained that, "the message is pretty clear in the e-mail chain,

whereas who knows how calls are interpreted later, and I didn't want to end up in a conversation that might even get close to being price-fixing or anything that somebody could interpret as price-fixing.” (Cohen, IHT at 259).

Finally, to be clear, Cohen did not view his February 8, 2013 as raising any concern regarding price fixing. (Cohen, IHT at 257 (“I don't view this e-mail exchange as anything coming close to price-fixing.”)).

514. Cohen was aware of the potential antitrust violation his communications with Guggenheim would raise. (Cohen, Tr. 539-540).

Schein's Response:

No response.

Patterson's Response:

Patterson joins Benco's response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, the cited testimony in the proposed finding does not say what Complaint Counsel contends. Nowhere in the cited testimony does Cohen discuss potential antitrust violations or his awareness thereof. (Cohen, Tr. 539-40). Cohen is simply explaining the difference between, and his preference for, an e-mail communication over a phone call. (Cohen, Tr. 539-40).

Second, Chuck Cohen has explained at trial and during his investigational hearing what he meant by the the language that is the subject matter of the cited testimony. (Cohen, Tr. 537-41, 840-41; Cohen, IHT at 254-62). Cohen was concerned that a call might be

taken out of context, whereas a written e-mail contains a complete record of the communication. (Cohen, Tr. 540, 840-41 (“I wanted my communication to be at least documented and the extent of that conversation to be documented.”)). Cohen further explained the benefits of an e-mail and the potential concerns regarding a call on this topic as follows: “there's two people on the phone, and there's no transcript of the call, and I don't want to -- I don't want to get in any trouble about doing something that's unprofessional or illegal or not correct.” (Cohen, IHT at 258).

Third, it was particularly important that there be a written record of Cohen's February 8, 2013 communication to Guggenheim because it involved customers. (Cohen, Tr. 540-41). Cohen further explained that, “the message is pretty clear in the e-mail chain, whereas who knows how calls are interpreted later, and I didn't want to end up in a conversation that might even get close to being price-fixing or anything that somebody could interpret as price-fixing.” (Cohen, IHT at 259).

Finally, to be clear, Cohen did not view his February 8, 2013 as raising any concern regarding price fixing. (Cohen, IHT at 257 (“I don't view this e-mail exchange as anything coming close to price-fixing.”)).

515. Cohen had numerous conversations with Paul Guggenheim over the years, including “once in a while about a customer situation.” (Cohen, Tr. 540-541).

Schein's Response:

No response.

Patterson's Response:

Cohen and Guggenheim are life-long friends and have indeed had conversations over the years, as part of that friendship. PF ¶ 265. Patterson joins Benco's response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The proposed finding is misleading because the cited testimony was part of larger answer. Cohen's testimony, when asked, "But you didn't want to call Paul Guggenheim in this particular instance?," was: "Well, very rarely and I can't think of any about customers, I mean, once in a while about a customer situation, but this is involving customers, so we need to be much more appropriate." (Cohen, Tr. 540). Cohen then clarified in his very next answer that the "once in a while" that he was referring to in his prior answer was actually the NMDC situation in which he did not call Guggenheim. (Cohen, Tr. 540).

In context, Cohen's testimony – in response to Complaint Counsel's questions – does not support the proposed finding. Complaint Counsel could have asked clarifying questions to identify situations – if any actually existed – where Cohen might have called Guggenheim about a customer issue, but Complaint Counsel chose not to do so. Given that choice, they cannot Cohen's cited testimony to support this misleading proposed finding.

516. Cohen was concerned with communicating with Guggenheim about "the buying group situation" in New Mexico because it was a "customer situation" and might be construed as price fixing. (Cohen, Tr. 539-540).

Schein's Response:

No response.

Patterson's Response:

Patterson joins Benco's response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, Chuck Cohen has explained at trial and during his investigational hearing what he meant by the language cited in the proposed finding. (Cohen, Tr. 537-41, 840-41; Cohen, IHT at 254-62). Cohen was concerned that a call might be taken out of context, whereas a written e-mail contains a complete record of the communication. (Cohen, Tr. 540, 840-41 ("I wanted my communication to be at least documented and the extent of that conversation to be documented.")). Cohen further explained the benefits of an e-mail and the potential concerns regarding a call on this topic as follows: "there's two people on the phone, and there's no transcript of the call, and I don't want to -- I don't want to get in any trouble about doing something that's unprofessional or illegal or not correct." (Cohen, IHT at 258).

Second, it was particularly important that there be a written record of Cohen's February 8, 2013 communication to Guggenheim because it involved customers. (Cohen, Tr. 540-41). Cohen further explained that, "the message is pretty clear in the e-mail chain, whereas who knows how calls are interpreted later, and I didn't want to end up in a conversation that might even get close to being price-fixing or anything that somebody could interpret as price-fixing." (Cohen, IHT at 259).

Finally, to be clear, Cohen did not view his February 8, 2013 as raising any concern regarding price fixing. (Cohen, IHT at 257 ("I don't view this e-mail exchange as anything coming close to price-fixing.")).

517. Cohen did not recall other situations where he expressed concern that calling Guggenheim would be construed as price fixing. (Cohen, Tr. 540-541).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, Chuck Cohen did not have any concerns regarding any other prior calls to Guggenheim because none had involved customers. (Cohen, Tr. 540 ("I can't think of any about customers.")).

Second, it was particularly important that there be a written record of Cohen's February 8, 2013 communication to Guggenheim because it involved customers. (Cohen, Tr. 540-41). Cohen further explained that, "the message is pretty clear in the e-mail chain, whereas who knows how calls are interpreted later, and I didn't want to end up in a conversation that might even get close to being price-fixing or anything that somebody could interpret as price-fixing." (Cohen, IHT at 259).

Finally, to be clear, Cohen did not view his February 8, 2013 as raising any concern regarding price fixing. (Cohen, IHT at 257 ("I don't view this e-mail exchange as anything coming close to price-fixing.")).

E. Benco Informed Its Team the Big Three Will Maintain a United Front Against Buying Groups.

518. Shortly after Guggenheim's email exchange with Cohen regarding NMDC (CX0090), Respondents' executives, Guggenheim, Misiak, Rogan, Cohen, Ryan, and Sullivan, attended the Chicago Dental Society industry meeting held on February 21-23, 2013 ("February 2013 Chicago Midwinter Meeting"). (CCFF ¶¶ 519-526).

Schein's Response:

Complaint Counsel does not cite any record evidence in support of this proposed finding. Further, there is no evidence that Mr. Sullivan's attendance at an industry meeting was somehow connected in any way with a prior email exchange between Mr. Cohen and Mr. Guggenheim about NMDC. Schein incorporates its responses to CCFF 519-526 here.

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding.

519. The Chicago Midwinter Meeting is a large dental trade meeting held every February in Chicago. (Misiak, Tr. 1373; Guggenheim, Tr. 1613). This meeting is typically attended by dentists, as well as distributors and manufacturers of dental products who display their products for dentists. (Misiak, Tr. 1373).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness.

520. Patterson and other dental products distributors attended the February 2013 Chicago Midwinter Meeting. (Guggenheim, Tr. 1613-1614).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

521. Cohen attended the February 2013 Chicago Midwinter Meeting. (CX1507 at 002 (Statement of Cohen: "[a]ttended Chicago Mid-Winter Meeting" in February 2013); CX4360 at 025 (2013 Chicago Dental Society registration listing "Charles Cohen"); CX1149 at 001 (Statement of Cohen: "Busy days at Chicago Mid-Winter meeting."); CX8015 (Cohen, Dep. at 29, 40-41, 44)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding cites uncontested facts. The proposed finding, however, bears no relation to the heading of this section.

522. Guggenheim testified that he “believed” he attended the February 2013 Chicago Midwinter Meeting. (Guggenheim, Tr. 1614; *see also* CX4360 at 022 (2013 Chicago Dental Society registration listing “Paul Guggenheim”)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson’s business.

523. Misiak testified that he typically attends the February Chicago Midwinter Meeting. (Misiak, Tr. 1373-1374).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson’s business.

524. Rogan attended the Chicago Midwinter meeting every year. (CX0317 (Rogan, IHT at 38)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

525. Ryan attended the February 2013 Chicago Midwinter meeting, and testified that he had attended most of the Chicago Midwinter meetings for the last 30 years. (Ryan, Tr. 1084-1085; CX8037 (Ryan, Dep. at 11-12)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Pat Ryan never conclusively testified that he attended the February 2013 Chicago Midwinter meeting. (Ryan, Tr. 1084-85; Ryan, Dep. at 11-12). Therefore, the proposed finding should be rejected because it is not supported by facts.

526. Sullivan attended the February 2013 Chicago Midwinter meeting. (CX6580 at 149-156 (Sullivan's expense report showing attendance at Chicago Midwinter Meeting in 2013); CX4360 at 026 (2013 Chicago Dental Society registration listing "Tim Sullivan"); *see also* Sullivan, Tr. 3879)).

Schein's Response:

The asserted fact is irrelevant. There is no evidence that attendance at the 2013 Chicago Midwinter Meeting precipitated meeting or communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would

support an inference that any such industry event communications would involve a substantive communication or pertain to buying groups. Complaint Counsel does not cite to any documents leading up to, memorializing, or post-dating the events that would bear on the substance or purpose of any alleged industry event communications.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness discussing Schein's business.

527. On February 23, 2013, the final day of the February 2013 Chicago Midwinter Meeting, Ryan instructed Benco's sales team: "Benco does not recognize GPOs as a single customer. GPOs are what [ruined] the medical supply business and why they work on single digit margins. If this door is ever opened in dental, its [*sic*] all over for all of us. . . . [P]icture a day when every single customer of yours is in some kind of buying club and all margins are now 12% over cost and its [*sic*] a race to the bottom. It [doesn't] catch on here, because so far, all of the major dental companies have said, 'NO', and that's the stance we will continue to take." (CX1149 at 002 (emphasis in original); Ryan, Tr. 1075-1078, 1080-1083).

Schein's Response:

Mr. Ryan posted a reply to a Virginia salesperson on SharePoint, Benco's voluntary subscription-based communication tool. (Ryan, Tr. 1076). There is no evidence to suggest that Mr. Ryan's post was related in any way to the Chicago Midwinter Meeting and not the Virginia salesperson's post in SharePoint. (CX 8037 (Ryan, Dep. at 197 ("Q. Is it possible that you talked to somebody from Schein about buying groups at the 2013 Chicago midwinter? Q. No? A. No." (objections omitted)))); *see also* SRF 360).

Mr. Ryan's SharePoint post was, at best, an unsubstantiated opinion. Mr. Ryan's assessment that "GPOs are what [ruined] the medical supply business and why they work

on single digit margins” is not reliable because he has no experience with the medical supply industry. (CX 1149; Ryan, Tr. 1218-19 (“Q. Have you ever worked in the medical supply business? A. No. Q. Do you know anything about the medical supply business? A. Only anecdotally.”); *see also* SRF 258-259). Moreover, as explained in SRF 77, medical GPOs are very different than dental buying groups, as the medical and dental markets are markedly different. (SRF 77). Complaint Counsel provides no reliable basis for a comparison of the two.

Similarly, to the extent his comment regarding “all of the major dental companies” included Schein, Mr. Ryan testified that his assessment of Schein’s stance on buying groups “was just pure speculation” – his “sense from market intel” – and not based on any actual knowledge. (Ryan, Tr. 1222, 1253; *see also* SRF 258-259).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, Pat Ryan at the time was the Director of Benco’s Strategic Markets division. (Ryan, Dep. at 24-26). He had no role in Benco’s sales management, and, therefore, no ability to “instruct Benco’s sales team.”

Second, Pat Ryan’s SharePoint post is not an instruction to his team or to any Benco team. Pat Ryan’s post is simply a response to a post by another Benco employee. In CX1149, Gerald Barto, a Benco sales employee, posted about a situation in which he was unable to qualify multiple dental offices – that lacked common ownership – for discounted pricing under Benco’s Partner Sharing program. (CX1149; Ryan, Tr. 1078-79). Benco’s

Partner Sharing (PS) program provides volume discounts to individual customers who purchase more than \$100,000 per year in dental supplies. (CX1084; CX1100; Benco FF ¶ 152). Another Benco employee, Jeff McAdoo first responds to Gerald Barto's post suggesting a way to seemingly avoid Benco's rules on Partner Sharing by ignoring the common ownership requirement inherent in Benco's Partner Sharing volume discount. At this point, Pat Ryan responds to clarify Benco's policy that "[t]o be recognized as one customer, one of the following three situations" must apply. (CX1149; Ryan, Tr. 1080 ("I reply with the situations where we recognize somebody as one customer.")). Therefore, the exchange between Mr. Barto, Mr. McAdoo, and Mr. Ryan contained in CX1149 was not about Benco being "afraid" of Buying Groups – or even about Buying Groups at all – but rather, about Benco's Profit Sharing discount program. (Ryan, Tr. 1218).

Third, Pat Ryan's references to margins and "a race to the bottom" were addressed to the issue of Benco's sales commissions. As Ryan testified at trial, his intent was to try to get Mr. Barto and Mr. McAdoo to understand the impact on their commissions of intentionally circumventing Benco's requirements on common ownership by applying Partner Sharing discounts to multiple dental practices that lacked common ownership. (Ryan, Tr. 1082, 1218-21).

Fourth, Pat Ryan has never worked in the medical supply industry and does not have any personal knowledge about the medical supply industry. (Ryan, Dep. 169-70). Ryan's comment about GPOs is introduced by analogizing GPOs in the medical industry to the dental industry. (CX1149). Accordingly, Ryan's entire comment regarding GPOs – of which the language quoted in this paragraph from the cited exhibit is taken out of context – is not credible evidence and should be accorded no weight by the court here.

Lastly, the cited exhibit and testimony contains only the statements and impressions of Pat Ryan, not Benco as a whole.

528. Ryan’s statement on February 23, 2013 in CX1149 (that “all of the major dental companies have said “‘NO’,” the reference to “all of the major dental companies” (emphasis in original)) included Benco, Schein and Patterson. (Ryan, Tr. 1083).

Schein’s Response:

Schein does not dispute that Mr. Ryan testified that Schein was included among “all of the major dental companies.” Schein does dispute that Mr. Ryan’s statement *only included* Schein, Patterson, and Benco. (CX 8037 (Ryan, Dep. at 187 (“I would throw a few others in there, too, but ... Darby certainly.”)); SRF 527). Mr. Ryan’s comment was an uninformed opinion, and not based on any reliable evidence. Mr. Ryan testified that his assessment of Schein’s stance on buying groups “was just pure speculation” – his “sense from market intel” – and not based on any actual knowledge. (Ryan, Tr. 1222, 1253).

Patterson’s Response:

Patterson joins Benco and Schein’s responses.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Pat Ryan was familiar with Benco’s position regarding buying group because he was a Benco employee. But Pat Ryan has repeatedly testified that he had no personal knowledge regarding Schein’s and Patterson’s positions on buying groups and that any statements – like the one cited in the proposed finding – was based purely on his speculation and what he observed in the market. (Ryan, Tr. 1083 (“From what I could tell in the market place.”); Ryan, Tr. 1221-22 (explaining that he no personal knowledge; “[j]ust what I had

seen in the field, what I can sense from market intel. That's really it.”); Ryan Tr. 1253 (testifying that he never spoke to anyone at Henry Schein about buying groups and his comment in CX1149 about Henry Schein was based on “pure speculation”)).

529. CX1149 depicts a Daily Activity Stream Summary, which is an internal bulletin board or communication tool used to communicate with the sales team, including the territory sales reps, the equipment specialists, and sales management. (Ryan, Tr. 1076-1078). The bulletin board served as a repository for questions and documents, and harnessed the knowledge of the whole organization. (Ryan, Tr. 1078).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Pat Ryan’s actual testimony differs substantially from Complaint Counsel’s fictional paraphrase in the proposed finding. What Ryan actually said regarding while describing the Daily Activity Stream Summary generated by Benco’s SharePoint system was far more nuanced than the proposed finding. (Ryan, Tr. 1076-78). Complaint Counsel could have asked clarifying questions of Ryan, but they did not do so. Complaint Counsel’s paraphrase in the proposed finding is inaccurate, not supported by the actual testimony, and should be rejected.

530. Ryan admitted at trial that, prior to the February 2013 Chicago Midwinter Meeting, the “marketplace” information he received contradicted his statement on the Benco bulletin (CX1149)

that “all of the major dental companies” had refused buying groups. (Ryan, Tr. 1083-1084; *see also* CCFF ¶¶ 532-533).

Schein’s Response:

The asserted fact seeks to paint a misleading picture. At trial, Mr. Ryan was shown a few snippets of emails he had received that suggested that Schein was working with buying groups. (SF 138). There is no basis for asserting that Mr. Ryan recalled or considered those emails in drafting his chat. Nor is there any basis for inferring that the chat was based on any information Mr. Ryan received at the Chicago Midwinter Meeting. The fact that Mr. Ryan’s statement that “all of the major dental companies have said, ‘NO’” is not literally true does not mean that Mr. Ryan conspired with Patterson and Schein at the Chicago Midwinter Meeting. Rather, it is consistent with Mr. Ryan’s testimony that the statement was just speculation. (Ryan, Tr. 1221-22).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The proposed finding is not based on Pat Ryan’s testimony but rather Complaint Counsel’s fictional narrative of what it wished Ryan might have testified to. But the fact is that Pat Ryan simply did not testify to what Complaint Counsel purports he did in this proposed finding. Pat Ryan never “admitted” that his statement in CX1149 was based on anything other than his marketplace observations at the time. (CX1149; Ryan, Tr. 1083 (“[f]rom what I could tell in the marketplace”)). Ryan further did not testify regarding any

“contradiction.” Complaint Counsel putting words in the mouths of witnesses that did not actually testify to that effect cannot be the basis for a factual finding.

531. Ryan received an email on March 24, 2011 from Taylor in which Taylor reported to Ryan that he believed Schein was doing business with a buying group. (CX1039 at 001; Ryan, Tr. 1245 (“Q. And Mr. Taylor reported to you that he believed Henry Schein was doing business with the Dental Cooperative; right? A. Yes. Q. You considered the Dental Cooperative to be a buying group; right? A. Yes.”); *see also* Cohen, Tr. 852 (“Q. Now, Mr. Taylor notes that Schein is doing business with buying groups in 2011? A. That’s what the e-mail indicates.”)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, Complaint Counsel never obtained any testimony from Don Taylor, the author of the cited exhibit. So there is no record of what Taylor may have meant by the phrase that Complaint Counsel has cherry-picked from his e-mail in the proposed finding. When Taylor writes “they certainly do it,” he may have meant that Schein certainly does “win some business” from Benco. (CX1149). Without testimony from Taylor, Complaint Counsel cannot speculate, attribute a meaning that fits with its care narrative, and they presume that meaning as a basis for a proposed finding.

Second, even if Don Taylor believed that Schein was doing business with a buying group, it does not mean that Taylor’s belief was correct. Moreover, it does not mean that Pat Ryan believed that Taylor’s belief was correct. The cited testimony in the final

sentence of the proposed finding underscores this failing. Chuck Cohen, when asked about CX1149, said only “[t]hat’s what the e-mail indicts,” not that he believed Taylor’s belief to have been true. (Cohen, Tr. 852).

532. In September 2011, Ryan received an email stating the Schein had been doing business with a buying group. (CX1116; Ryan, Tr. 1049-1050 (“Q. So here, Dr. Goldsmith was telling you that Smile Source was working with Henry Schein? A. That’s what he says, yes.”)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, in response to Complaint Counsel’s questions, Pat Ryan responded three consecutive times that he was “skeptical” of Dr. Goldsmith’s claim. (Ryan, Tr. 1050-51 (“I am skeptical of things like that.”); (“I have a built-in skepticism of people, what people tell me that I don’t know.”); (“[I]n my experience, sometimes people throw around names that they’re working with as a way to gain credibility with me if I don’t know them.”)).

Second, Pat Ryan’s skepticism of Dr. Goldsmith was well founded, as Dr. Goldsmith’s testimony is not credible. (HSFF ¶¶ 1122-28). Specifically, Dr. Goldsmith’s e-mails to Benco were littered with false statements aimed at gaining credibility with Benco. (HSFF ¶¶ 1122-28). Exactly as Pat Ryan had feared. (Ryan, Tr. 1050-51).

533. Benco received market intelligence that Patterson entered into a discounting arrangement with the NMDC buying group in February 2013. Prior to Ryan's February 23, 2013 statement in CX1149 ("all of the major dental companies have said, 'NO', and that's the stance we will continue to take") (emphasis in original)), Ryan saw an email sent on February 4, 2013 that indicated Patterson was going to partner with a buying group. (CX1215; Ryan, Tr. 1069-1070 ("Q. And so Dr. Mason, who was the founding member of this buying group, indicated that Patterson had partnered with the buying group? A. That's what he says, yeah."); Ryan, Tr. 1083-1084).

Schein's Response:

No response.

Patterson's Response:

Patterson joins Benco's response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the evidence in the case.

It is simply untrue for Complaint Counsel to assert – conspicuously without citation – that “Benco received market intelligence that Patterson entered into a discounting arrangement with the NMDC buying group in February 2013.” To the extent that Complaint Counsel is referring to Dr. Mason's statement in his February 4, 2013 e-mail that the NMDC had “partnered with Patterson,” that statement turned out to be untrue. (CX0090; Mason, Tr. 2374-76). Moreover, no one at Benco believed it to be true at the time. Chuck Cohen was “skeptical.” (Cohen, Tr. 708-709). Pat Ryan testified only that “That's what he says,” – indicating that he did not believe Dr. Mason's claim. (Ryan, Tr. 1069-70).

F. Patterson Also Informed Its Team the Big Three All “Stay Out” of Buying Groups.

534. In February 2013, Devon Nease, Patterson Branch Manager for its Chesapeake Region, met with a dentist (Dr. Mike Fernandez) who provided Nease with a bid proposal from an entity called Atlantic Dental Care, or ADC. (CX0092; CX8002 (Nease, Dep. at 16, 30-32)).

Schein’s Response:

No response.

Patterson’s Response:

First, the correct citation for Nease’s deposition testimony is: (CX8002 (Nease, Dep. at 16, 30-32, 42)). Second, Devon Nease is no longer a Patterson employee; he was Patterson’s Branch Manager for its Chesapeake Region from August 2011 to August 2014. (CX8002 (Nease, Dep. at 16-17)). Otherwise, Patterson has no specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson’s business.

535. Nease was responsible for overseeing the operations and sales of Patterson’s Chesapeake Branch. (CX8002 (Nease, Dep. at 17)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson’s business.

536. The bid proposal from Dr. Fernandez described ADC as “a group of general dentists in the Southeastern region of Virginia” who “were looking to preserve their autonomy and independent practice and take advantage of the economy of scale that a large corporate or group practice enjoys.” (CX0092 at 004; CX8002 (Nease, Dep. at 40-41); CX0092 identified as bid proposal from Dr. Fernandez). The “Proposal Requirements” listed “[a]ggressively priced solutions that provide increased discounts and overall lower costs.” (CX0092 at 005).

Schein’s Response:

No response.

Patterson’s Response:

This finding is incorrect in several respects. First, none of the cited documents or testimony indicate that Dr. Fernandez wrote the bid proposal. Second, the proposal did not state that ADC was “a group of general dentists in the Southeastern region of Virginia.” The proposal stated that ADC “*was a group formed in 2012 by a group of general dentists in the Southeastern region of Virginia.*” (CX0092 at 004) (emphasis added). Third, this finding misquotes the proposal requirements by inverting two of the words: “overall” and “lower.” The proposal requirements included “[a]ggressively priced solutions that provide increased discounts and *lower overall cost.*” (CX0092 at 005) (emphasis added). Otherwise, Patterson has no specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

537. On February 27, 2013, Nease sent an email to Anthony Fruehauf, Patterson’s Mid-Atlantic Regional Manager and forwarded ADC’s bid proposal. (CX0092 at 002; *see also* CX8002 (Nease, Dep. at 40)).

Schein’s Response:

No response.

Patterson's Response:

The correct citation is CX0092 at 001. Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

538. On February 27, 2013, the same day that Fruehauf received the ADC bid proposal from Nease, Fruehauf forwarded ADC's proposal to Misiak with the following message:

I have attached an RFP that the GPO in Chesapeake will be sending out. I have had numerous discussions with Devon [Nease] about our position and what it could mean if we set a precedent of offering lower prices to groups such as this. Devon is on board and understands our position. His concern was more of how he would be judged if we lost a big chunk of business.

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

Schein's Response:

No response.

Patterson's Response:

First, this proposed finding is misleading in that it omits the rest of Nease's email to Fruehauf. Nease's email continued: "I assured him we were behind his efforts to maintain our Value Add strategy and to use this as an opportunity to deliver the best service, sundries, and equipment to our customers that are aligned with out [sic] 'Why.' If you can think of any guidance I can offer it would be appreciated. We will continue to tell our story and focus on profitable growth in our region." (CX0092 at 001). Second, this finding is misleading to the extent that it suggests Patterson's "position" was not working with ADC or buying groups generally. Fruehauf testified: "I don't necessarily think it was

Patterson's position. I think it was Devon's position and my position in the region.” (CX8013 (Fruehauf, Dep. at 101)). Fruehauf was concerned about how partnering with ADC would affect its territory reps and relationships with current customers who were not part of ADC and therefore would not get an additional discount. (PF ¶¶ 406-407; *see also* CX8013 (Fruehauf, Dep. at 102)).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

539. When Misiak received Fruehauf's February 27, 2013 email asking for guidance in responding to Nease's communication about ADC's request for a bid, Misiak immediately forwarded Fruehauf's email to Guggenheim. (CX0092 at 001).

Schein's Response:

No response.

Patterson's Response:

This proposed finding is misleading in its characterization of how quickly Misiak forwarded Fruehauf's email to Guggenheim. Misiak did not forward Fruehauf's email until almost *seven hours* after receiving it. (CX0092 at 001). Misiak received Fruehauf's email at *10:02 a.m.* on February 27, 2013. (CX0092 at 001). Misiak forwarded Fruehauf's email to Guggenheim at *4:58 p.m.* on February 27, 2013. (CX0092 at 001). Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

540. Misiak stated in his February 27, 2013 email to Guggenheim that he had “coached Anthony [Fruehauf] on how to stay out of this with grace” and that he was concerned that “Schein and Benco sneak into these co-op bids and deny it.” (CX0092 at 001; *see also* Misiak, Tr. 1371).

Schein’s Response:

Schein does not dispute that Misiak drafted the cited email. Schein does dispute Complaint Counsel’s claim that the email is evidence of an agreement with Schein. (*See* CC Br. 101 & n.766). Misiak testified that his email reflected a desire for business intelligence. (Misiak, Tr. 1369 (“Q. What was the concern in your mind? A. Part of my job again is just to understand what the competition is doing, the business environment.”); CX 0316 (Misiak, IHT at 252-53 (“That’s just business intelligence. ... So we know what the competition is doing and how we would need to compete to keep the customers. ... Concerned if we didn’t have a strategy to deal with it”)); *see also* Misiak, Tr. 1502-04 (Mr. Misiak had “no personal knowledge” of Schein’s “strategy regarding buying groups.”)). Complaint Counsel has presented no contrary evidence, no evidence that Schein denied its buying group business, and no evidence of “sneak[ing].” Nor is such “sneak[ing]” possible, as business with buying groups is by its nature open and notorious.

Patterson’s Response:

Misiak did not actually know what Schein’s strategy regarding buying groups was. (Misiak, Tr. 1502-04) (“Misiak had “no personal knowledge” of Schein’s “strategy regarding buying groups.”). Rather, Misiak testified that he was trying to “understand strategy and competitive analysis and information” for “what [Patterson’s] competitors were doing,” which was “part of [his] job.” (Misiak, Tr. 1369). Complaint Counsel did not present any contrary evidence as to the source of Misiak’s beliefs. Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

541. Misiak testified that, in his email in CX0092 at 001, he was referring to buying groups or GPOs when he wrote "co-op bids." (Misiak, Tr. 1365-1366; CX8038 (Misiak, Dep. at 160)).

Schein's Response:

No response.

Patterson's Response:

First, this proposed finding inaccurately states Misiak's testimony. When asked what he meant by co-op, Misiak testified: "I think I'm -- I'm referencing that as *similar to a GPO*. I think that they were kind of interchangeable." (Misiak, Tr. 1365-1366) (emphasis added). Second, the cited deposition testimony does not support this proposed finding. Misiak did not testify as to what he meant by "co-op" in the cited deposition testimony.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

542. Misiak's February 27, 2013 email (CX0092) was about GPO strategy, and he directed his sales team not to bid for ADC's business. (Misiak, Tr. 1351, 1358; *see also* CX0316 (Misiak, IHT at 243) ("Q. Is it fair to say that you told Anthony to not submit a bid for this Atlantic Dental Care group? A. I think, yeah, that's what I say in this email.")).

Schein's Response:

No response.

Patterson's Response:

This proposed finding is inaccurate and misleading. First, Misiak did not testify that his February 27, 2013 email was about GPO strategy. He testified that Patterson's strategy was focused less on GPOs. (Misiak, Tr. 1351) ("Q. Here in this e-mail, were you giving Mr. Fruehauf direction on Patterson's strategy and position as they related to GPOs? A. I'm giving him strategy and direction as to what we're currently focused on in our strategy, less that is around GPOs.").

Second, the latter half of this finding—stating that Misiak directed his sales team not to bid for ADC's business—is misleading. First, Misiak's email was responding to *Fruehauf's request* for advice. (CX0093 at 001; CCF 539 ("When Misiak received Fruehauf's February 27, 2013 email *asking for guidance* in responding to Nease's communication about ADC's request for a bid") (emphasis added)). Misiak advised Fruehauf that *his (Misiak's) personal* approach to buying group requests was to "politely" decline. PF ¶ 410 (citing CX0093 at 001). Moreover, at the time Fruehauf emailed Misiak asking for advice, Fruehauf's *existing* position had *already* been that he would "steer clear" of ADC, and Misiak had simply "agreed with it." (PF ¶ 408).

Additionally, when asked at trial if Misiak told Fruehauf not to submit a bid to ADC, Misiak testified: "I don't remember specifically saying that. And I'm not sure that it didn't happen at a branch level." (Misiak, Tr. 1358). In light of Patterson's decentralized operations, Misiak testified he could not even say for sure that Patterson did *not* bid on ADC. (Misiak, Tr. 1358) ("Patterson, [is] a very decentralized organization with decisions being made every day in the field with a lot of autonomy, I can't say for sure that a bid wasn't presented."). Likewise, Fruehauf testified that Misiak "didn't specifically tell him not to" bid on ADC. (CX8013 (Fruehauf, Dep. at 113-114)).

Finally, this proposed finding is also misleading to the extent it suggests Patterson’s approach to buying groups had changed because of the alleged conspiracy. Misiak’s personal views about buying groups were the same in March 2012 as they were in February 2013. (CCFF ¶ 132). Misiak’s February 27, 2013 email to Fruehauf contains the same advice Misiak gave McFadden in March 2012—one year before Patterson allegedly joined the conspiracy. (CCFF ¶ 132; Compl. ¶ 36). McFadden emailed Misiak about a buying group request in March 2012, stating: “I get these more often than I like. This stuff scares me. I’m gonna tell him thanks but no thanks.” (CCFF ¶ 132 (citing CX0084 at 001)). Misiak responded, “Your response is right.” (CCFF ¶ 132 (citing CX0084 at 001)).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson’s business.

543. In response to Fruehauf’s February 27, 2013 email regarding ADC’s bid proposal (CX0092), Misiak instructed Fruehauf and his sales team to “stay out” of selling to GPOs. (CX0093 at 001; Misiak, Tr. 1349, 1354-1355, 1358, 1368; *see also* CX0316 (Misiak, IHT at 243) (“Q. Is it fair to say that you told Anthony to not submit a bid for this Atlantic Dental Care group? A. I think, yeah, that’s what I say in this email.”)).

Schein’s Response:

No response.

Patterson’s Response:

This proposed finding is misleading and inaccurate. Misiak did not instruct Fruehauf or his sales team to stay out of selling to GPOs. Misiak was responding to *Fruehauf’s request* for advice. (CX0093 at 001). Misiak advised Fruehauf that *Misiak’s personal* approach to buying group requests was to “politely” decline. (PF ¶ 410 (citing CX0093 at 001)). At the time Fruehauf emailed Misiak asking for advice, Fruehauf’s

existing position had *already* been that he would “steer clear” of ADC, and Misiak had simply “agreed with it.” (PF ¶ 408).

When asked at trial if Misiak told Fruehauf not to submit a bid to ADC, Misiak testified: “I don't remember specifically saying that. And I'm not sure that it didn't happen at a branch level.” (Misiak, Tr. 1358). In light of Patterson’s decentralized operations, Misiak could not even say for sure that Patterson did *not* bid on ADC. (Misiak, Tr. 1358 (“Patterson, [is] a very decentralized organization with decisions being made every day in the field with a lot of autonomy, I can't say for sure that a bid wasn't presented.”)). Likewise, Fruehauf testified that Misiak “didn’t specifically tell him not to” bid on ADC. (CX8013 (Fruehauf, Dep. at 113-114)).

This proposed finding is also misleading to the extent it suggests Patterson’s approach to buying groups had changed because of the alleged conspiracy. Misiak’s personal views about buying groups were the same in March 2012 as they were in February 2013. (CCFF ¶ 132). Misiak’s February 27, 2013 email to Fruehauf contains the same advice Misiak gave McFadden in March 2012—one year before Patterson allegedly joined the conspiracy. (CCFF ¶ 132; Compl. ¶ 36). McFadden emailed Misiak about a buying group request in March 2012, stating: “I get these more often than I like. This stuff scares me. I’m gonna tell him thanks but no thanks.” (CCFF ¶ 132 (citing CX0084 at 001)). Misiak responded, “Your response is right.” (CCFF ¶ 132 (citing CX0084 at 001)).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson’s business.

544. Misiak's response to Fruehauf's February 27, 2013 email regarding ADC's bid proposal (CX0092) stated:

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

(CX0093 at 001).

Schein's Response:

No response.

Patterson's Response:

This proposed finding is misleading to the extent it suggests Misiak's response to Fruehauf's February 27, 2013 email was an instruction to not sell to buying groups. Misiak's email was a response to *Fruehauf's request* for advice. (CX0093 at 001; CCF 539 ("When Misiak received Fruehauf's February 27, 2013 email *asking for guidance* in responding to Nease's communication about ADC's request for a bid") (emphasis added)). Misiak advised Fruehauf that *his (Misiak's) personal* approach to buying group requests was to "politely" decline. (PF ¶ 410; CX0093 at 001). At the time Fruehauf emailed Misiak asking for advice, Fruehauf's *existing* position had *already* been that he would "steer clear" of ADC, and Misiak had simply "agreed with it." (PF ¶ 408).

Additionally, this proposed finding is also misleading to the extent it suggests Patterson's approach to buying groups had changed because of the alleged conspiracy. Misiak's personal views about buying groups were the same in March 2012 as they were in February 2013. (CCFF ¶ 132). Misiak's February 27, 2013 email to Fruehauf contains the same advice Misiak gave McFadden in March 2012—one year before Patterson

allegedly joined the conspiracy. (CCFF ¶ 132; Compl. ¶ 36). McFadden emailed Misiak about a buying group request in March 2012, stating: “I get these more often than I like. This stuff scares me. I’m gonna tell him thanks but no thanks.” (CCFF ¶ 132 (citing CX0084 at 001)). Misiak responded, “Your response is right.” (CCFF ¶ 132 (citing CX0084 at 001)).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only Patterson’s business.

545. Where Misiak wrote in CX0093 that “currently we do participate with group purchasing organizations” he meant to write “currently we do *not* participate with group purchasing organizations.” (emphasis added) (Misiak, Tr. 1350).

Schein’s Response:

No response.

Patterson’s Response:

This proposed finding is misleading to the extent it suggests that the partially quoted statement from Misiak’s email—“currently we do *not* participate with group purchasing organizations” —is Patterson’s position on buying groups. Misiak wrote in his February 27, 2013 email responding to Fruehauf’s request for advice: “When I get these calls directly *I* politely say that *I* appreciate the opportunity, but current we do [not] participate with group purchasing organizations.” CX0093 at 001 (emphasis added).

This proposed finding is also misleading to the extent it suggests the partially quoted statement from Misiak’s email was an instruction to not sell to buying groups. Misiak’s email was a response to *Fruehauf’s request* for advice. (CX0093 at 001; CCFF 539 (“When Misiak received Fruehauf’s February 27, 2013 email *asking for guidance* in

responding to Nease’s communication about ADC’s request for a bid”) (emphasis added)). Misiak advised Fruehauf that *his (Misiak’s) personal* approach to buying group requests was to “politely” decline. (PF ¶ 410; CX0093 at 001). At the time Fruehauf emailed Misiak asking for advice, Fruehauf’s *existing* position had *already* been that he would “steer clear” of ADC, and Misiak had simply “agreed with it.” (PF ¶ 408).

Moreover, when asked at trial if Misiak told Fruehauf not to submit a bid to ADC, Misiak testified: “I don't remember specifically saying that. And I'm not sure that it didn't happen at a branch level.” (Misiak, Tr. 1358). In light of Patterson’s decentralized operations, Misiak testified he could not even say for sure that Patterson did *not* bid on ADC. (Misiak, Tr. 1358) (“Patterson, [is] a very decentralized organization with decisions being made every day in the field with a lot of autonomy, I can't say for sure that a bid wasn't presented.”).

Finally, this proposed finding is also misleading to the extent it suggests Patterson’s approach to buying groups had changed because of the alleged conspiracy. Misiak’s personal views about buying groups were the same in March 2012 as they were in February 2013. (CCFF ¶ 132). Misiak’s February 27, 2013 email to Fruehauf contains the same advice Misiak gave McFadden in March 2012—one year before Patterson allegedly joined the conspiracy. (CCFF ¶ 132; Compl. ¶ 36). McFadden emailed Misiak about a buying group request in March 2012, stating: “I get these more often than I like. This stuff scares me. I’m gonna tell him thanks but no thanks.” (CCFF ¶ 132 (citing CX0084 at 001)). Misiak responded, “Your response is right.” (CCFF ¶ 132 (citing CX0084 at 001)).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson’s business.

546. Misiak testified that, when he wrote “stay out of this with grace” in CX0093, “this” referred to the GPO. (Misiak, Tr. 1354-1355).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson’s business.

547. Fruehauf’s February 27, 2013 email (CX0092) stated that Nease feared “los[ing] a big chunk of business” as a result of declining to bid on the ADC group. (CX0092 at 001; CX8013 (Fruehauf, Dep. at 102-103)).

Schein’s Response:

The fact relies on hearsay and ignores Mr. Nease’s testimony. Mr. Fruehauf’s email stated that Mr. Nease was concerned about “how he would be judged if we lost a big chunk of business” in the Chesapeake region. (CX 0092-001). Yet, Mr. Nease testified that he never asked Mr. Fruehauf about “be[ing] judged for losing a big chunk of business.” (CX 8002 (Nease, Dep. at 52); CX 0092-001). Mr. Nease also testified that he “was not worried or fearful” about losing business at the ADC practices, but was concerned. (CX 8002 (Nease, Dep. at 52-53, 85)). Absent Mr. Fruehauf’s email, there is no evidence to support the claim that ADC’s membership represented “a big chunk” of Patterson’s business in the Chesapeake region. Additionally, ADC is not a buying group and cannot be used as evidence of business lost from not working with a buying group. (CX 2019-004 (“ADC is

not a buying group.”)). As such, Complaint Counsel’s citation in its Post-Trial Brief to this email as evidence of Patterson rejecting a buying group “[a]lthough a branch manager expressed a fear of ‘losing a big chunk of business’” is, therefore, inaccurate and misleading. (See CC Br. 20 & n.166 (“a branch manager expressed a fear of “los[ing] a big chunk of business.”)).

Patterson’s Response:

Patterson joins Schein’s response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson’s business.

548. In response to Fruehauf’s inquiry about ADC’s bid proposal (CX0092), Misiak informed Fruehauf that Schein and Benco – like Patterson – did not participate in buying groups in response. (CX0093 at 001; Misiak, Tr. 1356).

Schein’s Response:

As with the email quoted in CCFF 540, Mr. Misiak did not have personal knowledge of Schein’s strategy or practice regarding buying groups, and his belief was mistaken. (Misiak, Tr. 1502-04; CX 0316 (Misiak, IHT at 280); *see also* SRF 540).

Patterson’s Response:

This proposed finding is misleading to the extent it suggests Misiak’s personal beliefs accurately reflect Schein and Benco’s business practices regarding buying groups. Misiak did not actually know whether Schein and Benco worked with buying groups. (Misiak, Tr. 1357). Misiak *personally* believed that Schein and Benco did not work with buying groups: “I’m referencing that *I don’t believe* they participate in [GPOs].” (Misiak, Tr. 1357) (emphasis added).

This proposed finding is also misleading to the extent that it suggests Misiak's statements in this email represent Patterson's position on buying groups. Misiak's email was a response to *Fruehauf's request* for advice. (CX0093 at 001). Misiak advised Fruehauf that *his (Misiak's) personal* approach to buying group requests was to "politely" decline. (PF ¶ 410; CX0093 at 001). At the time Fruehauf emailed Misiak asking for advice, Fruehauf's *existing* position had *already* been that he would "steer clear" of ADC, and Misiak had simply "agreed with it." (PF ¶ 408).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

549. Misiak also explained that Patterson's largest competitors, Henry Schein and Benco, refused buying groups as well:

Confidential and not for discussion ..our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me.

(CX0093 at 001 (emphasis in original); Misiak, Tr. 1356-1358).

Schein's Response:

Schein does not dispute that Mr. Misiak *believed* that Schein did not work with buying groups and was interested in competitive intelligence. (SRF 540; Misiak, Tr. 1357 ("I'm referencing that I don't believe they participate in them.")). But Mr. Misiak's belief was based on nothing more than "just hearing things from the field." (CX 0316 (Misiak, IHT at 280); *see also* Misiak, Tr. 1502-04 (no personal knowledge of Schein's buying group practices)). As with the emails quoted in CCFF 548, Mr. Misiak did not have personal knowledge of Schein's strategy or practice regarding buying groups. (Misiak, Tr. 1502-05; CX 0316 (Misiak, IHT at 280-82); *see also* SRF 540, 548). And, his belief was

mistaken. Indeed, Mr. Misiak's request for information "if you hear differently" indicates he was not sure what Schein's strategy or practice was.

Patterson's Response:

This proposed finding is misleading to the extent it suggests Misiak's personal beliefs accurately reflect Schein and Benco's business practices regarding buying groups. Misiak did not actually know whether Schein and Benco worked with buying groups. (Misiak, Tr. 1357). Misiak *personally* believed that Schein and Benco did not work with buying groups: "I'm referencing that *I don't believe* they participate in [GPOs]." (Misiak, Tr. 1357) (emphasis added).

This proposed finding is also misleading to the extent that it suggests Misiak's statements in this email represent Patterson's position on buying groups. Misiak testified that the point of this statement was to collect market intelligence about the practices of Patterson's competitors. (PF ¶ 413-414; Misiak, Tr. 1363) ("[P]art of my role as president of the company is to understand the business environment -- as president of the dental business, I think it was important for me to understand the market, the climate, the environment, the customers and the competition, so I'm asking, if they heard something, to let me know.").

Moreover, Misiak's email was a response to *Fruehauf's request* for advice. (CX0093 at 001; CCF 539 ("When Misiak received Fruehauf's February 27, 2013 email *asking for guidance* in responding to Nease's communication about ADC's request for a bid")) (emphasis added)). Misiak advised Fruehauf that *his (Misiak's) personal* approach to buying group requests was to "politely" decline. (PF ¶ 410; CX0093 at 001). At the time Fruehauf emailed Misiak asking for advice, Fruehauf's *existing* position had

already been that he would “steer clear” of ADC, and Misiak had simply “agreed with it.” (PF ¶ 408).

Finally, this proposed finding is also misleading and inaccurate to the extent it suggests Patterson did not actually work with buying groups as of February 27, 2013. Patterson did work with buying groups both before and during Complaint Counsel’s alleged conspiracy period. *See, e.g.*, PF ¶¶ 174-175; RX0271 at 001 (as of May 2014, a Patterson branch had been selling to Jackson Health—“a GPO”—“for *over 10 years*”) (emphasis added).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson’s business.

550. When Misiak wrote in CX0093 that Patterson’s two largest competitors “stay out of these as well,” he meant that Schein and Benco stayed out of GPOs, just as Patterson stayed out of GPOs. (Misiak, Tr. 1357-1358).

Schein’s Response:

This is a restatement of CCFF 549. Schein does not dispute that Mr. Misiak *believed* that Schein did not work with buying groups and was interested in competitive intelligence. (SRF 540, 549; Misiak, Tr. 1357). Schein does dispute that Mr. Misiak’s belief was based on anything more than “just hearing things from the field.” (CX 0316 (Misiak, IHT at 280); *see also* Misiak, Tr. 1502-04 (no personal knowledge of Schein’s buying group practices)). As with the email quoted in CCFF 548, Mr. Misiak did not have personal knowledge of Schein’s strategy or practice regarding buying groups, and he was mistaken. (Misiak, Tr. 1502-04; CX 0316 (Misiak, IHT at 280-82); *see also* SRF 540,

548). Indeed, his request for information “if you hear differently” indicates he was not sure what Schein’s strategy or practice was.

Patterson’s Response:

When asked what he meant by this statement, Misiak testified: “I believe I’m referencing the fact that I don’t think that Schein or Benco has a strategic position on GPOs.” (Misiak, Tr. 1357). This proposed finding is misleading to the extent it suggests Misiak’s personal beliefs accurately reflect Schein and Benco’s business practices regarding buying groups. Misiak did not actually know whether Schein and Benco worked with buying groups. Misiak *personally* believed that Schein and Benco did not work with buying groups: “I’m referencing that *I don’t believe* they participate in [GPOs].” (Misiak, Tr. 1357) (emphasis added).

Finally, this proposed finding is also misleading and inaccurate to the extent it suggests Patterson did not actually work with buying groups as of February 27, 2013. Patterson did work with buying groups both before and during Complaint Counsel’s alleged conspiracy period. *See, e.g.*, PF ¶¶ 174-175; RX0271 at 001 (as of May 2014, a Patterson branch had been selling to Jackson Health—“a GPO”—“for *over 10 years*”) (emphasis added).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson’s business.

551. At the time that Misiak wrote in CX0093 that Patterson’s two largest competitors “stay out of these as well,” he believed that Schein and Benco stayed out of GPOs, just as Patterson stayed out of GPOs. (Misiak, Tr. 1357-1358).

Schein's Response:

This is a restatement of CCFF 549. Schein does not dispute that Mr. Misiak *believed* that Schein did not work with buying groups and was interested in competitive intelligence. (SRF 540, 549; Misiak, Tr. 1357). But Mr. Misiak's belief was based on nothing more than "just hearing things from the field." (CX 0316 (Misiak, IHT at 280); *see also* Misiak, Tr. 1502-04 (no personal knowledge of Schein's buying group practices)). As with the email quoted in CCFF 548, Mr. Misiak did not have personal knowledge of Schein's strategy or practice regarding buying groups. (Misiak, Tr. 1502-04; CX 0316 (Misiak, IHT at 280-82); *see also* SRF 540, 548). And, his belief was mistaken. Indeed, Mr. Misiak's request for information "if you hear differently" indicates he was not sure what Schein's strategy or practice was.

Patterson's Response:

This proposed finding is virtually identical to CCFF 549. Again, when asked what he meant by this statement, Misiak testified: "I believe I'm referencing the fact that I don't think that Schein or Benco has a strategic position on GPOs." (Misiak, Tr. 1357). This proposed finding is misleading to the extent it suggests Misiak's personal beliefs accurately reflect Schein and Benco's business practices regarding buying groups. Misiak did not actually know whether Schein and Benco worked with buying groups. Misiak *personally* believed that Schein and Benco did not work with buying groups: "I'm referencing that *I don't believe* they participate in [GPOs]." (Misiak, Tr. 1357) (emphasis added).

Finally, this proposed finding is also misleading and inaccurate to the extent it suggests Patterson did not actually work with buying groups as of February 27, 2013. Patterson did work with buying groups both before and during Complaint Counsel's alleged conspiracy period. *See, e.g.*, PF ¶¶ 174-175; RX0271 at 001 (as of May 2014, a

Patterson branch had been selling to Jackson Health—“a GPO”—“for *over 10 years*”) (emphasis added).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson’s business.

552. In Misiak’s statement in CX0093 that Patterson’s “2 largest competitors stay out of these as well,” the reference to “2 largest competitors” meant Schein and Benco, “these” meant GPOs, and “as well” meant Schein and Benco were staying out of the GPO business like Patterson. (CX0093 at 001; Misiak, Tr. 1356-1358).

Schein’s Response:

This is a restatement of CCFF 549. Schein does not dispute that Mr. Misiak *believed* that Schein did not work with buying groups and was interested in competitive intelligence. (SRF 540, 549; Misiak, Tr. 1357). But Mr. Misiak’s belief was based on nothing more than “just hearing things from the field.” (CX 0316 (Misiak, IHT at 280); *see also* Misiak, Tr. 1502-04 (no personal knowledge of Schein’s buying group practices)). As with the email quoted in CCFF 548, Mr. Misiak did not have personal knowledge of Schein’s strategy or practice regarding buying groups. (Misiak, Tr. 1502-04; CX 0316 (Misiak, IHT at 280-82); *see also* SRF 540, 548). And, his belief was mistaken. Indeed, Mr. Misiak’s request for information “if you hear differently” indicates he was not sure what Schein’s strategy or practice was.

Patterson’s Response:

This proposed finding is misleading to the extent it suggests Misiak’s personal beliefs accurately reflect Schein and Benco’s business practices regarding buying groups. Misiak did not actually know whether Schein and Benco worked with buying groups.

(Misiak, Tr. 1357). Misiak personally believed that Schein and Benco did not work with buying groups: “I’m referencing that I don’t believe they participate in [GPOs].” (Misiak, Tr. 1357) (emphasis added).

This proposed finding is also misleading to the extent that it suggests Misiak’s statements in this email represent Patterson’s position on buying groups. Misiak testified that the point of this statement was to collect market intelligence about the practices of Patterson’s competitors. (PF ¶ 413-414; Misiak, Tr. 1363).

Moreover, Misiak’s email was a response to Fruehauf’s request for advice. (CX0093 at 001; CCF 539 (“When Misiak received Fruehauf’s February 27, 2013 email asking for guidance in responding to Nease’s communication about ADC’s request for a bid”) (emphasis added)). Misiak advised Fruehauf that his (Misiak’s) personal approach to buying group requests was to “politely” decline. (PF ¶ 410; CX0093 at 001). At the time Fruehauf emailed Misiak asking for advice, Fruehauf’s existing position had already been that he would “steer clear” of ADC, and Misiak had simply “agreed with it.” (PF ¶ 408).

Finally, this proposed finding is misleading and inaccurate to the extent it suggests Patterson did not actually work with buying groups as of February 27, 2013. Patterson did work with buying groups both before and during Complaint Counsel’s alleged conspiracy period. *See, e.g.*, PF ¶¶ 174-175; RX0271 at 001 (as of May 2014, a Patterson branch had been selling to Jackson Health—“a GPO”—“for *over 10 years*”) (emphasis added).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson’s business.

553. Misiak testified that his statements in CX0093 (“Confidential and not for discussion ..our 2 largest competitors stay out of these as well”) were about market information, and he admitted that market information is neither “confidential” nor something that was “not for discussion” by his sales team. (Misiak, Tr. 1363-1364 (Q. And information about the market, competition, that’s not confidential; right? A. No. . . . Q. I’m asking you, is information about the market and competition in general – is that confidential information and not for discussion for your employees? A. No.”)).

Schein’s Response:

No response, other than to note market information can be confidential for a variety of reasons.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson’s business.

554. Misiak could not offer any explanation for why he wrote “Confidential and not for discussion” when he told Fruehauf that Benco and Schein did not participate in buying groups. (CX0093 at 001; Misiak, Tr. 1363-1364).

Schein’s Response:

Mr. Misiak was not asked why he used the term confidential and therefore was not given the opportunity to provide “any explanation.” (Misiak, Tr. 1363-64 (“Q. I’m asking you, is information about the market and competition in general -- is that confidential information and not for discussion for your employees? A. No.”); *see also* SRF 549).

Patterson’s Response:

This proposed finding is deeply misleading. Complaint Counsel ***did not ask*** Misiak for an explanation for why he wrote “confidential and not for discussion.” Thus, Complaint Counsel cannot assert that Misiak “could not offer any explanation.”

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

555. In response to Fruehauf's inquiry about ADC's bid proposal (CX0092), Misiak instructed Fruehauf to inform him if Benco and Schein were selling to GPOs and to send him specific proof if he had it. (CX0093 at 001 (Statement of Misiak; "If you hear differently [about Schein and Benco selling to buying groups] and ha[d] specific proof please send that to me."); Misiak, Tr. 1364).

Schein's Response:

This is a restatement of CCFF 549. Schein does not dispute that Mr. Misiak believed that Schein did not work with buying groups and was interested in competitive intelligence. (SRF 540, 549; Misiak, Tr. 1357). But Mr. Misiak's belief was based on nothing more than "just hearing things from the field." (CX 0316 (Misiak, IHT at 280); *see also* Misiak, Tr. 1502-04 (no personal knowledge of Schein's buying group practices)). As with the email quoted in CCFF 548, Mr. Misiak did not have personal knowledge of Schein's strategy or practice regarding buying groups. (Misiak, Tr. 1502-04; CX 0316 (Misiak, IHT at 280-82); *see also* SRF 540, 548). And, his belief was mistaken. Indeed, Mr. Misiak's request for information "if you hear differently" indicates he was not sure what Schein's strategy or practice was.

Patterson's Response:

Misiak testified that the point of this statement was to collect market intelligence about the practices of Patterson's competitors. (PF ¶ 413-414; Misiak, Tr. 1363) ("[P]art of my role as president of the company is to understand the business environment -- as president of the dental business, I think it was important for me to understand the market,

the climate, the environment, the customers and the competition, so I'm asking, if they heard something, to let me know.").

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

556. Misiak could not provide any reason why he asked Fruehauf for "specific proof" that Patterson's competitors were acting contrary to the position he described. (Misiak, Tr. 1363-1364).

Schein's Response:

At trial, Mr. Misiak was not asked why he asked for proof. Schein also notes that it is reasonable to seek proof backing up competitive intelligence. Indeed, Mr. Misiak's request for information "if you hear differently" indicates he was not sure what Schein's strategy or practice was. (*See also* SRF 549).

Patterson's Response:

The proposed finding is deeply misleading. Once again, Complaint Counsel *did not ask* Misiak to offer an explanation for why he asked Fruehauf for "specific proof." Thus, Complaint Counsel cannot assert that Misiak "could not provide any reason."

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

557. Patterson's branch managers understood Patterson's position was not to focus on buying groups. (CX0093 at 001 ("Devon understands our position"); Misiak, Tr. 1349-1350 (Patterson's position in February 2013 was not to do business with GPOs)).

Schein's Response:

No response.

Patterson's Response:

This finding is inaccurate and misleading. First, Complaint Counsel asserts that Patterson's branch *managers* understood Patterson's position was not to focus on buying groups, but the citation references Devon Nease, *one* branch manager.

Second, the quote from CX0093 is inaccurate, taken out of context and the document does not support this finding. Fruehauf testified that when he wrote "position," he was not referring to Patterson's position, but rather his and Nease's opinion. (CX8013 (Fruehauf, Dep. at 101)). Fruehauf was concerned about how partnering with ADC would affect its territory reps and relationships with current customers who were not part of ADC and therefore would not get an additional discount, which he had discussed with Nease. (PF ¶¶ 406-407; *see also* CX8013 (Fruehauf, Dep. at 102)).

Finally, the cited Misiak trial testimony refers to a sentence written by Misiak later in the email chain and is not related to Fruehauf's sentence: "Devon is on board and understands our position." (Misiak, Tr. 1349; CX0093 at 001).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

558. Misiak was not aware of any analysis of how many Patterson customers it might lose by foregoing the ADC opportunity. (Misiak, Tr. 1341).

Schein's Response:

No response.

Patterson's Response:

Misiak was not aware of any analysis being done but did not foreclose the possibility that the analysis still occurred. Misiak testified: "So Patterson is a large organization, and they have many analysts and -- in the field. Anthony had analysts that worked for him in the region and Devon did in the branch. I don't know of analytics that were done. That doesn't mean they weren't." (Misiak, Tr. 1341).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

559. Misiak did not recall Patterson reviewing any data with respect to buying groups. (CX0316 (Misiak, IHT at 268)).

Schein's Response:

No response.

Patterson's Response:

This proposed finding lacks a timeframe and is vague. It also contradicts other proposed findings, in particular that Patterson hired McKinsey in late 2015 "in part to analyze the buying group market." CCFF 1329. It is also not supported by the cited investigational hearing testimony and is inaccurate. Misiak's *recollection* was not a broad characterization of Patterson's research efforts relating to buying groups. Rather, he testified that prior to Rogan's Smile Source research leading up to Patterson's 2017 bid, he could not "*recall*" that Patterson had done "anything to look at the hard data with respect to GPOs and buying groups." (CX0316 (Misiak, IHT at 226)).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

560. Patterson did not do an independent investigation of whether ADC was a buying group or DSO, relying instead on obtaining information about ADC from Benco. (CX0314 (Guggenheim, IHT at 289-294)).

Schein's Response:

No response.

Patterson's Response:

The cited testimony does not support this proposed finding. Paul Guggenheim did not testify that Patterson did not do an independent investigation of whether ADC was a buying group or DSO. He also did not testify that Patterson relied on information about ADC from Benco. Instead, Guggenheim testified that he (as President of Patterson Dental) "did not" reach out and "was not aware" of anyone else at Patterson who reached out to ADC to understand more about its structure. (CX0314 (Guggenheim, IHT at 290)). Guggenheim also testified that he "did not" instruct anyone to reach out to ADC to learn more about its structure. (CX0314 (Guggenheim, IHT at 290)).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

561. Nease was concerned that Patterson would lose business by refusing to bid on ADC. (CX8002 (Nease, Dep. at 46)).

Schein's Response:

Mr. Nease testified that he “felt like we could compete and still retain a good portion of that business.” (CX 8002 (Nease, Dep. at 48)).

Patterson's Response:

Nease did not testify he was concerned Patterson would lose business *by refusing to bid on ADC*. Nease testified that after learning about ADC's RFP, he wanted to “understand better” the affect “from a practice expenses and cost perspective” would be if “practices decided to move their business from Patterson to another company.” (CX8002 (Nease, Dep. at 46)). Complaint Counsel asked if one of these effects would be Patterson losing business, and Nease agreed that was a concern. (CX8002 (Nease, Dep. at 46)).

Moreover, Nease testified that he was *not* particularly concerned about losing sales to Benco after Benco won ADC's bid proposal. (CX8002 (Nease, Dep. at 68-69)). After Benco won the bid, Patterson continued to compete for the business of ADC's individual members, as Patterson always had. (PF ¶ 311; CX8002 (Nease, Dep. at 51)).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

562. Fruehauf thought a “significant . . . chunk of [revenue] was in jeopardy” if Patterson lost the ADC business. (CX8013 (Fruehauf, Dep. at 101-102)).

Schein's Response:

Mr. Fruehauf offered an opinion which is not supported by evidence. (CX 8013 (Fruehauf, Dep. at 101-02 (“And a significant, *at least in our mind*, chunk of that was in

jeopardy.”) (emphasis added)); *see also* SRF 547 (Mr. Nease not fearful of losing a “chunk” of business)).

Patterson’s Response:

Fruehauf did not testify he was concerned Patterson would lose revenue *if Patterson lost the ADC business*. Fruehauf’s testimony was in the context of discussions he and Nease had regarding the effect of ADC on the market: “Generally, what we talked about was the disruption in business. This was a small market with, you know, a few hundred dentists in total doing about a total of 10 -- 9 or \$10 million in revenue. And a significant, at least in our mind, chunk of that was in jeopardy. So my coaching to Devon [Nease] was on how do you keep the territory reps from seeing this as a bad guy, how do we continue to put our best foot forward, offer value, try to win the business while maintaining the rest of the market.” (CX8013 (Fruehauf, Dep. at 101-102)).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson’s business.

563. Fruehauf did not recall any instance other than the instruction not to bid on ADC where Patterson communicated to a salesperson that he or she would not be “judged unfavorably” as the result of a loss of business. (CX8013 (Fruehauf, Dep. at 106)).

Schein’s Response:

No response.

Patterson’s Response:

Complaint Counsel asked Fruehauf whether he could “identify any loss of a Patterson account other than these losses to ADC where a Patterson salesperson was told that he or she would not be . . . judged unfavorably for that loss.” (CX8013 (Fruehauf,

Dep. at 106)). This question assumed a fact that did not actually occur. Fruehauf testified that he did not “specifically recall” telling Devon he would not be judged negatively, but that he was “sure [he] told Devon that . . . we want to continue to go to market the way we have and provide a high value at a fair price” and that if Nease continued to do that, he would be “judged fairly.” (CX8013 (Fruehauf, Dep. at 105)). Also, when Fruehauf answered Complaint Counsel’s misleading and inaccurate hypothetical, Fruehauf explained Complaint Counsel’s question assumed a scenario that had not happened: “I don’t recall *any* specific instances where we told a rep, look, if you lose the business you’re not going to be in trouble or if you’re the business you are going to be in trouble.” (CX8013 (Fruehauf, Dep. at 106)) (emphasis added).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson’s business.

G. Patterson Confronted Benco When It Suspected Benco of Discounting to a Buying Group.

564. Following the agreement with Benco, Patterson actively monitored and confronted Benco on suspicions of cheating. (CCFF ¶¶ 565-573; *see also* Guggenheim, Tr. 1627-1628).

Schein’s Response:

No response.

Patterson’s Response:

This proposed finding is confusing and false. It is unclear whether “the agreement with Benco” refers to Benco winning the ADC bid or Patterson allegedly joining the alleged agreement. Either way, the cited findings and trial testimony also do not support this proposed finding. Witness testimony explicitly contradicts it. Both Guggenheim and

Cohen testified that Guggenheim's June 2013 email regarding ADC was not an enforcement of an agreement not to work with buying groups. (PF ¶ 304; Guggenheim, Tr. 1870; Cohen, Tr. 918–19). Guggenheim also testified that his June 2013 email was not related to any buying group conspiracy. (PF ¶ 305; Guggenheim, Tr. 1696). Instead, Guggenheim sent the June 2013 email to gain business intelligence. (PF ¶ 301; CX0314 (Guggenheim, IHT at 299-303)). He did this because he had been approached by Patterson local branch manager, Devon Nease, at the end of May 2013 concerning Benco winning the ADC bid. (PF ¶ 301; Guggenheim, Tr. 1622; CX0094 at 001)). Guggenheim's purpose was to see what he "could learn in terms of field intelligence about what we might be missing here." (PF ¶ 301; CX0314 (Guggenheim, IHT at 285)). Guggenheim was attempting to gain information that would better allow Nease to compete for this business. (PF ¶ 301; CX0314 (Guggenheim, IHT at 287)). *See also* Responses to CCFF ¶¶ 565-573, *infra*.

Benco's Response:

The proposed finding contains only Complaint Counsel's opinion on the ultimate issue in the case. Therefore, it should be disregarded.

565. On May 31, 2013, Nease sent Guggenheim an email informing him that Benco had bid for and won the business of Atlantic Dental Care. (CX0094 at 001 ("Just a heads up on a situation in Chesapeake, VA, Benco recently responded to and won a bid proposal with a buying group called Atlantic Dental Care."); Guggenheim, Tr. 1622; 1625-1627)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

566. Patterson initially viewed ADC as a buying group. (CX0093 at 001; Misiak, Tr. 1335-1336; *see also* CX0092 at 001 ("Attached is an RFP from a dentist who's formed a Co-op.")).

Schein's Response:

No response.

Patterson's Response:

None of the cited testimony or documents support the "initially" component of this proposed finding. Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

567. At the time Guggenheim received Nease's May 2013 email and learned Benco won ADC's business (CX0094), Guggenheim had not forgotten Cohen's earlier email about Benco's policy of not doing business with buying groups (CX0056). (Guggenheim, Tr. 1627).

Schein's Response:

No response.

Patterson's Response:

When asked if it was fair to say that around the end of May 2013 he had not forgotten Cohen's earlier email about Benco's policy on buying groups, Guggenheim responded: "I -- I guess that's fair to say. I don't know that I thought about it, but no, yeah, that's probably fair to say." (Guggenheim, Tr., 1627).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

568. After learning from Nease that Benco bid for and won ADC's business (CX0094), Guggenheim located an email from Cohen from four months earlier, which explained Benco's no buying group policy (CX0056), and he responded to Cohen. (Guggenheim, Tr. 1627).

Schein's Response:

No response.

Patterson's Response:

Guggenheim sent the June 2013 email to gain business intelligence. (PF ¶ 301; CX0314 (Guggenheim, IHT at 299-303)). He did this because he had been approached by Patterson local branch manager, Devon Nease, at the end of May 2013 concerning Benco winning the ADC bid. (PF ¶ 301; Guggenheim, Tr. 1622; CX0094 at 001)). Guggenheim's purpose was to see what he "could learn in terms of field intelligence about what we might be missing here." (PF ¶ 301; CX0314 (Guggenheim, IHT at 285)). Guggenheim was attempting to gain information that would better allow Nease to compete for this business. (PF ¶ 301; CX0314 (Guggenheim, IHT at 287)). Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

569. On June 6, 2013, Guggenheim sent an email to Cohen and asked his competitor to "shed some light on [Benco's] business agreement with Atlantic Dental Care." (CX0095 at 001; Guggenheim, Tr. 1627-1628).

Schein's Response:

No response.

Patterson's Response:

Guggenheim sent the June 2013 email to gain business intelligence. (PF ¶ 301; CX0314 (Guggenheim, IHT at 299-303)). He did this because he had been approached by Patterson local branch manager, Devon Nease, at the end of May 2013 concerning Benco winning the ADC bid. (PF ¶ 301; Guggenheim, Tr. 1622; CX0094 at 001)). Guggenheim's purpose was to see what he "could learn in terms of field intelligence about what we might be missing here." (PF ¶ 301; CX0314 (Guggenheim, IHT at 285)). Guggenheim was attempting to gain information that would better allow Nease to compete for this business. (PF ¶ 301; CX0314 (Guggenheim, IHT at 287)). Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Guggenheim's e-mail asked, "Reflecting back on our conversation earlier this year, could you shed some light on your business agreement with Atlantic Dental Care? I understand they are a group of 55 dentists in and around Chesapeake Va. Being led by a practice management consultant that your team has signed a supply agreement with. I'm wondering if your position on buying groups is still as you articulated back in February? Let me know your thoughts....Sometimes these things grow legs without our awareness." (CX0062).

570. In his June 6, 2013 email to Cohen, forwarding their February 8, 2013 correspondence, Guggenheim asked Cohen to confirm that Benco's "position on buying groups [was] still as [Cohen] articulated back in February." (CX0095 at 001; Guggenheim, Tr. 1627-1628; *see also* Cohen, Tr. 560). Guggenheim's June 6, 2013 email to Cohen stated:

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

(CX0095 at 001).

Schein's Response:

No response.

Patterson's Response:

Again, Guggenheim sent the June 2013 email to gain business intelligence. (PF ¶ 301; CX0314 (Guggenheim, IHT at 299-303)). He did this because he had been approached by Patterson local branch manager, Devon Nease, at the end of May 2013 concerning Benco winning the ADC bid. (PF ¶ 301; Guggenheim, Tr. 1622; CX0094 at 001)). Guggenheim's purpose was to see what he "could learn in terms of field intelligence about what we might be missing here." (PF ¶ 301; CX0314 (Guggenheim, IHT at 285)). Guggenheim was attempting to gain information that would better allow Nease to compete for this business. (PF ¶ 301; CX0314 (Guggenheim, IHT at 287)). Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Guggenheim testified that he had sent the e-mail to gain business intelligence. (CX0314 (Guggenheim, IHT at 299, 300-03)). He did this because he had been approached

by the Patterson local branch manager, Devon Nease, at the end of May 2013 concerning Benco winning the ADC bid. (Guggenheim, Tr. 1622; CX0094 at 1). Guggenheim's purpose was to see what he "could learn in terms of field intelligence about what we might be missing here." (CX0314 (Guggenheim, IHT at 285)). Guggenheim was attempting to gain information that would better allow Nease to compete for this business. (CX0314 (Guggenheim, IHT at 287) ("I wanted to see what intelligence I could find out to help Devon get back in there and compete.")).

571. Guggenheim's June 6, 2013 email to Cohen blind copied Misiak, Rogan, and Nease. (CX0095 at 001; Guggenheim, Tr. 1630).

Schein's Response:

No response.

Patterson's Response:

Guggenheim testified that "it's just kind of a habit" to blind copy Rogan. (Guggenheim, Tr. 1630). Guggenheim blind copied Misiak because "he was the one that originally sent [Guggenheim] this information when it first started" and because he "was the VP of sales, so [Guggenheim] felt like [it] was the right thing to do." (Guggenheim, Tr. 1630-1631). Guggenheim blind copied Nease because Misiak had "originated this along with Devon [Nease]" and "because Devon was the manager" of the affected branch. (Guggenheim, Tr. 1630). Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

572. Guggenheim viewed Benco's bidding on and doing business with ADC as a deviation from what Cohen previously told him about Benco's policy not to do business with buying groups in February 2013 (CX0056). (Guggenheim, Tr. 1628).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit and cited testimony.

Guggenheim testified that he had sent the e-mail to gain business intelligence. (CX0314 (Guggenheim, IHT at 299, 300–03)). He did this because he had been approached by the Patterson local branch manager, Devon Nease, at the end of May 2013 concerning Benco winning the ADC bid. (Guggenheim, Tr. 1622; CX0094 at 1). Guggenheim's purpose was to see what he "could learn in terms of field intelligence about what we might be missing here." (CX0314 (Guggenheim, IHT at 285)). Guggenheim was attempting to gain information that would better allow Nease to compete for this business. (CX0314 (Guggenheim, IHT at 287) ("I wanted to see what intelligence I could find out to help Devon get back in there and compete.")).

573. Cohen understood that Guggenheim's June 2013 email (CX0095) asked how Benco doing business with buying group ADC was consistent with the no buying group policy that Cohen had communicated to Guggenheim in February 2013 (CX0056). (Cohen, Tr. 561).

Schein's Response:

No response.

Patterson's Response:

Complaint Counsel asked Cohen at trial whether Guggenheim was asking Cohen how Benco's decision to bid on ADC was consistent with Cohen's previous email to Guggenheim in February 2013 (CX0056). (Cohen, Tr. 561). Cohen simply agreed with Complaint Counsel's interpretation of the email: "I believe that's his question. Yes." (Cohen, Tr. 561).

Benco's Response:

Chuck Cohen's actual testimony differs substantially from Complaint Counsel's fictional paraphrase in the proposed finding. What Cohen actually said was: "I think he's wondering why they were losing their customers to us." (Cohen, Tr. 561).

Specifically, Chuck Cohen testified that Paul Guggenheim asked him if Benco's position on buying groups was the same as it had been in February 2013. (Cohen, Tr. 733). Chuck Cohen testified that it was an easy question to answer because the ADC contract had already been awarded to Benco, and there was no harm in sharing Benco's thinking regarding the ownership structure of ADC. (Cohen, Tr. 733-35). Cohen responded to Guggenheim with an explanation of why ADC was a large group practice, and not a buying group. (CX0062).

H. Benco Reassured Patterson It Will Continue to Abide By a No Buying Group Policy.

574. Cohen replied to Guggenheim's June 6, 2013 email (CX0095) two days later on June 8, 2013, and he reiterated to Guggenheim that Benco had a no buying-group policy. (Cohen, Tr. 561-562; CX0062 at 001).

Schein's Response:

No response.

Patterson's Response:

Patterson joins Benco's response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit and cited testimony.

Chuck Cohen testified that Paul Guggenheim asked him if Benco's position on buying groups was the same as it had been in February 2013. (Cohen, Tr. 733). Chuck Cohen testified that it was an easy question to answer because the ADC contract had already been awarded to Benco, and there was no harm in sharing Benco's thinking regarding the ownership structure of ADC. (Cohen, Tr. 733-35). Cohen responded to Guggenheim with an explanation of why ADC was a large group practice, and not a buying group. (CX0062).

Both Guggenheim and Cohen deny that this e-mail constituted enforcement of an agreement not to work with buying groups. (Guggenheim, Tr. 1871-72 ("Q. And again, just so the record is crystal clear on this, by this e-mail, did you believe that you were enforcing any agreement between Patterson and Benco not to do business with buying groups? A. Absolutely not. Q. And by this e-mail, did you intend to enforce any such agreement? A. No.")); (Cohen, Tr. 918-19 ("Q. Is there a secret code that you and Mr. Guggenheim worked out where one of these terms means enforce or enforcement? A. No. Q. Was there ever -- when you were a kid, did you ever use lemon juice to create invisible ink and then you put it over a candle or something and it appears? Did you ever do when you were a kid? A. Yes. Q. Is there -- was there lemon juice with a secret code that's invisible to the rest of us that has 'enforce' or 'enforcement' in there? A. No. Q. I mean, you'd pretty much have to make that up if you were interpreting this to contain the word

“enforce” or “enforcement,” wouldn’t you, sir? A. The answer is no, and Paul ran at that point a much larger operation than Benco did. I’m not in the business of telling him how to run his business. It would not be something I would say even in jest. Q. All right. And just so we’re clear, you’d pretty much have to make it up to think that this e-mail thread between you and Mr. Guggenheim somehow had the word “enforce” or “enforcement” in it, wouldn’t you? A. I would think so.”)).

575. Cohen’s June 8, 2013 response to Guggenheim set forth a detailed explanation for Benco’s decision to bid for ADC. Cohen stated:

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

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

(CX0062 at 001; Cohen, Tr. 561-564).

Schein’s Response:

No response.

Patterson’s Response:

Patterson joins Benco’s response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit and cited testimony.

Chuck Cohen testified that Paul Guggenheim asked him if Benco’s position on buying groups was the same as it had been in February 2013. (Cohen, Tr. 733). Chuck

Cohen testified that it was an easy question to answer because the ADC contract had already been awarded to Benco, and there was no harm in sharing Benco's thinking regarding the ownership structure of ADC. (Cohen, Tr. 733-35). Cohen responded to Guggenheim with an explanation of why ADC was a large group practice, and not a buying group. (CX0062).

Both Guggenheim and Cohen deny that this e-mail constituted enforcement of an agreement not to work with buying groups. (Guggenheim, Tr. 1871-72 ("Q. And again, just so the record is crystal clear on this, by this e-mail, did you believe that you were enforcing any agreement between Patterson and Benco not to do business with buying groups? A. Absolutely not. Q. And by this e-mail, did you intend to enforce any such agreement? A. No.)); (Cohen, Tr. 918-19 ("Q. Is there a secret code that you and Mr. Guggenheim worked out where one of these terms means enforce or enforcement? A. No. Q. Was there ever -- when you were a kid, did you ever use lemon juice to create invisible ink and then you put it over a candle or something and it appears? Did you ever do when you were a kid? A. Yes. Q. Is there -- was there lemon juice with a secret code that's invisible to the rest of us that has 'enforce' or 'enforcement' in there? A. No. Q. I mean, you'd pretty much have to make that up if you were interpreting this to contain the word "enforce" or "enforcement," wouldn't you, sir? A. The answer is no, and Paul ran at that point a much larger operation than Benco did. I'm not in the business of telling him how to run his business. It would not be something I would say even in jest. Q. All right. And just so we're clear, you'd pretty much have to make it up to think that this e-mail thread between you and Mr. Guggenheim somehow had the word "enforce" or "enforcement" in it, wouldn't you? A. I would think so.))).

576. In Cohen's June 8, 2013, response to Guggenheim, he also provided multiple reasons why ADC was not a buying group, including that ADC had a total of 32 practices; the 32 practices had "legally merged together"; the merged entity was "owned by the former practice owners"; ADC was in the "process of rebranding all of the offices Atlantic Dental Care"; and the company had a board of directors "made up of some of the stakeholders who makes the decisions." (CX0062 at 001; Cohen, Tr. 562-563 ("Q. And then you went on to explain why you believed ADC was not a buying group. A. Yes. . . . What you were explaining to him was that the individual practices of ADC had actually merged together; is that what you were saying? A. Yes. Q. And that meant they weren't a buying group, but they were a corporate or big group. A. DSO. Yes.")).

Schein's Response:

No response.

Patterson's Response:

Patterson joins Benco's response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit and cited testimony.

Chuck Cohen testified that Paul Guggenheim asked him if Benco's position on buying groups was the same as it had been in February 2013. (Cohen, Tr. 733). Chuck Cohen testified that it was an easy question to answer because the ADC contract had already been awarded to Benco, and there was no harm in sharing Benco's thinking regarding the ownership structure of ADC. (Cohen, Tr. 733-35). Cohen responded to Guggenheim with an explanation of why ADC was a large group practice, and not a buying group. (CX0062).

Both Guggenheim and Cohen deny that this e-mail constituted enforcement of an agreement not to work with buying groups. (Guggenheim, Tr. 1871-72 ("Q. And again, just so the record is crystal clear on this, by this e-mail, did you believe that you were enforcing any agreement between Patterson and Benco not to do business with buying

groups? A. Absolutely not. Q. And by this e-mail, did you intend to enforce any such agreement? A. No.”)); (Cohen, Tr. 918–19 (“Q. Is there a secret code that you and Mr. Guggenheim worked out where one of these terms means enforce or enforcement? A. No. Q. Was there ever -- when you were a kid, did you ever use lemon juice to create invisible ink and then you put it over a candle or something and it appears? Did you ever do when you were a kid? A. Yes. Q. Is there -- was there lemon juice with a secret code that’s invisible to the rest of us that has ‘enforce’ or ‘enforcement’ in there? A. No. Q. I mean, you’d pretty much have to make that up if you were interpreting this to contain the word “enforce” or “enforcement,” wouldn’t you, sir? A. The answer is no, and Paul ran at that point a much larger operation than Benco did. I’m not in the business of telling him how to run his business. It would not be something I would say even in jest. Q. All right. And just so we’re clear, you’d pretty much have to make it up to think that this e-mail thread between you and Mr. Guggenheim somehow had the word “enforce” or “enforcement” in it, wouldn’t you? A. I would think so.”)).

577. In Cohen’s June 8, 2013 response, he assured Guggenheim about his future plans -- that he would “continue monitoring the process to ensure that ADC delivers on their commitment to us,” including ensuring that ADC was not a buying group. (Cohen, Tr. 563-564; CX0062 at 001).

Schein’s Response:

No response.

Patterson’s Response:

Patterson joins Benco’s response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit and cited testimony.

Chuck Cohen testified that Paul Guggenheim asked him if Benco's position on buying groups was the same as it had been in February 2013. (Cohen, Tr. 733). Chuck Cohen testified that it was an easy question to answer because the ADC contract had already been awarded to Benco, and there was no harm in sharing Benco's thinking regarding the ownership structure of ADC. (Cohen, Tr. 733-35). Cohen responded to Guggenheim with an explanation of why ADC was a large group practice, and not a buying group. (CX0062).

Both Guggenheim and Cohen deny that this e-mail constituted enforcement of an agreement not to work with buying groups. (Guggenheim, Tr. 1871-72 ("Q. And again, just so the record is crystal clear on this, by this e-mail, did you believe that you were enforcing any agreement between Patterson and Benco not to do business with buying groups? A. Absolutely not. Q. And by this e-mail, did you intend to enforce any such agreement? A. No.")); (Cohen, Tr. 918-19 ("Q. Is there a secret code that you and Mr. Guggenheim worked out where one of these terms means enforce or enforcement? A. No. Q. Was there ever -- when you were a kid, did you ever use lemon juice to create invisible ink and then you put it over a candle or something and it appears? Did you ever do when you were a kid? A. Yes. Q. Is there -- was there lemon juice with a secret code that's invisible to the rest of us that has 'enforce' or 'enforcement' in there? A. No. Q. I mean, you'd pretty much have to make that up if you were interpreting this to contain the word "enforce" or "enforcement," wouldn't you, sir? A. The answer is no, and Paul ran at that point a much larger operation than Benco did. I'm not in the business of telling him how to run his business. It would not be something I would say even in jest. Q. All right. And just so we're clear, you'd pretty much have to make it up to think that this e-mail thread

between you and Mr. Guggenheim somehow had the word “enforce” or “enforcement” in it, wouldn’t you? A. I would think so.”)).

578. Cohen testified that Guggenheim did not request further discussion and that it seemed like Guggenheim was satisfied with his response. (Cohen, Tr. 564; CX0062 at 001).

Schein’s Response:

No response.

Patterson’s Response:

Patterson joins Benco’s response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit and cited testimony.

Chuck Cohen testified that Paul Guggenheim asked him if Benco’s position on buying groups was the same as it had been in February 2013. (Cohen, Tr. 733). Chuck Cohen testified that it was an easy question to answer because the ADC contract had already been awarded to Benco, and there was no harm in sharing Benco’s thinking regarding the ownership structure of ADC. (Cohen, Tr. 733-35). Cohen responded to Guggenheim with an explanation of why ADC was a large group practice, and not a buying group. (CX0062).

Guggenheim then responded with a polite reply. (CX3301) (“Sounds good Chuck. Just wanted to clarify where guys stand.”).

579. Cohen’s email to Guggenheim described the criteria that exempted ADC from the nobuying group agreement and assured Guggenheim that he would “continue monitoring the process to ensure that ADC delivers on their commitment to us,” including ensuring that ADC was not a buying group. (CX0062 at 001; CCFF ¶¶ 574-577).

Schein's Response:

No response.

Patterson's Response:

Patterson joins Benco's response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit and cited testimony.

First, the proposed finding contains only Complaint Counsel's opinion on the ultimate issue in the case. Therefore, it should be disregarded.

Second, Chuck Cohen testified that Paul Guggenheim asked him if Benco's position on buying groups was the same as it had been in February 2013. (Cohen, Tr. 733). Chuck Cohen testified that it was an easy question to answer because the ADC contract had already been awarded to Benco, and there was no harm in sharing Benco's thinking regarding the ownership structure of ADC. (Cohen, Tr. 733-35). Cohen responded to Guggenheim with an explanation of why ADC was a large group practice, and not a buying group. (CX0062).

580. Based on what Guggenheim learned from Cohen's June 8, 2013 email (CX0062), Guggenheim now viewed ADC as a DSO rather than a buying group. (Guggenheim, Tr. 1636).

Schein's Response:

No response, other than to note that this asserted fact is based on how *Cohen* viewed ADC. Neither the email nor the cited testimony shows that Patterson had reached that conclusion, other than to recognize Mr. Cohen's point.

Patterson's Response:

This proposed finding is not supported by the cited testimony or document and is inaccurate. Guggenheim did not testify that after Cohen's June 8, 2013 email, he viewed ADC as a DSO instead of a buying group. Guggenheim had forwarded Cohen's email to Nease, who then responded to Guggenheim asking for his thoughts on Cohen's view that ADC is a DSO and not a buying group. (CX0096 at 001). Guggenheim responded: "it's a little grey but I guess [Cohen] has a point." (CX0096 at 001). Complaint Counsel asked Guggenheim at trial whether the "point" he was referring to was that ADC is "more like a DSO or a corporate dental chain rather than a buying group." (Guggenheim, Tr. 1636). Guggenheim responded: "I -- yeah, I guess that's right." (Guggenheim, Tr. 1636). Complaint Counsel then asked Guggenheim whether his answer was a yes. (Guggenheim, Tr. 1636). Guggenheim again responded: "Yeah. I'm trying to remember what was in my mind in June of 2013. It seems like that's what I was saying, yeah." (Guggenheim, Tr. 1636-1637). Indeed, earlier in Complaint Counsel's questioning, Guggenheim specifically stated that it was *Cohen's* belief that ADC was a DSO and not a buying group. Complaint Counsel referred to Cohen's June 8, 2013 email (CX0062) and then asked Guggenheim: "And therefore, Atlantic Dental Care was not a buying group?" (Guggenheim, Tr. 1633). Guggenheim responded: "In his determination." (Guggenheim, Tr. 1633).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

581. On June 10, 2013, Guggenheim responded to Cohen June 8, 2013 email (CX0062) and confirmed that he understood Cohen position about bidding for ADC's business. (Guggenheim,

Tr. 1633; *see also* CX0096 at 001 (confirming to a sales manager that Cohen has made “an exception” because ADC was a DSO, not a buying group)).

Schein’s Response:

No response.

Patterson’s Response:

This proposed finding is confusing and misleading. First, it is unclear whether this finding means that Guggenheim confirmed he understood Cohen’s position about bidding for ADC’s business in his response to Cohen’s email *or* that Guggenheim responded to Cohen’s email and separately confirmed he understood Cohen’s position in response to Complaint Counsel’s questioning at trial. To the extent that this finding suggests Guggenheim confirmed he understood Cohen’s position *in his email response* to Cohen, this finding is not supported by the cited testimony or document and is inaccurate. First, Guggenheim did confirm he understood Cohen’s position during his trial testimony, but he never testified that he confirmed his understanding to Cohen. (Guggenheim, Tr. 1633) (“Q. And Mr. Cohen said that he believed that these four things that he had listed met ‘our criteria for group for a large group practice.’ Do you see that? A. Yeah. He says that ‘we believe this meets our criteria for’ -- yes. Q. And therefore, Atlantic Dental Care was not a buying group? A. In his determination.”). Second, Guggenheim did not confirm to Nease that Cohen “made an exception.” After Guggenheim forwarded Cohen’s June 8, 2013 email to Nease, Nease asked Guggenheim: “So are they making an exception because they have legally merged? How do you feel about this?” (CX0096 at 001). Guggenheim replied: “Yeah, I guess that does create a different situation as they would logically buy as one entity. It’s a little grey but I guess he has a point.” (CX0096 at 001).

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Guggenheim responded only with a polite reply. (CX3301) ("Sounds good Chuck. Just wanted to clarify where guys stand.").

582. Guggenheim's June 10, 2013 response to Cohen stated, "[s]ounds good Chuck. Just wanted to clarify where you guys stand." (CX0062 at 001).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Guggenheim responded only with a polite reply. (CX3301) ("Sounds good Chuck. Just wanted to clarify where guys stand.").

583. Guggenheim was satisfied with Cohen's June 8, 2013 response (CX0062). (Guggenheim, Tr. 1633-1634; *see also* CX0096 at 001 (Guggenheim forwarded Cohen's email to Nease, the branch manager for the region where ADC was located, explaining to Nease, "I guess that does create a different situation as they would logically buy as one entity. It's a little grey but I guess he has a point.")).

Schein's Response:

No response.

Patterson's Response:

Guggenheim was "satisfied" with Cohen's email in the sense that Cohen had answered his question and then Guggenheim "moved on" from it. (Guggenheim, Tr. 1633-1634) ("Q. You were satisfied with Chuck Cohen's response? A. Yeah. Moved on.").

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

584. Guggenheim forwarded the email exchange with Cohen (CX0062) to his boss, CEO of Patterson Companies, Scott Anderson. (CX0097 at 001).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

585. Guggenheim forwarded the email exchange with Cohen (CX0062) to McFadden. (CX0098 at 001).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

586. Following the June 2013 communication with Cohen (CX0062), Guggenheim directed Nease to “aggressively get after [ADC’s] business and compete.” (Guggenheim, Tr. 1634; CX0314 (Guggenheim, IHT at 303)).

Schein’s Response:

No response.

Patterson’s Response:

While the quote from Guggenheim’s investigational hearing testimony is accurately restated, it is likely being misinterpreted. Guggenheim could only have meant that he wanted Patterson to compete for the business of ADC’s individual members—as opposed to the business of ADC itself—since Guggenheim knew that Benco had already won ADC’s bid in May 2013—the month before his June 2013 email with Cohen. (CX0094 at 001 (May 31, 2013 email from Nease to Guggenheim: “Benco recently responded to and won a bid proposal with a buying group called Atlantic Dental Care”); Guggenheim, Tr. 1622).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson’s business.

587. Based on Benco’s communication from Cohen to Guggenheim (CX0062) in June 2013 that ADC was under common ownership and was not a buying group, Guggenheim changed his position and felt that Patterson should compete for the ADC business. (Guggenheim, Tr. 1634).

Schein’s Response:

No response, other than to note the evidence does not support the alleged “change [in] position.” Mr. Guggenheim testified, “I felt he should go compete *like we do*, go after the business.” (Guggenheim, Tr. 1634 (emphasis added)).

Patterson's Response:

The assertion that “Guggenheim changed his position” regarding ADC is not supported by the cited testimony. Additionally, while the assertion that Guggenheim felt that Patterson should compete for ADC’s business after his June 2013 email with Cohen is accurately restated, it is likely being misinterpreted. Guggenheim could only have meant that he wanted Patterson to compete for the business of ADC’s individual members—as opposed to the business of ADC itself—since Guggenheim knew that Benco had already won ADC’s bid in May 2013—the month before his June 2013 email with Cohen. (CX0094 at 001 (May 31, 2013 email from Nease to Guggenheim: “Benco recently responded to and won a bid proposal with a buying group called Atlantic Dental Care”); Guggenheim, Tr. 1622).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson’s business.

588. Internal communications at Patterson referenced other instances when Patterson was concerned Benco was working with buying groups when it had a no buying group policy. (*See, e.g.*, CX3169 at 001 (Statement of Rogan: “Benco is a distributor like us. Where are these supplies coming from? If this is a GPO (group purchasing organization), we need to know.”); Rogan, Tr. 3526-3527 (Rogan was asking if Tralongo was a GPO)).

Schein's Response:

No response.

Patterson's Response:

This proposed finding is confusing. First, Complaint Counsel only cites to one example but asserts there are several instances and, therefore inappropriately extrapolating

too broad of a conclusion from a single instance. Moreover, the example cited does not even clearly support this proposed finding. The cited document and testimony do not make clear that Benco was actually working with Tralongo. Nor do the cited document and testimony clearly indicate that Rogan wanted to know whether Tralongo is a buying group because Benco was working with it when they had a no buying group policy. A sales representative (Brian Cherbonneau) emailed Rogan and said that “Aesthetic Smiles officially fired us today for a Benco subsidy called Tralongo?” (CX3169 at 001). Rogan responded: “No idea what this is. What do you mean subsidy?” (CX3169 at 001). Cherbonneau never responded to Rogan’s question. (CX3169 at 001). There is no testimony from any witnesses that Benco did work with Tralongo. Additionally, there is no indication in either the document or cited testimony that Benco had a no buying group policy. Complaint Counsel also did not ask Rogan why he wrote: “if this is a GPO we need to know.”

Moreover, there is no evidence that Patterson communicated with Schein and/or Benco about Tralongo. In fact, Rogan testified he never contacted Benco when he was made aware that Benco might have been selling to Tralongo. (Rogan, Tr. 3575–76).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson’s business.

I. Patterson Ensured Compliance with Agreement Internally.

589. Patterson served its DSO customers through a division that was originally called “Special Markets” and later called Strategic Accounts. (McFadden, Tr. 2670; CX0315 (McFadden, IHT at 80, 96-97)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

590. Patterson was developing its Special Markets division by May 2013. (McFadden, Tr. 2670, 2689).

Schein's Response:

No response.

Patterson's Response:

Patterson hired an experienced consulting firm, Strategic Business Solutions, LLC, to evaluate and make recommendations on the DSO opportunity in late summer 2012. (PF ¶ 74). In the fall of 2012, the lead consultant, Michele Perpich, provided Patterson's management with a 99-page report and recommendation that the company develop a plan to enter the DSO space. (PF ¶ 76; RX0043 at 001-099 (Perpich Report); Guggenheim, Tr. 1582). In early 2013, Patterson's executive team obtained the approval of its board of directors to invest in and enter the DSO space. (PF ¶ 78; Guggenheim, Tr. 1783 (Patterson obtained board approval "several months after" the management meeting in November 2012)). Patterson, therefore, made the decision to enter the DSO market in early 2013. (PF ¶¶ 78-79). Patterson's Special Markets division was formally launched in September 2013. (PF ¶ 79; RX0118 at 001).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

591. Patterson's Special Markets division was created to manage large accounts. (CX3014 at 004 ("Patterson Dental Special Markets will focus on large group practices"); CX0158 at 002).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

592. Patterson was already serving a number of DSOs at the time it established its Special Markets division. (RX0072 (Excel worksheet "Sales Data" tab)).

Schein's Response:

No response.

Patterson's Response:

The cited excel does not refer to any of the listed customers as DSOs. The customers are grouped into two categories: large group practices and small group practices. (RX0072).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

593. At the time Patterson established its Special Markets division in 2013, the DSO market was dominated by Schein, with Benco also serving the DSO market. (Guggenheim, Tr. 1540; *see also* Misiak, Tr. 1464; McFadden, Tr. 2690).

Schein's Response:

No response, other than to note that Complaint Counsel has not alleged or defined a "DSO market" and thus there is no evidence that Schein "dominated" such a market. As it was the first to serve DSOs, Schein did serve more DSOs than other distributors.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

594. Patterson looked at what its competitors were doing as a model when it designed its Special Markets division. (McFadden, Tr. 2690-2691).

Schein's Response:

No response.

Patterson's Response:

This finding is only partially accurate. McFadden did not testify that its competitors' behavior was used as a model *for the design of Patterson Special Markets*. Instead, McFadden agreed Patterson looked at what its competitors were doing in the special markets space "as a model." (McFadden, Tr. 2691) ("Q. Did Patterson look at what its competitors were already doing in the special markets space as a model? A. Yes.").

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

595. Patterson had the resources and infrastructure to work with buying groups both before it established its Special Markets division and after Special Markets was formed in 2013. (Misiak, Tr. 1510).

Schein's Response:

No response.

Patterson's Response:

This proposed finding overstates Misiak's testimony. Misiak testified that Patterson had the resources and infrastructure to work with "*a buying group*"—not *multiple* buying groups—before and after Patterson created the Special Markets Division. (Misiak, Tr. 1510) ("Q. Mr. Misiak, before Patterson created the Special Markets Division in 2013, did Patterson have the resources or infrastructure to partner with *a buying group*? A. Probably. Q. Is that a yes? A. Yes. Q. And that would have been the case after Special Markets Division was created in 2013 as well? A. Correct.").

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

596. In June 2013, at the same time that Guggenheim and Cohen communicated about why Benco chose to bid on and do business with ADC (CX0062), Patterson was building out its Special Markets division to do business with DSOs and other multi-office entities. (CCFF ¶¶ 587, 590).

Schein's Response:

No response.

Patterson's Response:

While this proposed finding is factually correct, there is nothing in the record suggesting that these two events—Patterson building out its Special Markets Division and the June 2013 Guggenheim-Cohen ADC email—are related in anyway.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

597. McFadden received numerous requests from buying groups inquiring whether Patterson was interested in bidding on their business. (McFadden, Tr. 2705 (Patterson's Special Markets division started getting "a lot of emails from buying groups"); CX8004 (McFadden, Dep. at 116-117); *see also* CX3116 at 001; Misiak, Tr. 1386 ("Q. What did you mean by 'the GPO noise has been pretty loud from the field'? A. I can't remember exactly what I meant when I sent this back in 2013, probably that I've received a lot of e-mails. Q. E-mails about what? A. About GPOs or buying groups....from our branch infrastructure, from our sales reps.")).

Schein's Response:

No response.

Patterson's Response:

This proposed finding is confusing because it does not provide a timeframe. The cited testimony indicates that the requests started coming in around the time that Patterson launched its Special Markets division. (McFadden, Tr. 2705) (McFadden testified that he "started getting a lot of emails early on, after the announcement of Patterson Special Markets, from various groups, and that continued on for a couple of years."); CX8004 (McFadden, Dep. at 116-117) ("almost one year into [the] launch" of Patterson Special Markets, Patterson had "gotten a lot of requests popping up.")).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

598. McFadden approached Guggenheim at times to ask if he should pursue buying groups. (Guggenheim, Tr. 1642-1643).

Schein's Response:

No response.

Patterson's Response:

There is no indication that McFadden approached Guggenheim about pursuing buying groups in the cited trial testimony. When asked why the Patterson Special Market's announcement had a statement that the definition did not include GPOs, Guggenheim responded: "Because we were -- Neal was getting a lot of noise coming up the channel about, you know, focusing on GPOs. I was deeply concerned about the millions of dollars we invested in this division. And Neal needed to get focused on winning DSO business. That was the charter and the objective. And so what was happening was a lot of questions or things around GPOs were coming at Neal, and I wanted Neal to specifically focus on the strategic initiative, which was group -- was, you know, group practices and DSOs." (Guggenheim, Tr. 1642-1643).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

599. McFadden was open to the possibility of working with buying groups. (CCFF ¶¶ 600, 601).

Schein's Response:

No response.

Patterson's Response:

First, CCFF ¶ 601 does not support this proposed finding. Second, this finding overstates Dr. Goldsmith's testimony, as cited in CCFF ¶ 600. CCFF ¶ 600 (and Dr. Goldsmith's testimony) indicate McFadden was interested in Smile Source. (CCFF ¶ 600). They do not, however, support the assertion that McFadden was "open to the possibility of working with buying groups."

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

600.



Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

601. When Special Markets was first started, the announcement "meant a lot more than DSOs." (CX0315 (McFadden, IHT at 169)).

Schein's Response:

No response, other than to note that this refers to Patterson's Special Markets division, not Schein's

Patterson's Response:

This proposed finding takes McFadden's testimony out of context. McFadden testified that the "general public" thought Special Markets was "a lot more than DSOs," but at Patterson, "it meant DSOs." (CX0315 (McFadden, IHT at 169)) ("So special markets, when we announced it to the general public, meant a lot more than DSOs. At Patterson, it meant DSOs, and that's what we were going to focus on.").

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

602. McFadden was anxious to develop new business and saw "any sale" as a "potential opportunity," including sales to GPOs. (CX0315 (McFadden, IHT at 169-170; *see also* CX0106 at 001 (Statement of Misiak: "Is it worth it to explore GPO???????"))).

Schein's Response:

The asserted fact ignores evidence. The August 1, 2013 email indicates that, per the Senior Vice President of the buying group Tim Bugg, "Henry Schein has been in his office looking to sign an agreement with them." (CX 0106-002). Mr. McFadden testified that he was looking to explore GPOs because the email suggested that "Henry Schein is participating in this particular group, and [he] thought that this was -- could be a future potential opportunity if Henry Schein was participating in them." (McFadden, Tr. 2709). Mr. McFadden's testimony is supported by the evidence. (CX 0161 ("I have the impression that Schein is in this space.... see below" (citing to CX 0106))).

Patterson's Response:

This proposed finding mistakenly attributes the question, “Is it worth it to explore GPO?????” to Misiak. McFadden emailed this question *to Misiak*. (CX01016 at 001). This proposed finding also takes McFadden’s testimony out of context, is misleading with respect to McFadden’s views Special Markets selling to GPOs, and does not provide a timeframe. McFadden agreed that he was anxious to develop new business in *August 2013*, when Patterson’s Special Markets division was just getting started. (CX0315 (McFadden, IHT at 169)). McFadden had just started this new division, and [Patterson had] yet really to define exactly who [it was] and what [it was] going to do.” (CX0315 (McFadden, IHT at 169-170)). When Complaint Counsel asked if McFadden thought GPOs were a potential opportunity at the time of McFadden’s email asking Misiak if GPOs were worth exploring, McFadden testified: “Any sale was a potential opportunity. I didn't know what it all entailed about doing business this way. That's why I put the question marks. And I wanted to get my colleagues' background on it.” (CX0315 (McFadden, IHT at 170)). McFadden, however, “learned very soon after” the division was started that Special Markets was “going to focus on dental service organizations” and that McFadden personally needed to “focus” on DSOs and “not on all [the] other requests” he was getting. (CX0315 (McFadden, IHT at 170)).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

603. In August 2013, Rogan cautioned McFadden, who was interested in exploring a buying group: “We don’t need GPO’s in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry.” (CX0106 at 001).

Schein's Response:

The August 1, 2013 email indicates that, per the Senior Vice President of the buying group Tim Bugg, "Henry Schein has been in his office looking to sign an agreement with them." (CX 0106-002). Mr. McFadden forwarded the email because he believed that Schein was involved with a buying group. (*See* SRF 602). Ignoring Mr. McFadden's email, Mr. Rogan replied with an opinion, "based on ... [his] years in the industry" that Schein, Benco, and Patterson have always said no to buying groups. (Rogan, Tr. 3574). Mr. McFadden replied by resending the original email, stating: "Thanks Tim on the advice. I have the impression that Schein is in this space.... see below." (CX 0161; McFadden, Tr. 2840-41.). Mr. Rogan testified that Henry Schein's approach differed from his opinion regarding GPOs. (Rogan, Tr. 3661; CX 0106). Because Complaint Counsel cites Mr. Rogan's mistaken opinion as if it was fact, the proposed finding therefore misrepresents the evidence.

Patterson's Response:

While this finding accurately quotes Rogan's email to McFadden, it is likely being misinterpreted. Rogan was not representing Patterson's position to McFadden. He was communicating *his (Rogan's) own* personal views. (CX0106 at 001) (Rogan ended his email with: "My two cents...").

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

604. McFadden's boss, Guggenheim, placed an "extreme amount of pressure" on McFadden to focus exclusively on DSOs and stay away from buying groups. (CX0315 (McFadden, IHT at 240)).

Schein's Response:

No response, other than to note that the testimony does not mention staying away from buying groups.

Patterson's Response:

The second half of this proposed finding—staying away from buying groups—is inaccurate and not supported by the cited testimony. McFadden only testified that Guggenheim was putting pressure on him to focus only on DSOs. He did not testify that Guggenheim put pressure on him to “stay away from buying groups.” (CX0315 (McFadden, IHT at 240)) (“Paul [Guggenheim] was putting me under extreme amount of pressure to focus on DSOs only.”). Guggenheim testified he told McFadden to “focus on DSOs” because “the charter and investment and board direction around that significant investment was strategically pointed at DSOs specifically.” (Guggenheim, Tr. 1640).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

605. In July 2013, just months prior to the September 2013 company-wide Special Markets memo, Patterson's McFadden and Guggenheim discussed excluding “buying co-ops” from the definition of Special Markets. McFadden sent Guggenheim an email on July 15, 2013 with a draft of definitions for customers that would be eligible to work with Patterson's Special Markets. (CX3072). McFadden identified one of the criteria to meet the definition of Special Markets as follows: “To be considered a Special Markets account with Patterson Dental the following requirements must be met: . . . [m]ust have a formal management structure – not a buying co-op.” (CX3072 at 003). McFadden asked Guggenheim for his advice on this definition, and asked Guggenheim to discuss further. (CX3072 at 002).

Schein's Response:

No response.

Patterson's Response:

Nothing in the cited document suggests McFadden and Guggenheim actually discussed the Special Markets account definition. McFadden also did not explicitly ask for feedback on the Special Markets definition. McFadden emailed Guggenheim on July 15, 2013 with a list of *13 items* to discuss and closed his email with: "just some thoughts - - lets discuss *some* of this in Napa." (CX3072 at 002-003) (emphasis added). Guggenheim and McFadden then exchanged schedules and potential times, but never settled on a date or time. (CX3072 at 001-003) (the last email is McFadden saying he should arrive and be "settled into [his] hotel by 2[pm].").

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

606. On September 3, 2013, McFadden told a regional manager that Patterson was "choosing to forgo this route [joining with a GPO] as its [*sic*] both anti rep, manufacturer and distributor." (CX3116 at 001).

Schein's Response:

No response.

Patterson's Response:

First, nothing in the cited document indicates Bill Neal was a regional manager. Second, McFadden wrote this statement after receiving Bill Neal's email that Burkhart had joined Amerinet, a buying group. (CX3116 at 001-002). McFadden's response was in the context of his surprise that Burkhart made a business decision that could hurt Burkhart's business: "Thanks Bill - - I cannot believe Burkhart is joining with a GPO like this - - It seems they are cutting off their nose to spite their face?? Offering ancillary services like

lower cell phone bills, medical gasses, etc. while dropping merchandise prices does not benefit them nor their reps..... We are choosing to forgo this route as its both anti rep, manufacturer, and distributor.” (CX3116 at 001).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

607. On September 3, 2013, Dave Misiak e-mailed Guggenheim and Scott Anderson (CEO of Patterson Companies) that the “GPO noise has been pretty loud from the field. We have said no at every turn....Benco has also crept into few of these... My guidance has been to politely say no and whether [*sic*] the storm with these.” (CX3116 at 001; *see also* CX3074 at 001).

Schein’s Response:

No response.

Patterson’s Response:

This proposed finding only quotes part of Misiak’s email. Misiak also expressed surprise over Burkhardt deciding to work with buying groups: “Incredible to me how Burkhardt bit this apple and that they are broadcasting it. Proves they have no other value to add for customers.” (CX3116 at 001).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

608. When Misiak said that “GPO noise has been pretty loud from the field” in CX3116, he meant that he was hearing about GPOs from Patterson’s branch offices. (Misiak, Tr. 1386).

Schein’s Response:

No response.

Patterson's Response:

This proposed finding overstates Misiak's testimony. When Complaint Counsel asked what Misiak meant by "GPO noise has been pretty loud from the field," Misiak testified: "I can't remember exactly what I meant when I sent this back in 2013, probably that I've received a lot of e-mails. . . . [a]bout GPOs or buying groups. . . . [f]rom our branch infrastructure, from our sales reps." (Misiak, Tr. 1386).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

609. Patterson's management team was saying "no" to doing business with GPOs. (CX3116 at 001; Misiak, Tr. 1386-1387 ("Q. And when you wrote 'said no at every turn,' what was that referring to? A. Meaning it wasn't part of our strategy, so I've remained disciplined as the sales leader of the organization to say no. . . . Q. Said no to GPOs? A. Yes.")).

Schein's Response:

No response, other than to note that the asserted fact is vague as to time.

Patterson's Response:

This proposed finding is inaccurate and not supported by the cited document or testimony. Misiak expressed *his own* opinion about working with buying groups in CX3116, writing: "My guidance has been to politely say no and whether the storm with these." (CX3116 at 001) (emphasis added). When Misiak wrote "we have said no at every turn," Misiak testified that this meant buying groups were not "part of [Patterson's] strategy." (Misiak, Tr. 1387).

In practice, Patterson salespeople repeatedly met with and evaluated buying groups for years before, during, and after the alleged conspiracy. *See, e.g.*, FP ¶¶ 119, 130-134,

167-173; Guggenheim, Tr. 1529, 1569-1570 (when Guggenheim was southwest regional manager from 2000 to 2010, Patterson would “often evaluate” buying groups); McFadden, Tr. 2704 (“we were open-minded to take a look at some GPOs to see if it made business sense”); CX8017 (Rogan, Dep. at 60) (“[W]e take a look at [buying groups] and see if it makes sense for us to do business”); CX8023 (Guggenheim, Dep. at 185) (Guggenheim testified that Patterson has a “nuanced position on buying groups to evaluate them individually in each market based on whether or not they made sense”); CX8004 (McFadden, Dep. at 72–73) (“[W]e were always open to the local branches taking care of [buying groups] the way that they wanted to take care of those clients If there was business within those branch boundaries, the branch manager and local territory sales rep had the autonomy to deal with their local doctor -- their local client, you know, as they saw fit, you know, within -- within our culture.”)).

And Patterson did work with buying groups both before and during Complaint Counsel’s alleged conspiracy period when it made sense. *See, e.g.*, PF ¶¶ 174-175; CX3081 at 001 (as of July 2014, a local Patterson representative was “deal[ing] heavily” with Orthosynetics); McFadden, Tr. 2728 (“Orthosynetics is a quasi-buying group that focus[es] on orthodontics”); RX0271 at 001 (as of May 2014, a Patterson branch had been selling to Jackson Health—“a GPO”—“for over 10 years”).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

610. Misiak “remained disciplined as the sales leader of the organization to say no” to buying groups. (Misiak, Tr. 1387). Misiak passed that guidance on to Patterson’s sales team. (Misiak, Tr. 1388; CX3116).

Schein's Response:

No response.

Patterson's Response:

Misiak “remained disciplined as the sales leader of the organization to say no” to buying groups *because* they were not “part of [Patterson’s] strategy.” (Misiak, Tr. 1387; *see also* RX0046 at 019 (Patterson strategic document from 2012 identified two dental markets that Patterson focused on: (1) private practices and (2) large group practices); Misiak, Tr. 1468 (there was no dental market #3 for buying groups or GPOs because “they were not part of [Patterson’s] strategy”).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

611. McFadden sent a memo to regional and branch managers on September 4, 2013, which explicitly excluded the possibility of Special Markets working with buying groups by stating that the Special Markets “definition will not include group purchasing organizations (GPOs).” (CX0158 at 002; McFadden, Tr. 2700-2702; *see also* Misiak, Tr. 1394 (“A. That meant that the investments made and the infrastructure built out would not focus on GPOs. Q. And why was this sentence included in this memo? A. Because at a corporate level GPOs were not part of the strategy for the special markets group.”); Rogan, Tr. 3530 (Special Markets was a division that would not work with GPOs)).

Schein's Response:

No response.

Patterson's Response:

First, this proposed finding inaccurately uses the terms “buying group” and “GPO” synonymously. McFadden explicitly testified that he was not using those terms

synonymously. (McFadden, Tr. 2670) (“Q. And were you using ‘group purchasing organizations (GPOs)’ to mean the same thing as ‘buying groups’ there? A. I was not.”).

Second, McFadden testified that, as Patterson Special Markets received requests from buying groups, “we didn’t say no, as opposed to not now,” and that “we would watch and see, and if it made good business sense at Patterson we would probably do something, but it didn’t make any good business sense.” (McFadden, Tr. 2707). McFadden also testified that Guggenheim was “open-minded about the future that maybe there might be something to [the idea of working with buying groups], but not at this particular time.” (McFadden Tr., 2713).

Patterson salespeople repeatedly met with and evaluated buying groups and GPOs for years before, during, and after the alleged conspiracy. *See, e.g.*, PF ¶¶ 119, 130-134, 167-173; Guggenheim, Tr. 1529, 1569-1570 (when Guggenheim was southwest regional manager from 2000 to 2010, Patterson would “often evaluate” buying groups); McFadden, Tr. 2704 (“we were open-minded to take a look at some GPOs to see if it made business sense”); CX8017 (Rogan, Dep. at 60) (“[W]e take a look at [buying groups/GPOs] and see if it makes sense for us to do business”); CX8023 (Guggenheim, Dep. at 185) (Guggenheim testified that Patterson has a “nuanced position on buying groups to evaluate them individually in each market based on whether or not they made sense”). And Patterson did work with buying groups/GPOs both before and during Complaint Counsel’s alleged conspiracy period when it made sense. *See, e.g.*, FOF ¶¶ 174-175; CX3081 at 001 (as of July 2014, a local Patterson representative was “deal[ing] heavily” with Orthosynetics); McFadden, Tr. 2728 (“Orthosynetics is a quasi-buying group that focus[es] on

orthodontics”); RX0271 at 001 (as of May 2014, a Patterson branch had been selling to Jackson Health—“a GPO”—“for over 10 years”).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

612. Guggenheim and Misiak provided input into the definition of Special Markets in CX0158. (McFadden, Tr. 2699).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

613. The September 4, 2013 memorandum from McFadden defining Special Markets as excluding GPOs (CX0158) was approved by Guggenheim. (Guggenheim, Tr. 1641-1642).

Schein’s Response:

No response.

Patterson’s Response:

Guggenheim explained that the purpose of this portion of the memo was to ensure that Special Markets would stay focused on the DSOs it was created to pursue. (Guggenheim, Tr. 1643 (“So what I was trying to do was narrow Neal’s focus and make sure that we insulated him from getting distracted into other types of businesses and keep

him pointed at DSOs. That was a high concern for us, that he would get off the point of the strategy. Strategically, the initiative was around G- -- DSOs.”)).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

614. The September 4, 2013 memorandum regarding the establishment of Patterson’s Special Markets division did not exclude any type of entity other than GPOs. (CX0158 at 001; McFadden, Tr. 2703).

Schein’s Response:

No response.

Patterson’s Response:

This proposed finding overstates McFadden’s testimony. When asked whether there was any other entity besides GPOs that McFadden intended to not include in the Special Markets Division, McFadden answered: “Not at this particular time.” (McFadden, Tr. 2703).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

615. The September 4, 2013 memorandum regarding the establishment of Patterson’s Special Markets division expressly stated that “Government, institutions and schools” could qualify to work with Patterson’s new Special Markets division. (CX0158 at 002).

Schein’s Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

616. Patterson's Special Markets division was responsible for selling to other non-private practice customers, including prisons, dental schools, state and federal government customers, community health centers ("CHCs"), and medical or health clinics. (McFadden, Tr. 2670; Misiak, Tr. 1397-1398).

Schein's Response:

No response.

Patterson's Response:

First, none of the cited testimony states that Special Markets worked with "medical or health clinic." Second, none of the cited testimony states these entities are "non-private practice customers." Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

617. Patterson's Special Markets division dealt with non-DSO entities, including government, military, community health centers, Indian health, schools and other institutions, and it submitted bids for these customers. (McFadden, Tr. 2696-2697).

Schein's Response:

No response.

Patterson's Response:

The cited testimony does not support the assertion that Patterson submitted bids for the listed customers. And the list of customers in this proposed finding is not completely accurate. McFadden identified “Indian health *centers*,” “*dental* schools,” and did *not* list any other institutions. (McFadden, Tr. 2970) (McFadden testified that Special Markets “would ultimately include community health centers, Indian health centers, prisons, dental schools, government, military, and DSOs”) (emphasis added).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

618. McFadden drafted a business plan for Patterson's Special Markets division. (McFadden, Tr. 2695; CX3014 (“Special Markets Business Plan”).)

Schein's Response:

No response.

Patterson's Response:

McFadden testified that CX3014 “was the initial business plan that [he] wrote for the division.” (McFadden, Tr. 2695). Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

619. Guggenheim reviewed Patterson's Special Markets Business Plan (CX3014). (McFadden, Tr. 2695; *see also* CX8004 (McFadden, Dep. at 61)).

Schein's Response:

No response.

Patterson's Response:

At trial, McFadden testified: “We would run our rough drafts by Paul, and Paul would let us know if we were on the right track or not.” (McFadden, Tr. 2695). At his deposition, McFadden testified that CX3014 “was given to Paul [Guggenheim], the CEO at the time, to discuss within the executive leadership team and the board of directors.” (CX8004 (McFadden, Dep. at 61)).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

620. The Special Markets Business Plan stated that Patterson's Special Markets division would “also cater to federal customers, including government, military, community and Indian health, schools and institutions.” (CX3014 at 004).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

621. In compliance with directives from Misiak and Rogan, Patterson consistently denied buying groups. (See CCF 603, 634-651).

Schein's Response:

No response.

Patterson's Response:

This proposed finding is misleading and inaccurate. Patterson salespeople repeatedly met with and evaluated buying groups for years before, during, and after the alleged conspiracy. *See, e.g.*, PF ¶¶ 119, 130-134, 167-173; Guggenheim, Tr. 1529, 1569-1570 (when Guggenheim was southwest regional manager from 2000 to 2010, Patterson would “often evaluate” buying groups); McFadden, Tr. 2704 (“we were open-minded to take a look at some GPOs to see if it made business sense”); CX8017 (Rogan, Dep. at 60) (“[W]e take a look at [buying groups] and see if it makes sense for us to do business”); CX8023 (Guggenheim, Dep. at 185) (Guggenheim testified that Patterson has a “nuanced position on buying groups to evaluate them individually in each market based on whether or not they made sense”). And Patterson did work with buying groups both before and during Complaint Counsel’s alleged conspiracy period when it made sense. *See, e.g.*, FOF ¶¶ 174-175; CX3081 at 001 (as of July 2014, a local Patterson representative was “deal[ing] heavily” with Orthosynetics); McFadden, Tr. 2728 (“Orthosynetics is a quasi-buying group that focus[es] on orthodontics”); RX0271 at 001 (as of May 2014, a Patterson branch had been selling to Jackson Health—“a GPO”—“for over 10 years”).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

622. Patterson’s Special Markets Division continued to reject buying group inquiries in 2014. In April 2014, McFadden sent an email to Patterson’s Boston Branch Manager who was asking about how to handle an inquiry about Patterson working with a buying group, writing, “I have

received several calls from GPO's . . . as of this moment I am sure we should pass on these groups.” (CX3016 at 001 (April 23, 2014 email from McFadden to Patterson Boston Branch Manager Edward Ferrero)). McFadden then forwarded his email to the branch manager on to Guggenheim. (CX3016 at 001).

Schein's Response:

No response.

Patterson's Response:

This proposed finding is misleading. First, McFadden's email indicated that Edward Ferrero (the Boston branch manager) was free to “call [the GPO] and dig into some details and ask the hard questions.” (CX3016 at 001). Second, McFadden's email indicated that while he saw limited advantages to working with buying groups, he was willing to reconsider: “I have received several calls from GPO's - - I cannot find any advantage to PDCO moving in this direction, other than taking the account from Darby - - It's a slippery slope. *If you want to call him and dig into some details and ask the hard questions that's fine* - - They tout a 20% savings to the dentsits on supplies - - like I said – it's slippery.....*I don't know what the future holds but as of this moment I am sure we should pass on these groups.*” (CX3016 at 001) (emphasis added). Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

623. In May 2014, McFadden wrote to his Director of Operations, Amy Barlage, and a business operations specialist in Patterson's Special Markets division and instructed them not to participate with a buying group. (CX3004 at 001 (May 19, 2014 email from McFadden: “For now – I am electing to not participate with these [buying] groups – we have said no to several already.”)).

Schein's Response:

No response.

Patterson's Response:

This proposed finding is misleading and inaccurate. McFadden's email expressly indicated that the opinion expressed was *his personal opinion* and that his opinion about working with buying groups could change. (CX3004 at 001) ("*For now - - I am electing to not participate with these groups - - we have said no to several already - - there really is no advantage to Patterson, branches, or reps - - we can discuss in detail later - - thanks for researching this though - - you are right, they are gaining momentum - - that's why I prefaced this with 'for now.'*") (emphasis added).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

624. In 2014, Patterson's Special Markets division received between 10 and 25 requests from buying groups but did not do business with those groups. (McFadden, Tr. 2724-2725; 2685).

Schein's Response:

No response.

Patterson's Response:

This proposed finding mischaracterizes McFadden's testimony. McFadden testified that while he couldn't "give an exact number," he believed that between 10 and 25 buying groups had approached Patterson "after January 1, 2014." (McFadden, Tr. 2724-2725). McFadden *separately* testified that he "believe[d] pretty much every inquiry [he] received from buying or GPOs [he] always told them thank you, but no thanks."

(McFadden, Tr. 2685). There is no indication that the estimated 10-25 buying groups that approached Patterson after January 1, 2014 are the same buying groups that Patterson was referring to earlier in his testimony.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

625. Patterson's Special Markets Division continued to reject buying group inquiries in early 2015. (CX3045 at 001 (Statement of McFadden: "[D]oes he own all these offices—if not then he is a GPO—we don't deal with GPO's.")).

Schein's Response:

No response.

Patterson's Response:

This proposed finding is not supported by the cited document. Nothing in the cited document indicates that Patterson actually turned down the Livello Group/Dr. Narducci. The record actually shows that Patterson's "number one sales representative" (Ginger Harris) was "hot on the trail with [Dr. Narducci's buying group] out of Jacksonville that Schein is selling to." (CX0163 at 001; McFadden, Tr. 2714).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

626. Patterson's expansion into the DSO market through its Special Markets division in 2013 did not become profitable until January 2015 when it won a DSO account from Schein. (McFadden, Tr. 2691).

Schein's Response:

No response.

Patterson's Response:

This finding mischaracterizes McFadden's testimony. McFadden testified that "it took a long time to become profitable" and that Special Market's "first big was" was in January of 2015 when Patterson won Mortenson Dental Partners from Schein. (McFadden, Tr. 2691) ("[I]f you're talking about total expenses and total P&L, it took a long time to become profitable. But if you want to say when was our first big win, when did that become profitable, that would have been in January of 2015 when we won Mortenson Dental Partners from Henry Schein.").

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

J. Patterson Instructed Its Sales Team to Refuse to Do Business with Buying Groups.

627. Patterson did not have a policy regarding buying groups when McFadden was the Southeast Regional Manager from 2009 to 2013. (McFadden, Tr. 2676; *see also* CX8004 (McFadden, Dep. at 37-38) (McFadden was not aware of any Patterson corporate policy regarding buying groups); CX8004 (McFadden, Dep. at 28-29) (McFadden Southeast Regional Manager 2009 to 2013); *see also* CCFF ¶¶498-499).

Schein's Response:

No response.

Patterson's Response:

This proposed finding is misleading to the extent it suggests Patterson later developed or instituted a no buying group policy. The record shows that Patterson viewed buying groups skeptically and generally did not sell to them long before February 2013,

when Patterson is alleged to have joined the alleged agreement. (PF ¶ 118; Guggenheim, Tr. 1803-10; Compl. ¶ 36). Nevertheless, Patterson salespeople met with and evaluated buying groups for years before, during, and after the alleged conspiracy. *See, e.g.*, PF ¶¶ 119, 130-134, 167-173; Guggenheim, Tr. 1529, 1569-1570 (when Guggenheim was southwest regional manager from 2000 to 2010, Patterson would “often evaluate” buying groups); McFadden, Tr. 2704 (“we were open-minded to take a look at some GPOs to see if it made business sense”); CX8017 (Rogan, Dep. at 60) (“[W]e take a look at [buying groups] and see if it makes sense for us to do business”); CX8023 (Guggenheim, Dep. at 185) (Guggenheim testified that Patterson has a “nuanced position on buying groups to evaluate them individually in each market based on whether or not they made sense”). When it made sense, Patterson did work with buying groups both before and during Complaint Counsel’s alleged conspiracy period. *See, e.g.*, PF ¶¶ 174-175; CX3081 at 001 (as of July 2014, a local Patterson representative was “deal[ing] heavily” with Orthosynetics); McFadden, Tr. 2728 (“Orthosynetics is a quasi-buying group that focus[es] on orthodontics”); RX0271 at 001 (as of May 2014, a Patterson branch had been selling to Jackson Health—“a GPO”—“for over 10 years”). *See also* Replies to CCFF ¶¶ 498-499.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

628. When Guggenheim was a Regional Manager of Patterson’s Southwest Region from 2000 to 2010 (Guggenheim, Tr. 1529), he received no guidance from Patterson corporate on whether to do business with GPOs. (CX8023 (Guggenheim, Dep. at 38)).

Schein’s Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

629. There were times when Misiak himself had to determine if a customer was a buying group or a DSO. (Misiak, Tr. 1312). He would depend on information from his field organization to tell him if a group was a DSO or a buying group. (Misiak, Tr. 1313).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

630. Within a few weeks of Guggenheim's February 8, 2013 email with Cohen (CX0090), Patterson began instructing sales representatives to "stay out" of buying groups. (CX0093 at 001 (Statement of Misiak: "stay out" of buying group); CX0106 at 001 (Statement of Rogan: "We don't need GPO's in the dental business"); CX3116 at 001 (Statement of Misiak: "My guidance has been to politely say no [to buying groups] and whether [*sic*] the storm with these."); CX3168 at 001 (Statement of Rogan: "We don't sell to buying groups. Let's talk live."); CX3010 at 001 (Statement of McFadden: "[A]s of now we are not working with GPO's."); CX3016 at 001 (Statement of McFadden: "I am sure we should pass on these [buying] groups...."); CX3004 at 001 (Statement of McFadden: "For now – I am electing to not participate with [buying groups] – we have said no to several already"); CX3045 at 001 (Statement of McFadden: "[D]oes he own all these offices—if not then he is a GPO—we don't deal with GPOs.")).

Schein's Response:

No response.

Patterson's Response:

This proposed finding is misleading and inaccurate. The record shows that Patterson viewed buying groups skeptically and generally did not sell to them *long before* February 27, 2013. *See, e.g.*, PF ¶ 118-119; RX0401 at 1 (Patterson did not bid on MMCAP in 2009 because “it’s a GPO” and the requirements for working with the group included a fee: “every month by the 15th we had to send them a check for 1% of total sales they purchased from Patterson”); CCFF ¶ 132 (citing CX0084) (McFadden emailed Misiak about a buying group request in March 2012, stating: “I get these more often than I like. This stuff scares me. I’m gonna tell him thanks but no thanks.” Misiak responded, “Your response is right.”); CX3010 at 1 (September 2013 email: “In the past we have not done business with GPOs” because they cannot commit to buy certain, set volumes of equipment and supplies on behalf of their members and “we don’t have the resources or the systems to manage them properly”); CX8017 (Rogan, Dep. at 68 (Patterson “had always said no” to “buying groups.”)); (Misiak, Tr. 1469 (“Q. Were you focused on buying groups or GPOs before 2012? A. We were not.”); Misiak, Tr. 1493 (“Q. So back in 2012, the spring of 2012, group purchasing organizations, buying groups, were not part of your core strategy at Patterson Dental? A. They were not.”); Misiak Tr., 1499 (“Q. Mr. Misiak, were buying groups a part of your core strategy at Patterson Dental back in 2009? A. They were not. Q. Why not? A. It didn’t make the strategic initiative board for execution in 2009.”)).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

631. By February 27, 2013, Patterson had a strategy of not doing business with buying groups. (Misiak, Tr. 1339 (“Q. And was – were GPOs a part of the strategy on February 27, 2013? A. GPOs were not part of the strategy.”); Misiak, Tr. 1419 (“GPOs were not part of the corporate strategy.”), 1353 (“part of strategy is what you’re not going to do”); Misiak, Tr. 1352-1353 (when Patterson was approached by buying groups, Misiak would “[p]olitely turn them down”); CX8038 (Misiak, Dep. at 105-106)).

Schein’s Response:

No response.

Patterson’s Response:

This proposed finding is misleading. The record shows that Patterson viewed buying groups skeptically and generally did not sell to them *long before* February 27, 2013. *See, e.g.*, PF ¶ 118-119; (Misiak, Tr. 1469 (“Q. Were you focused on buying groups or GPOs before 2012? A. We were not.”); Misiak, Tr. 1493 (“Q. So back in 2012, the spring of 2012, group purchasing organizations, buying groups, were not part of your core strategy at Patterson Dental? A. They were not.”); Misiak Tr., 1499 (“Q. Mr. Misiak, were buying groups a part of your core strategy at Patterson Dental back in 2009? A. They were not. Q. Why not? A. It didn’t make the strategic initiative board for execution in 2009.”)); Guggenheim, Tr. 1720 (“Q. When you joined Patterson in the 2000, was part of the core strategy of Patterson to focus on buying groups? A. No.”); RX0401 at 1 (Patterson did not bid on MMCAP in 2009 because “it’s a GPO” and the requirements for working with the group included a fee: “every month by the 15th we had to send them a check for 1% of total sales they purchased from Patterson”); CCFF ¶ 132 (citing CX0084) (McFadden emailed Misiak about a buying group request in March 2012, stating: “I get these more often than I like. This stuff scares me. I’m gonna tell him thanks but no thanks.” Misiak responded, “Your response is right.”).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

632. In November 2013, Patterson VP of Merchandise Marketing Tim Rogan wrote in an email to Patterson's Manager of Marketing Communications, "We don't sell to buying groups. Let's talk live." (CX3168 at 001 (November 20, 2013 email from Rogan to Jennifer Hannon)).

Schein's Response:

No response.

Patterson's Response:

Rogan testified that "we don't sell to buying groups" meant: "we don't sell to very many buying groups. We evaluate them all." (CX8017 (Rogan, Dep. at 96)). But because it was 10:35 p.m., Rogan explained, "At the time I didn't expound upon it and say, 'But we're evaluating them.'" (CX8017 (Rogan, Dep. at 96)). Likewise, Rogan wrote "Let's talk live" because it was 10:35 p.m., and he simply meant that they could talk more in the morning if necessary. (CX8017 (Rogan, Dep. at 93)). "We did not have a policy [not to sell to buying groups]," Rogan testified, "[i]t was true in 2013, it's true today. We evaluate any customer that buys dental stuff to see if it makes sense for Patterson to do business with it." (Rogan, Tr. 96-97).

Moreover, Patterson notes that the record shows Patterson historically viewed buying groups skeptically and generally did not sell to them before Patterson allegedly joined the alleged agreement in February 2013. *See, e.g.*, Kahn, Tr. 19; PF ¶ 118-119; (Misiak, Tr. 1469 ("Q. Were you focused on buying groups or GPOs before 2012? A. We were not."); Misiak, Tr. 1493 ("Q. So back in 2012, the spring of 2012, group purchasing organizations, buying groups, were not part of your core strategy at Patterson Dental?

A. They were not.”); Misiak Tr., 1499 (“Q. Mr. Misiak, were buying groups a part of your core strategy at Patterson Dental back in 2009? A. They were not. Q. Why not? A. It didn’t make the strategic initiative board for execution in 2009.”)); Guggenheim, Tr. 1720 (“Q. When you joined Patterson in the 2000, was part of the core strategy of Patterson to focus on buying groups? A. No.”); RX0401 at 1 (Patterson did not bid on MMCAP in 2009 because “it’s a GPO” and the requirements for working with the group included a fee: “every month by the 15th we had to send them a check for 1% of total sales they purchased from Patterson”); CCFB ¶ 132 (citing CX0084) (McFadden emailed Misiak about a buying group request in March 2012, stating: “I get these more often than I like. This stuff scares me. I’m gonna tell him thanks but no thanks.” Misiak responded, “Your response is right.”). Otherwise, Patterson has no specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

633. Rogan testified that, in using the term “we” in his November 20, 2013 email to Hannon, he meant that Patterson didn’t sell to buying groups. (Rogan, Tr. 3527; CX3168 at 001).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

634. On December 2, 2013, in response to an inquiry from a Patterson Account Specialist who was asking about how to handle an inquiry from a group purchasing organization, McFadden responded, “as of now we are not working with GPO’s.” (CX3010 at 001).

Schein’s Response:

No response.

Patterson’s Response:

Patterson notes that the record shows Patterson historically viewed buying groups skeptically and generally did not sell to them before Patterson allegedly joined the alleged agreement in February 2013. *See, e.g.*, Kahn, Tr. 19; PF ¶ 118-119; (Misiak, Tr. 1469 (“Q. Were you focused on buying groups or GPOs before 2012? A. We were not.”); Misiak, Tr. 1493 (“Q. So back in 2012, the spring of 2012, group purchasing organizations, buying groups, were not part of your core strategy at Patterson Dental? A. They were not.”); Misiak Tr., 1499 (“Q. Mr. Misiak, were buying groups a part of your core strategy at Patterson Dental back in 2009? A. They were not. Q. Why not? A. It didn’t make the strategic initiative board for execution in 2009.”)); Guggenheim, Tr. 1720 (“Q. When you joined Patterson in the 2000, was part of the core strategy of Patterson to focus on buying groups? A. No.”); RX0401 at 1 (Patterson did not bid on MMCAP in 2009 because “it’s a GPO” and the requirements for working with the group included a fee: “every month by the 15th we had to send them a check for 1% of total sales they purchased from Patterson”); CCFF ¶ 132 (citing CX0084) (McFadden emailed Misiak about a buying group request in March 2012, stating: “I get these more often than I like. This stuff scares me. I’m gonna tell him thanks but no thanks.” Misiak responded, “Your response is right.”). Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

635. Patterson's salesforce understood the "clear" message that Patterson "steer[ed] clear of all buying groups." (CX3128 at 001 (Statement of McFadden: "As a rule we are trying our best to steer clear of all buying groups."); CX3342 at 001 ("I want to make sure that GPO's are not something we as a company are choosing to partner with at this point. I know Dave [Misiak] has been clear about this in the past and I wanted to verify that this still is the case.")).

Schein's Response:

No response.

Patterson's Response:

First, this proposed finding is vague as to time. It is not clear when Patterson's salesforce understood that Patterson "steer[ed] clear of all buying groups." Second, this proposed finding is misleading because it takes McFadden's quote out of context. McFadden received an email from a branch manager asking for "insight" about a current Patterson customer saying they are decreasing purchases and waiting to hear about lower prices through Kois and Patterson. (CX3128 at 002). McFadden responded that Patterson working with Kois was "news to [him]" and stated that "as a rule we are trying our best to steer clear of all buying groups." (CX3128 at 002). There is no indication that Patterson's salesforce understood a "clear message."

Finally, this proposed finding contradicts the record. The record shows that Patterson has always viewed buying groups skeptically and generally did not sell to them. *See, e.g.*, PF ¶ 118-119; RX0401 at 1 (Patterson did not bid on MMCAP in 2009 because "it's a GPO" and the requirements for working with the group included a fee: "every month by the 15th we had to send them a check for 1% of total sales they purchased from

Patterson”); CCFF ¶ 132 (citing CX0084) (McFadden emailed Misiak about a buying group request in March 2012, stating: “I get these more often than I like. This stuff scares me. I’m gonna tell him thanks but no thanks.” Misiak responded, “Your response is right.”); (Misiak, Tr. 1469 (“Q. Were you focused on buying groups or GPOs before 2012? A. We were not.”); Misiak, Tr. 1493 (“Q. So back in 2012, the spring of 2012, group purchasing organizations, buying groups, were not part of your core strategy at Patterson Dental? A. They were not.”); Misiak Tr., 1499 (“Q. Mr. Misiak, were buying groups a part of your core strategy at Patterson Dental back in 2009? A. They were not. Q. Why not? A. It didn’t make the strategic initiative board for execution in 2009.”)); Guggenheim, Tr. 1720 (“Q. When you joined Patterson in the 2000, was part of the core strategy of Patterson to focus on buying groups? A. No.”); Rogan, Tr. 3609 (“Q. We see here in the fall of 2012 that buying groups were not part of your core strategy at Patterson Dental. Did that change after you got the McKinsey consulting report at the end of 2015, early 2016? A. No. Q. Has it changed today? A. No. Q. Buying groups have never been part of the company's core strategy? A. Correct.”)).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

636. Misiak provided guidance to Patterson’s branches and regions to say “no” to doing business with buying groups. (Misiak, Tr. 1388-1389).

Schein’s Response:

No response.

Patterson's Response:

This proposed finding is inaccurate, misleading, and vague as to time. It is also not supported by the cited testimony. Misiak wrote in an email that his *personal* view was that buying groups were a “distraction” and that he generally would say no: “My guidance has been to politely say no and weather [sic] the storm with these.” (CX3116 at 001; Misiak, Tr. 1388). Misiak testified that he would have gave this guidance to Patterson’s regions. (Misiak, Tr. 1388).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

637. In compliance with the directive not to do business with buying groups, Patterson consistently denied buying groups. (CX3086 at 001 (Statement of Guggenheim: “We have explored this opportunity [with Kois] . . . and decided to pass at this time due to the implications to our margins and therefore our Sales Reps.”); CX3031 at 001 (“Patterson Dental has made the decision not to respond to the [GDA] RFP at this time.”)).

Schein's Response:

No response.

Patterson's Response:

This proposed finding is inaccurate, misleading, vague as to time, and contradicts the record. The record does not contain any Patterson directive not to do business with buying groups. Rather, the record shows that Patterson has historically viewed buying groups skeptically and generally did not sell to them (PF ¶ 118). Nevertheless, Patterson salespeople met with and evaluated buying groups for years before, during, and after the alleged conspiracy. *See, e.g.*, PF ¶¶ 119, 130-134, 167-173; Guggenheim, Tr. 1529, 1569-1570 (when Guggenheim was southwest regional manager from 2000 to 2010, Patterson

would “often evaluate” buying groups); McFadden, Tr. 2704 (“we were open-minded to take a look at some GPOs to see if it made business sense”); CX8017 (Rogan, Dep. at 60) (“[W]e take a look at [buying groups] and see if it makes sense for us to do business”); CX8023 (Guggenheim, Dep. at 185) (Guggenheim testified that Patterson has a “nuanced position on buying groups to evaluate them individually in each market based on whether or not they made sense”).

Patterson did work with buying groups when it made business sense before, during, and after Complaint Counsel’s alleged conspiracy period. (Kahn, Tr. 19 (the alleged conspiracy ended in April 2015); *see, e.g.*, PF ¶¶ 174-175; CX3081 at 001 (as of July 2014, a local Patterson representative was “deal[ing] heavily” with Orthosynetics); McFadden, Tr. 2728 (“Orthosynetics is a quasi-buying group that focus[es] on orthodontics”); RX0271 at 001 (as of May 2014, a Patterson branch had been selling to Jackson Health—“a GPO”—“for over 10 years”); CX8028 (Lepley, Dep. at 37–39) (Patterson entered into contracts with two buying groups, Dr. Levin and Lake Harbor, in May 2018)).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

638. On August 18, 2014, before a scheduled WebEx meeting with Kois on September 29, 2014 to learn about Kois’ business model, Guggenheim wrote to Rogan, “Agreed...I’ll kill it” referring to the request for a proposal from Kois Buyers Group. (CX0116 at 001; Guggenheim, Tr. 1676-1678).

Schein’s Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

639. Patterson did not bid for the Kois Buyers Groups in 2014. (CX3086 at 001).

Schein's Response:

No response.

Patterson's Response:

When Patterson was approached by Kois in 2014, Patterson engaged with the group, but determined that the group's proposal was unrealistic because the fledgling Kois Buyers Group falsely claimed that the group had more than 1,000 members and agreements with four major vendors to provide its members with significant discounts. (PF ¶¶ 172, 561-633).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

640. Patterson lost valuable customers and business to Burkhart when it did not bid for the business of Kois Buyers Group. (CX3088 at 001-002 (describing customers lost to Burkhart because they were part of the Kois Buyers Group as "top Patterson clients"); Guggenheim, Tr. 1662, 1665-1667).

Schein's Response:

The December 18, 2014 email presented as evidence does not support the fact. The email indicates that *one customer*, Dr. Perry, was considering leaving (but had not yet left)

Patterson for the Kois Buyers Group in December 2014. (CX 3088-001-02; *see also* CX 8023 (Guggenheim, Dep. at 291 (“Customers leave every day. ... Losing a customer, while unfortunate, especially one for this amount of time, it happens every day.”))). The email also reflects what Dr. Perry “believes that he will save” which does not appear to take into account the Kois Buyers Group’s “way too expensive” membership fees or an accurate accounting of what he spent on Patterson supplies, which inflated his savings. (CX 3088-001-02 (“Patterson doesn’t do a good job separating support costs and Cerec supplies on the doctors statement, so he will likely tell them he spent more than he really did with Patterson. This makes it easier for them to show a savings.”); Kois Sr., Tr. 239 (“it would cost between \$2,400 and \$6,000.... It was way too expensive”); SF 926-29). Dr. Perry also noted that he was skeptical of the Kois program. (CX 3088-001 (“He is going to track his savings very carefully and if it doesn’t work out, he would like to come back as a customer.”))). The email is not evidence that Dr. Perry actually left Patterson, or in the event he did, that he didn’t return to Patterson.

Patterson’s Response:

This proposed finding is not supported by the cited document or testimony. The document (CX3088) indicates that *one customer*, Dr. Perry, was considering leaving (but had not yet left) Patterson for the Kois Buyers Group in December 2014. (CX 3088-001-02; *see also* CX 8023 (Guggenheim, Dep. at 291 (“Customers leave every day. ... Losing a customer, while unfortunate, especially one for this amount of time, it happens every day.”))).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

641. Patterson did not bid for Smile Source in 2013. (Misiak, Tr. 1402; CX3117 at 001) (Statement of Misiak: “[w]e are currently not interested.”)).

Schein’s Response:

No response.

Patterson’s Response:

Patterson’s decision not to bid on Smile Source’s business in November 2013 was an independent business decision, due, in part, to Patterson’s skepticism that Smile Source could add value at that time. (PF ¶ 152; McFadden, Tr. 2178–19) (“Q. What was the result of the meeting with Dr. Goldsmith? A. He didn’t make a very good first impression. There was no reason for us to choose to do business with him after we met together. I don’t think he represented Smile Source very well.”); Tr. 2830–31 (“Q. And I think you said you sort of had an unfavorable opinion coming out of the meeting with Mr. Goldsmith; is that right? A. That’s right. . . . Q. Coming out of that meeting, did you say, that’s an opportunity we should pursue right now? A. No.”)). Patterson was also concerned about cannibalizing its existing business without gaining enough new business to offset the loss. (PF ¶ 153; Rogan, Tr. 3546-3548; CX0148 at 1 (Patterson researched some of Patterson’s customers and found that it “conduct[ed] business with all [doctors] [] looked up”)).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

642. Patterson turned down Smile Source in 2013 in spite of its members’ \$14 million annual spend because it was a buying group. (CX0297 at 001; CX3117 at 001; CX3009 at 001 (Statement of McFadden: “[W]e have said no to smile source. They are [a] buying club.”); *see also* [REDACTED]; CX0147 at 001).

Schein's Response:

No response.

Patterson's Response:

This proposed finding is misleading, inaccurate, and contradicts the record. First, Misiak told Dr. Goldsmith that Patterson was “currently not interested but [would] keep the strategy and Smile Source on the idea board and get back to [him] should things change” on November 20, 2013—this is *a month before* Trevor Maurer emailed Misiak saying that Smile Source purchases “over \$14MM annually in supplies.” Thus, Patterson could not have turned down Smile Source “*in spite of*” its members’ \$14 million annual spend.

Second, Patterson’s rationale for turning down Smile Source was more nuanced than simply saying no because it was a buying group. Patterson’s decision not to bid on Smile Source’s business in November 2013 was an independent business decision, due, in part, to Patterson’s skepticism that Smile Source could add value at that time. (PF ¶ 152; McFadden, Tr. 2178–19) (“Q. What was the result of the meeting with Dr. Goldsmith? A. He didn’t make a very good first impression. There was no reason for us to choose to do business with him after we met together. I don’t think he represented Smile Source very well.”); Tr. 2830–31 (“Q. And I think you said you sort of had an unfavorable opinion coming out of the meeting with Mr. Goldsmith; is that right? A. That’s right. . . . Q. Coming out of that meeting, did you say, that’s an opportunity we should pursue right now? A. No.”)). Patterson was also concerned about cannibalizing its existing business without gaining enough new business to offset the loss. (PF ¶ 153; Rogan, Tr. 3546–3548; CX0148 at 1 (Patterson researched some of Patterson’s customers and found that it “conduct[ed] business with all [doctors] [] looked up”)).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

643. Patterson did not bid for the New Mexico Dental Cooperative in 2013. (CX8035 (Mason, Dep. at 54-55); CX4090 at 001-002; *see also* CCFF ¶ 503).

Schein's Response:

No response.

Patterson's Response:

Patterson's decision not to bid on New Mexico Dental Cooperative in 2013 was an independent business decision made for reasons unrelated to the alleged buying group agreement. First, when Patterson and Dr. Mason were discussing a potential partnership, the New Mexico Dental Cooperative *did not even exist yet*. (PF ¶ 281; Mason, Tr. 2367–68 (“At that point in time of the meeting of February 11, there was not a full entity. We were still in the research discovery and trying to put it together.”); Mason, Tr. 2368 (“Q. But back in January and February of 2013, there was no entity the New Mexico Dental Cooperative. A. That is correct.”)). Dr. Mason was merely in the research and development stage. (PF ¶ 281; Mason, Tr. 2368).

Second, the local Patterson team decided not to work with NMDC after Dr. Mason sent a confusing and inaccurate email to all manufacturers indicating that NMDC had “partnered with Patterson” and would be hosting a meeting at Patterson's local Albuquerque office. (PF ¶ 283; CX0090 at 4 (“We have partnered with Patterson”); Mason, Tr. 2340 (“At that point we felt we had worked out a deal with Patterson, so we were being – negotiating.”)). Patterson, however, had no written agreement (draft or final) or oral

agreement with Dr. Mason or NMDC. (Mason, Tr. 2374–76) (Dr Mason could not recall any specific conversation that supports the statement in CX0090 that NMDC “had partnered with Patterson.”)). Additionally, there is no evidence of any discussion of Patterson offering discounts to NMDC.

Mason’s February 4 email caused “quite a stir” and Patterson’s local sales people in New Mexico were getting calls from manufacturers who were confused by Mason’s February 4, 2013 email. (PF ¶ 287-288; Mason, Tr. 2376 (“Q. You would agree with me that the e-mail you sent out on February 4 to a number of manufacturers and some distributors and others in New Mexico entitled New Mexico Dental Cooperative Purchasing created quite a stir. A. Yes, it did.”); (CX4090 at 1; Mason, Tr. 2386 (“Q. And you don’t have any reason to dispute that Mr. Belcheff and Mr. Reinhardt were getting calls from manufacturers. A. No.”); Mason, Tr. 2385 (“It is my understanding at this point that my previous e-mail confused the dental manufacturing world.”)).

Three days after Dr. Mason’s email, Patterson’s local New Mexico team decided to cancel the meeting and not move forward with NMDC. (PF ¶ 286; CX4090 at 2 (Scott Belcheff (a local Patterson representative from New Mexico) sent Mason an email on February 7, 2013 stating: “We need to cancel this meeting.”); Mason, Tr. 2380). Dr. Mason interpreted Patterson’s February 7, 2013 email to indicate that Patterson was pulling back and walking back from its discussions with NMDC because of Mason’s February 4, 2013 email to manufacturers. (PF ¶ 289; Mason, Tr. 2352 (“[T]here was some pullback by Scott Belcheff after I sent the big e-mail to the manufacturers.”); Mason, Tr. 2381 (“A. I -- not necessarily just this one paragraph, but yes, I did see the walk-back from what we originally were discussing. Q. And you just used the term “walk-back.” A. Yeah. Q. You saw this

February 7 e-mail as being a walking back of what you had a feeling of what Patterson was willing to do. A. That's correct.”).

Moreover, NMDC did not even consider itself a buying group. (PF ¶ 282; (Mason, Tr. 2364–65 (“I take it that you have a view that a dental cooperative is a very different animal from a buying group, so am I correct? A. I do believe that. Q. Now, what you’ve been talking about is a dental cooperative, not a buying group. A. Correct.”)).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

644. Patterson did not bid for a buying group founded by a dentist, Dr. Stephen Sebastian, in 2014. (CX3038 at 001 (“We do not have an answer for him. We generally do not deal with groups that are formed just to get better pricing”); CX3125 at 001).

Schein’s Response:

No response.

Patterson’s Response:

Patterson’s decision not to work with Dr. Stephen Sebastian’s buying group in 2014 was an independent business decision made for reasons unrelated to the alleged buying group agreement. Dr. Stephen Sebastian reached out to Patterson wanting to “talk to someone about the possibility of starting” a buying group and explained he was “looking to recruit a group of individually owned offices.” (CX3125 at 001-002). Patterson turned down Dr. Sebastian because he did not present a coherent proposal: he had no company and no clients. (PF ¶ 171; McFadden, Tr. 2814–17) (“[There] was no upside to Patterson Dental. And he doesn’t even have a company and he doesn’t even have any clients, and yet he’s wanting us to open him up, so it doesn’t make any sense.”)). Dr. Marshall did not

know if Dr. Sebastian had made a coherent proposal to Patterson. (PF ¶ 710). Complaint Counsel did not produce any evidence showing this decision was related to the alleged buying group agreement.

Moreover, Complaint Counsel's own expert, Dr. Marshall, testified that it is rational for distributors to turn down "incoherent," "irrational," or "irresponsible" business proposals from buying groups. (PF ¶ 709; Marshall, Tr. 3259 ("[I]f a distributor is talking to someone who they think is interacting with them in an irrational or irresponsible way, it would make sense not to do business with such a person."); Marshall, Tr. 3259 ("If there was, however, some kind of incoherent management at one of these firms, I could understand them turning away that business, that that would not be irrational to me.")). Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

645. Patterson did not bid for the Catapult Group in 2014. (CX3287 at 001 (Statement of Misiak: "I will respond to Dr. Graham . . . with a polite pass on this request.")).

Schein's Response:

No response.

Patterson's Response:

Patterson's decision not to work with the Catapult Group in 2014 was an independent business decision made for reasons unrelated to the alleged buying group agreement. Patterson did not bid on the Catapult Group in 2014 because it wanted a "vig," which Patterson considered unethical. (PF ¶ 171; Guggenheim, Tr. 1802, 1813–14)).

Complaint Counsel did not produce any evidence showing this decision was related to the alleged buying group agreement.

Moreover, Complaint Counsel's own expert, Dr. Marshall, testified that it is rational for distributors to turn down "incoherent," "irrational," or "irresponsible" business proposals from buying groups. (PF ¶ 709; Marshall, Tr. 3259 ("[I]f a distributor is talking to someone who they think is interacting with them in an irrational or irresponsible way, it would make sense not to do business with such a person."); Marshall, Tr. 3259 ("If there was, however, some kind of incoherent management at one of these firms, I could understand them turning away that business, that that would not be irrational to me.")). Dr. Marshall did not even know if Catapult Group had made a coherent proposal to Patterson. (PF ¶¶ 710; 493). Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

646. Patterson did not bid for the Dental Purchasing Group in 2014. (CX3080 at 001 (April 23, 2014, Statement of Guggenheim: "Typical approach of an upstart buying group. We pass on these as a matter of protecting our business model").

Schein's Response:

No response.

Patterson's Response:

Patterson's decision not to bid on the Dental Purchasing Group in 2014 was an independent business decision made for reasons unrelated to the alleged buying group agreement. Patterson did not bid on the Dental Purchasing Group in 2014 because the doctor who reached out to Patterson was a veterinarian. (PF ¶ 171; CX3080 at 1;

Guggenheim, Tr. 1656–57). Complaint Counsel did not produce any evidence showing this decision was related to the alleged buying group agreement. Complaint Counsel’s own expert, Dr. Marshall, knew nothing about the Dental Purchasing Group’s proposal to Patterson and did not know the doctor was a veterinarian. (PF ¶¶ 710-712).

Moreover, Complaint Counsel’s own expert, Dr. Marshall, testified that it is rational for distributors to turn down “incoherent,” “irrational,” or “irresponsible” business proposals from buying groups. (PF ¶ 709; Marshall, Tr. 3259 (“[I]f a distributor is talking to someone who they think is interacting with them in an irrational or irresponsible way, it would make sense not to do business with such a person.”); Marshall, Tr. 3259 (“If there was, however, some kind of incoherent management at one of these firms, I could understand them turning away that business, that that would not be irrational to me.”)). Otherwise, Patterson has no specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

647. When Guggenheim wrote in his April 23, 2014, email to McFadden that “We pass on these as a matter of protecting our business model,” he mean that Patterson passed on buying groups. (Guggenheim, Tr. 1657; CX3080 at 001).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

648. Patterson did not bid for a buying group founded by a dentist in Orlando, Dr. Nardducci, in January 2015. (CX3045 at 001 (January 14, 2015, Statement of McFadden to Southwest Region Manager Fruehauf about an inquiry from Dr. Narducci: "If he calls I will ask him for financial – does he own all these offices – if not then he is a GPO – we don't deal with GPO's...")).

Schein's Response:

No response.

Patterson's Response:

This proposed finding is not supported by the cited document. Nothing in the cited document indicates that Patterson actually turned down the Livello Group/Dr. Narducci. The record actually shows that Patterson's "number one sales representative" (Ginger Harris) was "hot on the trail with [Dr. Narducci's buying group] out of Jacksonville that Schein is selling to." (CX0163 at 001; McFadden, Tr. 2714).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

649. Patterson did not bid for a buying group called UOBG in May 2015. (CX0162 at 001 (Statement of McFadden: "We currently have little appetite to deal with the buying groups as we feel they compete directly with the branches and reps . . . [w]e have said no many times in order to remain pure in our intent and consistent across the company."))).

Schein's Response:

No response.

Patterson's Response:

May 2015 is a month after the alleged conspiracy not to working with buying groups ended. (Kahn, Tr. 19). Moreover, McFadden also wrote in this email that he was fine with the local branch selling to UOBG: "If the local branch wants to do something here that's *fine by me*." (CX0162 at 001) (emphasis added). Patterson's Maine branch manager responded to McFadden confirming the branch would handle the request: "'Thanks for the insight Neal – we will handle it at the Branch level.'" (CX0162 at 001). Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

650. In October, 2014, Patterson's President of Special Markets, Neal McFadden, instructed one of its branch managers to "steer clear of all buying groups." (CX3128 at 001 (October 23, 2014 Statement of McFadden to Branch manager: "As a rule we are trying our best to steer clear of all buying groups.")). Patterson's VP of Sales, Dave Misiak, agreed with McFadden's statement that Patterson was trying to steer clear of buying groups. (Misiak, Tr. 1391-1392)

Schein's Response:

No response.

Patterson's Response:

This proposed finding is misleading because it takes McFadden's quote out of context. McFadden was not instructing a branch manager to steer clear of buying groups. Instead, McFadden was offering advice in response to a request for "insight." (CX3128 at 002) (McFadden received an email from a branch manager asking for "insight" about a current Patterson customer saying they are decreasing purchases and waiting to hear about lower prices through Kois and Patterson). McFadden responded that Patterson working

with Kois was “news to [him]” and stated that “as a rule we are trying our best to steer clear of all buying groups.” (CX3128 at 002). Moreover, there is no indication in the cited document or trial testimony that Patterson’s salesforce “understood” this as a “clear message.”

This proposed finding also contradicts the record. The record shows that Patterson had always viewed buying groups skeptically and generally did not sell to them. *See, e.g.*, PF ¶ 118-119; RX0401 at 1 (Patterson did not bid on MMCAP in 2009 because “it’s a GPO” and the requirements for working with the group included a fee: “every month by the 15th we had to send them a check for 1% of total sales they purchased from Patterson”); CCFF ¶ 132 (citing CX0084) (McFadden emailed Misiak about a buying group request in March 2012, stating: “I get these more often than I like. This stuff scares me. I’m gonna tell him thanks but no thanks.” Misiak responded, “Your response is right.”); (Misiak, Tr. 1469 (“Q. Were you focused on buying groups or GPOs before 2012? A. We were not.”); Misiak, Tr. 1493 (“Q. So back in 2012, the spring of 2012, group purchasing organizations, buying groups, were not part of your core strategy at Patterson Dental? A. They were not.”); Misiak Tr., 1499 (“Q. Mr. Misiak, were buying groups a part of your core strategy at Patterson Dental back in 2009? A. They were not. Q. Why not? A. It didn’t make the strategic initiative board for execution in 2009.”)); Guggenheim, Tr. 1720 (“Q. When you joined Patterson in the 2000, was part of the core strategy of Patterson to focus on buying groups? A. No.”); Rogan, Tr. 3609 (“Q. We see here in the fall of 2012 that buying groups were not part of your core strategy at Patterson Dental. Did that change after you got the McKinsey consulting report at the end of 2015, early 2016? A. No. Q. Has it changed

today? A. No. Q. Buying groups have never been part of the company's core strategy? A. Correct.”)). Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

651. At the time of Misiak's instruction to “steer clear of all buying groups,” (CX3128), Misiak was not aware of any Patterson branch office doing business with any buying groups. (Misiak, Tr. 1392).

Schein's Response:

No response.

Patterson's Response:

First, the first half of this proposed finding grossly misstates and mischaracterizes the record. Misiak never instructed anyone to “steer clear of all buying groups.” If Complaint Counsel meant to write that McFadden gave this instruction, that also is inaccurate and mischaracterizes the record. McFadden was not instructing a branch manager to steer clear of buying groups. Instead, McFadden was offering advice in response to a request for “insight.” (CX3128 at 002) (McFadden received an email from a branch manager asking for “insight” about a current Patterson customer saying they are decreasing purchases and waiting to hear about lower prices through Kois and Patterson). McFadden responded that Patterson working with Kois was “news to [him]” and stated that “as a rule we are trying our best to steer clear of all buying groups.” (CX3128 at 002). Moreover, there is no indication in the cited document or trial testimony that Patterson's salesforce “understood” this as a “clear message.”

Second, the latter half of this proposed finding is also inaccurate. Misiak did not testify he was “not aware of any Patterson branch office doing business with any buying groups.” Misiak testified that in October 2014, “from a corporate perspective, we were not strategically focused on buying groups” but “[t]hat’s not to say branches weren’t doing business with buying groups.” (Misiak, Tr. 1391-1392).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

652. As President of Patterson, Guggenheim never personally “said yes” to selling to a buying group and never instructed anyone else within Patterson to “say yes” to a buying group. (Guggenheim, Tr. 1654).

Schein’s Response:

No response.

Patterson’s Response:

This proposed finding overstates Guggenheim’s testimony. When asked if as president of Patterson Dental, he never personally said yes to a buying group, Guggenheim testified: “Not that I recall.” (Guggenheim, Tr. 1654). Likewise, when asked if as president of Patterson Dental, he never told anybody else within Patterson to say yes to a buying group, Guggenheim testified: “Not that I recall.” (Guggenheim, Tr. 1654). Moreover, this does not mean Patterson did not work with buying groups or was part of the alleged agreement to boycott buying groups. To the contrary, the record shows Patterson *did* work with buying groups when it made business sense before, during, *and* after Complaint Counsel’s alleged conspiracy period. (Kahn, Tr. 19 (the alleged conspiracy ended in April 2015); *see, e.g.*, PF ¶¶ 174-175; CX3081 at 001 (as of July 2014, a local Patterson

representative was “deal[ing] heavily” with Orthosynetics); McFadden, Tr. 2728 (“Orthosynetics is a quasi-buying group that focus[es] on orthodontics”); RX0271 at 001 (as of May 2014, a Patterson branch had been selling to Jackson Health—“a GPO”—“for over 10 years”); CX8028 (Lepley, Dep. at 37–39) (Patterson entered into contracts with two buying groups, Dr. Levin and Lake Harbor, in May 2018)).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

653. Patterson’s decision not to do business with buying groups prior to the creation of Special Markets was not due to lack of infrastructure or resources to work with these groups. (*See* CCFF ¶ 595).

Schein’s Response:

No response.

Patterson’s Response:

This proposed finding is misleading and is based on a mischaracterization of Misiak’s trial testimony. *See* Reply to CCFF ¶ 595. Misiak testified that Patterson had the resources and infrastructure to work with “a *buying group*”—not *multiple* buying groups—before and after Patterson created the Special Markets Division. (Misiak, Tr. 1510) (“Q. Mr. Misiak, before Patterson created the Special Markets Division in 2013, did Patterson have the resources or infrastructure to partner with a *buying group*? A. Probably. Q. Is that a yes? A. Yes. Q. And that would have been the case after Special Markets Division was created in 2013 as well? A. Correct.”).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

654. Patterson's Special Markets division, which focused on DSO business and expressly excluded buying groups included Orthosynetics in its 2013 Strategic Plan as a DSO entity whose business Patterson wished to attract. (CX3014 at 023-024; CCFF ¶ 611).

Schein's Response:

OrthoSynetics was of interest to Patterson because one of its vendors referred the group, so "as a matter of trying to get some revenue, [Patterson] decided this particular one might make sense for [them] to sell to." (McFadden, Tr. 2728-29). Ultimately, Patterson determined that OrthoSynetics was a buying group "[a] lot like" Smile Source. (CX 0149-001; CX 8004 (McFadden, Dep. at 119-20 ("for lack of a better expression, *buying groups were not all created equally*. And they were like a jar of jellybeans. They each tasted differently. And we dealt with a group called OrthoSynetics, where we sold them technology. We thought that was not going to interfere with our territory reps. And we had our manufacturer partner's back that they would help us participate in that, and it makes sense to do that."))).

Patterson's Response:

This proposed finding is not entirely accurate. While Orthosynetics is listed in Patterson's 2013 Special Markets Business Plan, it is not identified as a "DSO," but rather described as a "special market target account." (CX3014 at 023-024). McFadden explained to a Special Markets Equipment Sales Manager in September 2014 that "the only reason [he was] considering [Orthosynetics] is because it is a limited specialty of orthodontist." (RX0342 at 001). Additionally, Patterson believed Orthosynetics was a quasi-buying group. (McFadden, Tr. 2728 ("Orthosynetics is a quasi-buying group that focus[es] on orthodontics"); PF ¶ 174; CX3081 at 001; CX8004 (McFadden, Dep. at 119-

20)); *see also* CX0149 (industry publication describing Smile Source as “[a] lot like OrthoSynetics”). *See also* Reply to CCFF ¶ 611.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

655. Orthosynetics is not a buying group. (RX0342 at 001). On September 11, 2014, McFadden stated that Orthosynetics was “not like a buying group.” (RX0342 at 001).

Schein’s Response:

False. OrthoSynetics is a group of independent practitioners receiving discounts based on the group’s collective purchases, and thus meets Complaint Counsel’s definition of a buying group. (Foley, Tr. 4627-28; CX 0309 (Muller, IHT at 202); CX 8009 (Wingard, Dep. at 92-93); CX 0149-001; CX 8004 (McFadden, Dep. at 119–20); Complaint ¶ 3). Further, Schein considered OrthoSynetics to be a buying group, which also meets Dr. Marshall’s criteria for a buying group. (Marshall, Tr. 2894-95).

Patterson’s Response:

This proposed finding is inaccurate and takes McFadden’s email out of context. McFadden was responding to a question from a Special Markets Equipment Sales Manager explaining why Special Markets was considering working with Orthosynetics when the definition excluded GPOs. (RX0342 at 001-002). McFadden explained that Orthosynetics is “peculiar” and that he was “considering” it because “it was a limited specialty of orthodontist and “not a general dentist buying group.” This is consistent with McFadden’s trial testimony that Orthosynetics is a quasi-buying group. (McFadden, Tr. 2728 (“Orthosynetics is a quasi-buying group that focus[es] on orthodontics”); *see also* PF ¶

174; CX8004 (McFadden, Dep. at 119–20)); CX0149 (industry publication describing Smile Source as “[a] lot like OrthoSynetics”)). Schein also thought Orthosynetics was a buying group. (Foley, Tr. 4620).

Moreover, OrthoSynetics is a group of independent practitioners receiving discounts based on the group’s collective purchases, and thus meets Complaint Counsel’s definition of a buying group. (Foley, Tr. 4627-28; CX0309 (Muller, IHT at 202); CX8009 (Wingard, Dep. at 92-93); CX0149 at 001; CX8004 (McFadden, Dep. at 119–20); Compl. ¶ 3).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

656. Jackson Health is not a buying group, but it is a large academic medical system in the Miami (Dade County), Florida area. (RX0270 at 001). On May 29, 2014, Carles, a Branch Manager at Patterson, wrote that Jackson Health was not a GPO. (RX0270 at 001; *see also* Rogan, Tr. 3535).

Schein’s Response:

No response.

Patterson’s Response:

At the time of his May 29, 2014 email, Rogan believed Jackson Health was a GPO. (RX0270 at 001) (“This is a GPO.”).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson’s business.

K. “We’ve Signed an Agreement that We Won’t Work with GPO’s.”

657. On June 12, 2014, McFadden received a text message from a former Patterson employee, Dave McIntosh, requesting a potential partnership with Patterson on behalf of a group of dental offices called Choice One. (CX0164 at 002). In response, McFadden wrote: “Is choice one a GPO or are you all actually acquiring practices? The reason I’m asking is we’ve signed an agreement that we won’t work with GPO’s.” (CX0164 at 002; McFadden, Tr. 2736-2737).

Schein’s Response:

As Complaint Counsel acknowledges, there is no evidence of the existence of any “signed ... agreement” regarding buying groups to which Mr. McFadden was referring, or that Mr. McFadden intended Mr. McIntosh to believe that Patterson had entered into an agreement with any competitor or manufacturer (as opposed to signed an agreement internally at Patterson). (*See* CC Br. 25, n.210). Complaint Counsel fails to cite any documents leading up to, memorializing, or post-dating Mr. McFadden’s text to support the existence of any signed agreement or conscious commitment with anyone (inside or outside Patterson) regarding entering into business with buying groups.

In fact, Mr. McFadden conceded he made it up. Mr. McIntosh was a former Patterson employee. (McFadden, Tr. 2736; CX 0315 (McFadden, IHT at 235-36)). Mr. McFadden testified that he invented something to get off his call with Mr. McIntosh, which Mr. McFadden described was “like getting a call from a telemarketer.” (McFadden, Tr. 2738; CX 0315 (McFadden, IHT at 239 (“Dave [McIntosh] is a difficult person. I terminated Dave. I don’t care for Dave. And Dave has a habit of just blowing your phone up with entrepreneurial ideas, and I just wanted to shut this down.”))).

Patterson’s Response:

First, Complaint Counsel itself acknowledges there is no evidence of the existence of any “signed...agreement” regarding buying groups to which Mr. McFadden was referring. (Kahn, Tr. 48) (“[W]e don’t believe there was a signed agreement”). Complaint

Counsel also fails to cite any documents leading up to, memorializing, or post-dating Mr. McFadden's text to support the existence of any signed agreement or conscious commitment with anyone (inside or outside Patterson) regarding entering into business with buying groups.

Second, McFadden testified repeatedly and consistently that he lied to McIntosh. (PF ¶ 426). McIntosh was a former Patterson employee who McFadden had terminated McIntosh from Patterson in late 2012 or early 2013. (PF ¶ 423; McFadden, Tr. 2737; CX0315 (McFadden, IHT at 235)). There was no signed agreement—McFadden lied in his response to McIntosh in claiming there was “a signed agreement not to work with GPOs” hoping it would end the conversation with McIntosh, who McFadden described as a “pest.” (PF ¶ 426-428; McFadden, Tr. 2737–38 (“I’ll have to say, just like I’ve said in my deposition, this was not my finest hour right here. I was not being honest with Dave, that we do not have a signed agreement. There was never a signed agreement.”); McFadden Tr. 2738 (“[G]etting a call from David [McIntosh] is like getting a call from a telemarketer.”); McFadden, Tr. 2742; CX8004 (McFadden, Dep. at 110–11); CX0315 (McFadden, IHT at 238–39)).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

658. McFadden testified that he lied to McIntosh in CX0164 about having signed an agreement because he wanted to end the conversation. (McFadden, Tr. 2737-2738 (“I just want to get rid of it and shut it down . . . I just wanted to end the conversation.”); CX8004 (McFadden, Dep. at 110-111)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

659. After McFadden's text message to McIntosh (CX0164), McIntosh replied and requested a meeting. (CX0164 at 002).

Schein's Response:

No response.

Patterson's Response:

The first half of this proposed finding is confusing, as it is not clear which McFadden text message Complaint Counsel is referring to. Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

660. McFadden replied almost immediately and suggested that they set up a meeting in the future. (CX0164 at 002 ("Thanks Dave. I am travelling a ton over the next few weeks. Maybe we can shoot for mid July?)). McFadden was "open" to hearing what McIntosh had to say if McIntosh was talking about a DSO. (McFadden, Tr. 2845).

Schein's Response:

No response.

Patterson's Response:

This proposed finding mischaracterizes how quickly McFadden replied to McIntosh's message. McIntosh sent a text message asking for a meeting at 2:38pm. (CX0164 at 002). McFadden responded *17 minutes later* at 2:55pm. (CX0164 at 002). Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

X. BENCO ORCHESTRATED AN AGREEMENT WITH SCHEIN THAT NEITHER WOULD DISCOUNT TO BUYING GROUPS.

A. Benco and Schein Exchanged Assurances that Neither Would Discount to Buying Groups.

661. Cohen informed Sullivan of Benco's position with regard to bidding on buying groups. (Cohen, Tr. 500-501; CX0301 (Cohen, IHT at 195-196, 199); CX8015 (Cohen, Dep. at 233-237); CX0311 (Sullivan, IHT at 260-263, 269); CX8025 (Sullivan, Dep. at 344-345)).

Schein's Response:

The evidence does not support a finding that Mr. Cohen informed Mr. Sullivan of "Benco's position with regard to bidding on buying groups." Complaint Counsel did not cite any *document* showing that Mr. Cohen informed Mr. Sullivan of Benco's no-buying-group policy.

Moreover, as Complaint Counsel admits in its Post-Trial Brief, Mr. Sullivan consistently testified that Mr. Cohen did *not* inform him of Benco's policy on buying groups. (CC Br. 25 n.212; CX 0311 (Sullivan, IHT at 269 ("Q. Has Mr. Cohen ever shared with you his general thoughts on buying groups? A. No."), 271 (Q. "Mr. Cohen never shared...that Benco had a policy of not selling or offering discounts to buying groups? A.

That's correct.")); CX 8025 (Sullivan, Dep. at 344-46 ("[N]ever, to my knowledge, did [Mr. Cohen] call me to talk about buying groups in general and the strategy;" no recollection of Mr. Cohen telling him "that Benco had a no buying group policy" or "that Benco doesn't work with buying groups")); Sullivan, Tr. 3944 (Mr. Cohen "did not" share with Mr. Sullivan "that Benco had a no buying group policy"))).

Despite this concession, Complaint Counsel nonetheless misleadingly cites to *unquoted* portions of Mr. Sullivan's Investigational Hearing and deposition. Neither, however, supports the proposed finding. Complaint Counsel cites to pages 260-63 and page 269 of Mr. Sullivan's Investigational Hearing, but those pages simply recount the March 25, 2013 telephone call concerning Atlantic Dental Care, not Benco's general "position with regard to bidding on buying groups." (CX 0311 (Sullivan, IHT at 261)). As Mr. Sullivan testified at the time, "I'm really not aware of what their strategy is" as he has "never had that discussion with Chuck about [their] strategy on buying groups." (CX 0311 (Sullivan, IHT at 261, 269)). Mr. Sullivan's deposition transcript is to the same effect. (CX 8025 (Sullivan, Dep. at 344-45 ("I want to clarify because you say 'other than' as if that was a discussion about buying groups. That was not a discussion about buying groups. I have not had a discussion ... with Chuck Cohen or anyone at Benco about their strategy on buying groups or ours or any attempt to come to any sort of agreement about how to treat buying groups.... [N]ever, to my knowledge did [Mr. Cohen] call me to talk about buying groups in general and the strategy therein."))).

Mr. Cohen, for his part, has consistently testified that he has no specific recollection of communicating Benco's position or policy with regard to buying groups to Mr. Sullivan. At his Investigational Hearing, Mr. Cohen testified that he had no recollection of what he

relayed to Mr. Sullivan because “we’re talking about several years ago.” (CX 0301 (Cohen, IHT at 199-200 (“I don’t recall any specifics around the conversation”))). At his deposition, Mr. Cohen again testified that he did not remember and simply drew inferences from documents Complaint Counsel showed him. (RX 1130 (Cohen, Dep. at 120 (“I don’t know one way or the other.”), 142 (“I don’t know that I did, but it looks like, from the e-mail, I did.”), 197 (“I don’t know. Anything I would say would be a guess.”))). At his second deposition, Mr. Cohen again testified that he could not “recall any specific conversations with Tim Sullivan about buying groups.” (CX 8015 (Cohen, Dep. at 229-31 (“I can’t speculate what we talked about;” “I don’t recall what we talked about...I can’t recall...I can’t recall any specific conversations;” “I can’t recall any specific conversations around buying groups.”))).⁹

Complain Counsel’s cited evidence is no different. When asked at trial whether he “communicate[d] Benco’s no-buying group policy to Mr. Sullivan,” Mr. Cohen answered that he “*believe[s]* [he] did,” not that he has actual knowledge or recollection of ever doing so. (Cohen, Tr. 500-01 (emphasis added)). Mr. Cohen’s prior IHT and deposition testimony cited by Complaint Counsel was no different and is consistent with his lack of recollection. (CX 0301 (Cohen, IHT at 195-98, 199 (“I *believe* ...;” “I don’t recall any specifics;” “I don’t know...;” “I don’t recall...;” “I don’t remember...”)); CX 8015 (Cohen, Dep. at 233-37 (“I don’t recall. These are conversations -- you put e-mails in front of me that are six or seven years old.”), 231 (“*I don’t recall any specific conversations with Tim Sullivan about buying groups.*”) (emphasis added))).

⁹ Mr. Cohen’s testimony in this case is consistent with his testimony in *SourceOne v. Patterson*, 15-cv-05440 (E.D.N.Y.). Mr. Cohen was asked about his March 25, 2013 call with Mr. Sullivan on, and he testified that he had no recollection of what was discussed. (RX1127 (Cohen, Dep. at 389-90 (“I don’t know. I don’t have a record of that.”))).

In any event, Mr. Cohen testified at his Investigational Hearing and at trial that Benco's policy was public, "pretty well known," and not a secret. (CX 0301 (Cohen, IHT at 198); Cohen, Tr. 714-15).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, the cited testimony does not include testimony from Chuck Cohen that he "informed Sullivan of Benco's position with regard to bidding on buying groups." (Cohen, Tr. 500-501). Complaint Counsel's erroneous paraphrasing of Cohen's actual testimony should be rejected.

Second, in response to Complaint Counsel's question, Chuck Cohen testified: "So our policy is a no-middleman policy, and I believe its pretty well known in the industry." (Cohen, Tr. 500-501).

662. Cohen communicated Benco's no buying group policy to Sullivan. (Cohen, Tr. 501) ("Q. You did communicate Benco's no-buying group policy to Mr. Sullivan; correct? A. I believe I did. Yes."); *see also* CCFF ¶¶ 663-664).

Schein's Response:

The asserted fact is not supported by the weight of the evidence.

As Complaint Counsel conceded in its Post-Trial Brief (*see* CC Br. 25 n.212), Mr. Sullivan consistently testified that Mr. Cohen had ***not*** communicated Benco's no-buying-group policy to Mr. Sullivan. (Sullivan, Tr. 3944 ("Q. Did Chuck Cohen ever share with you that Benco had a no buying group policy? A. He did not."); CX 0311 (Sullivan, IHT

at 269, 271); CX 8025 (Sullivan, Dep. at 344-46); Sullivan, Tr. 3944; CX 0301 (Cohen, IHT at 199-200); RX 1130 (Cohen, Dep. at 119-20); CX 8015 (Cohen, Dep. at 229-31, 233-37)). Mr. Sullivan further testified that he was not aware of Benco's buying group policies. (Sullivan, Tr. 4259).

Complaint Counsel seeks to discredit Mr. Sullivan's testimony by claiming that "contemporaneous documents and Cohen's consistent testimony ... demonstrate that Cohen did inform Sullivan of Benco's policy." (CC Pre-Trial Br. at 25, n.212 (citing CCFF 662-64)). But Complaint Counsel did not cite – and the record does not contain – any documents that disclose Benco's policy to Schein. (See CCFF 662-64 (citing only testimony not documents)).

Complaint Counsel's reliance on Mr. Cohen's testimony is also misplaced. CCFF 662 cites only Mr. Cohen's trial testimony. Mr. Cohen was clear that he had only *one* communication with Mr. Sullivan (relating to ADC in March 2013, two years after the start of the alleged conspiracy), that he did not have any specific recollection of the discussion, and was merely drawing inferences based on the documentary record. (Cohen, Tr. 501 (testifying that he only communicated with Mr. Sullivan "[o]n one occasion"); Cohen, Tr. 844 ("Q. And aside from ADC, you have never had any conversation with Mr. Sullivan about any buying group? A. That is correct."); CX 8015 (Cohen, Dep. at 229-31 ("I can't speculate what we talked about;" "I don't recall what we talked about...I can't recall...I can't recall any specific conversations;" "I can't recall any specific conversations around buying groups."))). While Mr. Cohen testified that he "believed" he may have communicated Benco's policy to Mr. Sullivan, he did not testify that he had any independent recollection or knowledge of doing so. (Cohen, Tr. 500-01; *see also* CX 0301

(Cohen, IHT at 195-99) (“I believe ...;” “I don’t recall any specifics;” “I don’t know...;” “I don’t recall...;” “I don’t remember...”); CX 8015 (Cohen, Dep. at 236-37 (“I don’t recall. These are conversations -- you put e-mails in front of me that are six or seven years old...;” “I don’t recall any specific conversations with Tim about buying groups.))).

Moreover, even if Mr. Cohen did disclose Benco’s no-buying-group policy, Mr. Sullivan did not share Schein’s policies or practices with Mr. Cohen or otherwise express agreement with Mr. Cohen’s policy or approach. (Cohen, Tr. 845 (“Q. And Mr. Sullivan never asked you about ... whether Benco had a no-buying group policy. A. I don’t believe so, no. Q. And Mr. Sullivan never told you what Schein’s policy was with respect to buying groups. A. No. Q. In fact, you do not know what Schein’s policy is with respect to doing business with buying groups...? A. I do not.”))).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The proposed finding conveniently omits Chuck Cohen’s answer to the first time Complaint Counsel asked the question. In response to Complaint Counsel’s question, Chuck Cohen testified: “So our policy is a no-middleman policy, and I believe its pretty well known in the industry.” (Cohen, Tr. 500-501).

663. Cohen testified at his deposition that he communicated Benco’s no buying group policy to Sullivan on at least one occasion. (CX8015 (Cohen, Dep. at 241) (“I can’t estimate a specific number. I know I’ve done it at least once.”))).

Schein's Response:

Complaint Counsel takes Mr. Cohen's testimony out of context. The full context reveals that Mr. Cohen had no *independent recollection* of disclosing Benco's no-buying-group policy to Mr. Sullivan, and only stated that he did it "at least once" based on inferences Ms. Kahn had asked Mr. Cohen to draw after repeated badgering over 12 transcript pages:

- Q. Have you talked to Mr. Sullivan about buying groups?
- A. I don't recall any specific conversations with Tim Sullivan about buying groups.
- Q. But you are aware that you've talked to Mr. Sullivan about buying groups?
- A. I don't recall any specific conversations with Mr. Sullivan about buying groups....
- Q. What's your best estimate of how many times you've communicated with Mr. Sullivan about buying groups?
- A. I can't estimate....
- Q. Is there a reason that you can't provide me with an estimate?
- A. I don't recall. These are conversations -- you put e-mails in front of me that are six or seven years old. So my memory is not that good.
- Q. So is it fair to say that you don't know how many times you've communicated with Mr. Sullivan about buying groups?
- A. It's fair to say I don't recall how many times I've communicated with Tim Sullivan about anything....
- Q. Okay. And what would have been the reasons that you were communicating with Mr. Sullivan about buying groups?
- A. I can't -- I can't recall a specific reason that I would have had a conversation with Tim about a buying group....

- Q. You did communicate Benco's no buying group policy to Mr. Sullivan, correct?
- A. I believe based on documents I've seen that I have communicated our no buying group policy to Mr. Sullivan.
- Q. And on how many occasions have you communicated Benco's no buying group policy with Mr. Sullivan?
- A. I can't estimate a specific number. I know I've done it at least once....
- Q. Is it fair to say that you do not know how many times you've talked to Mr. Sullivan about Benco's no buying group policy?
- A. It is fair to say I don't recall the specific -- any specific conversations with Mr. Sullivan about our no buying group policy.
- Q. But you did have one communication at least with Mr. Sullivan about Benco's no buying group policy, correct?
- A. I do believe based on documents that I've reviewed that there was at least one instance of a conversation with -- of an e-mail exchange about -- that referenced our no buying group policy."

(CX 8015 (Cohen, Dep. at 230-42 (emphasis added))).

By assuming an affirmative answer even after Mr. Cohen testified to no recollection of any conversations, Complaint Counsel ultimately got Mr. Cohen to state that, *based on the documents*, he communicated Benco's policy. But ***none*** of the documents actually says as much and Mr. Cohen affirmatively testified that he had no independent recollection of making any such disclosure.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The proposed finding conveniently omits Chuck Cohen's answer to the first time Complaint Counsel asked the question at trial. In response to Complaint Counsel's question, Chuck Cohen testified: "So our policy is a no-middleman policy, and I believe its pretty well known in the industry." (Cohen, Tr. 500-501).

664. Cohen testified at his investigational hearing that he communicated Benco's no buying group policy to Sullivan. (CX0301 (Cohen, IHT at 195-196) ("Q. Have you ever communicated with anyone from Schein about buying groups? A. I believe I have. Q. Can you tell me about those instances? A. I don't recall any specifics, but I believe I have, at different times, communicated our policy on buying groups. When asked, I answer. . . . Q. And who did you – who did you communicate with? A. I communicate with Tim – I communicated in that situation with Tim Sullivan."); CX0301 (Cohen, IHT at 200) ("We don't recognize buying groups and offer a lower price to their customers. We choose not to do that . . . that is our policy, and I communicated that policy [to Sullivan] is my recollection.")).

Schein's Response:

The cited evidence is insufficient to establish that Mr. Cohen disclosed Benco's no-buying-group policy to Mr. Sullivan.

Mr. Cohen's IHT testimony was equivocal. Mr. Cohen testified in his IHT that he "believe[s]" he communicated Benco's policy on buying groups, but he did not have a specific recollection of it. (CX 0301 (Cohen, IHT at 196-200 ("I don't recall any specifics... I don't remember the specific[s] about when.... I don't recall the specifics of how I told him.... I don't recall any specifics around the conversation.... When you say 'discussed,' I'm not even sure – I can't remember, as I sit here today, was it over the phone, was it by e-mail, or text....")))).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The proposed finding conveniently omits Chuck Cohen's answer to the first time Complaint Counsel asked the question at trial. In response to Complaint Counsel's question, Chuck Cohen testified: "So our policy is a no-middleman policy, and I believe its pretty well known in the industry." (Cohen, Tr. 500-501).

665. Benco knew that Schein was working with buying groups in 2011. (CCFF ¶ 666-673).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding. None of the individual findings cited in this proposed finding contain evidence of Benco conclusively knew that Schein was working with buying groups in 2011.

666. On September 30, 2011, Dr. Goldsmith sent an email to Ryan, attached a document titled, "Special Markets Pricing.docx," and noted that the attached document contained an "example of the pricing we get now." (CX1217 at 001-002; *see also* CX1041 at 003-006).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, in response to Complaint Counsel's questions, Pat Ryan responded three consecutive times that he was "skeptical" of Dr. Goldsmith's claim. (Ryan, Tr. 1050-51 ("I am skeptical of things like that."); ("I have a built-in skepticism of people, what people tell me that I don't know."); ("[I]n my experience, sometimes people throw around names that they're working with as a way to gain credibility with me if I don't know them.").

Second, Pat Ryan's skepticism of Dr. Goldsmith was well founded, as Dr. Goldsmith's testimony is not credible. (HSFF ¶¶ 1122-28). Specifically, Dr. Goldsmith's e-mails to Benco were littered with false statements aimed at gaining credibility with Benco. (HSFF ¶¶ 1122-28). Exactly as Pat Ryan had feared. (Ryan, Tr. 1050-51).

667. Dr. Goldsmith's pricing attachment (CX1217) identified Schein as the manufacturer, indicating that Schein was supplying products to Smile Source. (Cohen, Tr. 499 ("Q. . . . [D]o you see the price list that's attached that Schein is listed? A. Yes. Q. And that's an indicator that Schein was supplying products to Smile Source? A. It's an indicator that Schein was supplying products to Smile Source. Yes.").

Schein's Response:

No response, other than to note that Schein is a distributor, not a manufacturer.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, Complaint Counsel's questions to Chuck Cohen about the cited exhibit were couched only in terms of "is it possible." (Cohen, Tr. 499 ("Q. So is it possible that you learned in 2011 that Schein was doing business with Smile Source? A. It's possible. I didn't get the original e-mail or the attachment.")). Accordingly, the proposed finding should be disregarded.

Second, the Benco employee that actually received the e-mail and attachment from Dr. Goldsmith was Pat Ryan. In response to Complaint Counsel's questions, Pat Ryan responded three consecutive times that he was "skeptical" of Dr. Goldsmith's claim. (Ryan, Tr. 1050-51 ("I am skeptical of things like that."); ("I have a built-in skepticism of people, what people tell me that I don't know."); ("[I]n my experience, sometimes people throw around names that they're working with as a way to gain credibility with me if I don't know them.")).

Third, Pat Ryan's skepticism of Dr. Goldsmith was well founded, as Dr. Goldsmith's testimony is not credible. (HSFF ¶¶ 1122-28). Specifically, Dr. Goldsmith's e-mails to Benco were littered with false statements aimed at gaining credibility with Benco. (HSFF ¶¶ 1122-28). Exactly as Pat Ryan had feared. (Ryan, Tr. 1050-51).

668. Ryan forwarded Dr. Goldsmith's email and attachment to Cohen the same day, September 30, 2011. (CX1041 at 001).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, Complaint Counsel's questions to Chuck Cohen about the cited exhibit were couched only in terms of "is it possible." (Cohen, Tr. 499 ("Q. So is it possible that you learned in 2011 that Schein was doing business with Smile Source? A. It's possible. I didn't get the original e-mail or the attachment.")). Accordingly, the proposed finding should be disregarded.

Second, the Benco employee that actually received the e-mail and attachment from Dr. Goldsmith was Pat Ryan. In response to Complaint Counsel's questions, Pat Ryan responded three consecutive times that he was "skeptical" of Dr. Goldsmith's claim. (Ryan, Tr. 1050-51 ("I am skeptical of things like that."); ("I have a built-in skepticism of people, what people tell me that I don't know."); ("[I]n my experience, sometimes people throw around names that they're working with as a way to gain credibility with me if I don't know them.")).

Third, Pat Ryan's skepticism of Dr. Goldsmith was well founded, as Dr. Goldsmith's testimony is not credible. (HSFF ¶¶ 1122-28). Specifically, Dr. Goldsmith's e-mails to Benco were littered with false statements aimed at gaining credibility with Benco. (HSFF ¶¶ 1122-28). Exactly as Pat Ryan had feared. (Ryan, Tr. 1050-51).

669. Smile Source informed Benco in 2011 that Schein was its supplier. (CX1041 at 001-006; CX1116 (Statement of Dr. Goldsmith: "We currently use Henry Schein for our services, but, want to see what sort of relationship could be established with Benco.)); Ryan, Tr. 1049-1050 (testifying

that Dr. Goldsmith told him in CX1116 that Smile Source was working with Henry Schein); Cohen, Tr. 497-500 (testifying that he received an email from Ryan indicating that Schein supplied Smile Source)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, in response to Complaint Counsel's questions, Pat Ryan responded three consecutive times that he was "skeptical" of Dr. Goldsmith's claim. (Ryan, Tr. 1050-51 ("I am skeptical of things like that."); ("I have a built-in skepticism of people, what people tell me that I don't know."); ("[I]n my experience, sometimes people throw around names that they're working with as a way to gain credibility with me if I don't know them.")).

Second, Pat Ryan's skepticism of Dr. Goldsmith was well founded, as Dr. Goldsmith's testimony is not credible. (HSFF ¶¶ 1122-28). Specifically, Dr. Goldsmith's e-mails to Benco were littered with false statements aimed at gaining credibility with Benco. (HSFF ¶¶ 1122-28). Exactly as Pat Ryan had feared. (Ryan, Tr. 1050-51).

670. On March 24, 2011, Don Taylor wrote to Ryan, Troy Stout, and Mark Rowe of Benco: "I spoke with Pat about this earlier and got the sense that we could not pursue groups like this [Dental Cooperative] per Chuck. If we can, this would be a great opportunity to win some business from Schein." (CX1039 at 001; Cohen, Tr. 852). Taylor's email noted that Schein was doing business with buying groups in 2011. (CX1039 at 001; Cohen, Tr. 852).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, Complaint Counsel never obtained any testimony from Don Taylor, the author of the cited exhibit. So there is no record of what Taylor may have meant by the phrase that Complaint Counsel has cherry-picked from his e-mail in the proposed finding. When Taylor writes "they certainly do it," he may have meant that Schein certainly does "win some business" from Benco. (CX1149). Without testimony from Taylor, Complaint Counsel cannot speculate, attribute a meaning that fits with its care narrative, and they presume that meaning as a basis for a proposed finding.

Second, even if Don Taylor believed that Schein was doing business with a buying group, it does not mean that Taylor's belief was correct. Moreover, it does not mean that Pat Ryan believed that Taylor's belief was correct. The cited testimony in the final sentence of the proposed finding underscores this failing. Chuck Cohen, when asked about CX1149, said only "[t]hat's what the e-mail indicates," not that he believed Taylor's belief to have been true. (Cohen, Tr. 852).

671. Cohen had a conversation with Ryan about Taylor's email. (CX1039). (Cohen, Tr. 851-852; *see also* CX1038 (Statement of Ryan: "We all know the answer here, right? Not no, hell no.")).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Nwhere in the cited exhibit does it indicate that Chuck Cohen had a conversation with Pat Ryan about Don Taylor's e-mail. (CX1039). Complaint Counsel's strained interpretation, which is not supported by the text of the cited exhibit, should be rejected.

672. Cohen testified that "by November 7, 2011, [he] received e-mails indicating Schein was working with at least three buying groups." (Cohen, Tr. 867-868 (testifying that "by November 7, 2011, [he] received e-mails indicating Schein was working with at least three buying groups.")).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Chuck Cohen testified that he never spoke to Tim Sullivan about any of these three e-mails.

673. Ryan testified, "there was no doubt in [his]mind that [Schein was] working with Smile Source," a buying group in September 2011. (Ryan, Tr. 1250-1251 (testifying that "there was no doubt in [his] mind that [Schein was] working with Smile Source," a buying group in September 2011); *see also* Ryan, Tr. 1050-1051 (testifying that Smile Source informed him that it was working with Henry Schein in September 2011, and Ryan had no reason to doubt that information)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Pat Ryan testified that he did not reach out to anyone at Schein or take any action to try to stop Schein from working with Smile Source after receiving this information.

674. By July 2012, Cohen did not believe Schein was working with the buying group Smile Source. (Cohen, Tr. 525).

Schein's Response:

The asserted fact is misleading and does not reflect the substance of Mr. Cohen's testimony.

Mr. Cohen was not making any affirmative statement about his beliefs about Schein's policies, practices, or relationships with buying groups generally, or Smile Source in particular. Nor did Mr. Cohen suggest that his understanding or beliefs had changed at any point in time. Complaint Counsel's attempt to draw such an inference is disingenuous.

At trial, Mr. Cohen testified simply that, while he received an email from Smile Source's Dr. Goldsmith (CX 0018), he was always skeptical about what buying groups said about their business. (Cohen, Tr. 525 ("I know what the e-mail from Dr. Goldsmith said, and I'm always skeptical of what customers or those with an agenda say, so I didn't know what to think.")). This testimony does not suggest that Mr. Cohen's belief about Schein and Smile Source – whatever it was – was the result of any information from Schein.¹⁰

¹⁰ As the trial testimony established, many buying groups misrepresented material information about their business. Smile Source, for example, misrepresented the number of members it had and its ability to make purchasing decisions.

Nor did the trial testimony establish what Mr. Cohen's state of mind was "[b]y July of 2012" or whether his beliefs had changed from prior periods. Mr. Cohen specifically testified that "I can't say one way or the other what my understanding was in July of 2012 about Schein's selling or not selling to GPOs." (Cohen, Tr. 523-24).

Unhappy with that answer, Ms. Kahn tried to "refresh [Mr. Cohen's] recollection" with his IHT. But Complaint Counsel did not establish that the IHT testimony refreshed Mr. Cohen's recollection of what he understood in July 2012. Mr. Cohen just reiterated his lack of knowledge: "I'm trying to answer the question directly, but the answer is I don't really know, but I'm *assuming* that they were not." (Cohen, Tr. 526 (emphasis added)). Moreover, Mr. Cohen testified at his IHT that "[i]f Henry Schein was working with Smile Source, we probably would have heard it from the individuals and customers other than the guy who works at Smile Source[.]" and because he had not heard such "scuttlebutt" he inferred that Schein was not working with Smile Source. (CX 0301 (Cohen, IHT at 216-17)). This hardly establishes that Mr. Cohen had inside knowledge about Schein's policies or practices about buying groups, or that Mr. Cohen believed that there was a change in Schein's policies or practices.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

(CX 1138; Goldsmith, Tr. 2089; 2092). Other buying groups, like Unified Smiles and Kois, made similar misrepresentations. (Foley, Tr. 4687; Kois Sr., Tr. 211). Thus, it is not surprising that Mr. Cohen would be skeptical about a buying group's claims about its business.

Chuck Cohen's actual testimony differs substantially from Complaint Counsel's fictional paraphrase in the proposed finding. What Cohen actually said was: "I know what the e-mail from Dr. Goldsmith said, and I'm always skeptical of what customers or those with an agenda say, so I didn't know what to think." (Cohen, Tr. 525).

675. In 2013, Cohen understood that he was not competing against Schein and Patterson for buying groups because Schein and Patterson were not in the buying group space. (Cohen, Tr. 569-570; CX0301 (Cohen, IHT at 296)).

Schein's Response:

False.

Mr. Cohen testified at trial and in his IHT that Benco was not competing for buying groups because Benco had a no-buying-group policy since 1996, not because of anything that Schein or Patterson was or was not doing with buying groups. (Cohen, Tr. 569 ("Our longstanding policy was that we don't recognize buying groups or offer discounts to buying groups."); CX 0301 (Cohen, IHT at 296 ("Q. Your understanding was that in 2013 you were not competing against Schein and Patterson for buying groups? A. In 2013, just like in 1996, we weren't competing with anybody for buying groups."))). Mr. Cohen also rejected Complaint Counsel's suggestion that Benco was not competing with Patterson or Schein *because* Patterson or Schein were themselves not competing for this business. As he testified, Mr. Cohen couldn't "say ... one way or the other" whether "Schein [or] Patterson had aligned with a buying group." (Cohen, Tr. 570).

While Mr. Cohen could not recall any instance of Schein working with a buying group during his Investigational Hearing (a fact that Mr. Cohen later corrected at trial after being shown documents where he was told about some of Schein's buying group partners),

he never suggested that this was a reason why Benco was not competing against Schein for buying group business. (*See* CX 0301 (Cohen, IHT at 296)).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Complaint Counsel in the proposed finding blatantly misstates Chuck Cohen's testimony and attempts to instead replace Cohen's actual testimony with Complaint Counsel's strained interpretation, taken out of context, and distorted to fit Complaint Counsel's own narrative, which is not supported by the actual evidence in the case.

Chuck Cohen's actual testimony was:

Q. Your understanding was that in 2013 you were not competing against Schein and Patterson for buying groups; is that correct?

A. Again, we compete to win dentists all the time, and I'm not quite sure that I understand the question. We -- our longstanding policy was that we don't recognize buying groups or offer discounts to buying group members, simply because they're in a buying group, and we compete with the -- we compete in the market to win the customers.

(Cohen, Tr. 569).

Complaint Counsel then goes back to Cohen's investigational hearing -- where Cohen's testimony again does not support Complaint Counsel's fictional narrative. At his investigational hearing, Cohen's actual testimony was:

Q. Your understanding was that in 2013 you were not competing against Schein and Patterson for buying groups.

A. In 2013, just like in 1996, we weren't competing with anybody for buying groups.

(Cohen, IHT at 296).

676. In 2013, Cohen understood that “the policy that Henry Schein had was that they do not recognize GPOs.” (Cohen, Tr. 583-584; CX0301 (Cohen, IHT at 310) (“Q. . . . And what did you understand Mr. Sullivan’s position was on buying groups at the time of this e-mail? A. Well, if we go back to the last wrath of text messages, I think that the policy that Henry Schein had was that they do not recognize GPOs.”)).

Schein’s Response:

There is no evidence that Benco knew of Schein’s buying group policies or practices. In fact, the evidence is to the contrary. “As far as [Schein’s] overall policy, I don’t know.” (Cohen, Tr. 525, 583).

Nor does the cited trial testimony and IHT support the asserted fact. At trial, Mr. Cohen testified that “it’s hard to know from the perspective of today what I understood Tim Sullivan and/or Schein’s perspective on buying groups to be on September 16, 2013.” (Cohen, Tr. 583). Unsatisfied with this response, Complaint Counsel sought to refresh Mr. Cohen’s recollection with his IHT, but Complaint Counsel never elicited any testimony that the IHT refreshed Mr. Cohen’s recollection. Thus, the trial testimony does not establish Mr. Cohen’s purported contemporaneous knowledge of Schein’s policies or practices.

The IHT does not establish that Mr. Cohen had contemporaneous knowledge of Schein’s policies or practices. Complaint Counsel knows this. At Mr. Cohen’s IHT, Complaint Counsel conceded “I know you have no recollection” but proceeded to question Mr. Cohen anyway. (CX 0301 (Cohen, IHT at 280)). Complaint Counsel did not lay a foundation necessary to establish that Mr. Cohen had any communications with Schein in

which Schein's disclosed its policies and practices, and therefore, any testimony from Mr. Cohen about Schein's practices would be speculation.

More importantly, the specific IHT passage cited by Complaint Counsel reveals that Mr. Cohen was testifying, not based on his own recollection of any communications with Mr. Sullivan, but based on inferences he drew from reading exhibits placed in front of him. Mr. Cohen made clear at his IHT that he does not recall Mr. Sullivan ever sharing Schein's buying group policies or practices with Mr. Cohen. (CX 0301 (Cohen, IHT at 387 ("I don't think I got anything in response. I said we're bidding, and that was the end of the dialogue. ... I do not recall a response.")); Cohen, Tr. 850-51 (testifying that "the sole basis for [his] understanding of Schein's policy are the text messages [he was] shown at the investigational hearing")). As he testified, "if we go back to the last wrath of text messages, I think that the policy that Henry Schein had was they do not recognize GPOs." (CX 0301 (Cohen, IHT at 310)). Moreover, none of the exhibits shown to Mr. Cohen during his IHT (or at trial) – including the "wrath of texts" - discuss Schein's buying group policies or practices. (Cohen, Tr. 850-51; CX 0060 (Chats Tab 20-25, 44-46; CX 6027-028-29).

Thus, Complaint Counsel's assertion that "In 2013, Cohen understood that 'the policy that Henry Schein had was that they do not recognize GPOs'" is false, unsupported, and misleading. At most, Mr. Cohen speculated in March 2017 (at his IHT) based on a "wrath of text messages" that said nothing of Schein's approach to GPOs or buying groups.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, the question asked by Complaint Counsel at trial asked about Tim Sullivan's position – not Schein's position or policy. (Cohen, Tr. 582-83). As numerous Schein witnesses testified at trial, Sullivan's views are not necessarily the positions or policies of all of Schein.

Second, Complaint Counsel – yet again – mischaracterizes Chuck Cohen's actual testimony. Cohen never even said he "understood" either Sullivan or Schein's position or policy. Following an objection, Cohen's actual answer was:

Q. Sure. What did you understand Mr. Sullivan's position was on buying groups at the time of this e-mail?

A. I mean, this is a -- I've looked at e-mails today from a variety of times, so it's hard to know from the perspective of today what I understood Tim Sullivan and/or Schein's perspective on buying groups to be on September 16, 2013.

(Cohen, Tr. 582-83).

677. Cohen believed that Schein, Patterson, and Benco all had a similar policy with respect to buying groups in 2013. (Cohen, Tr. 590) ("Q. . . . Did you understand that Schein, Patterson and Benco all had a similar policy with respect to buying groups in September of 2013? A. Yes.")). In 2013, Cohen believed that Benco was not competing against Schein and Patterson for buying groups. (Cohen, Tr. 568-570; CX0301 (Cohen, IHT at 296)). Cohen testified: "Q. Your understanding was that in 2013 you were not competing against Schein and Patterson for buying groups? A. In 2013, just like in 1996, we weren't competing with anybody for buying groups. Q. And you understood that Patterson and Schein weren't in that space either at that time? A. That's correct." (CX0301 (Cohen, IHT at 296); Cohen, Tr. 568-570).

Schein's Response:

The asserted fact is misleading and is not supported by the evidence. Mr. Cohen testified time and again that he did not know Schein's policy regarding buying groups

(Cohen, Tr. 870 (Cohen did not “know what Schein's policies or practices were with respect to buying groups”); RX1137 (Cohen, Dep. at 334-35 (“Q. Are you aware of Henry Schein's policy regarding doing business with buying groups? THE WITNESS: No.”)); CX8015 (Cohen, Dep. at 489-90 (“I don’t recall ever hearing from anyone at Schein what Schein's policy was on buying groups. Q. Do you know what Schein’s policy is with respect to doing business or not doing business or offering discounts or not offering discount to buying groups? A. I do not.”)); CX 0301 (Cohen, IHT at 216 (“As far as their overall policy, I don't know.”))).

Complaint Counsel ignores Mr. Cohen’s 2013 email to Jamie Kasinski seeking “the name of the buying group in [his] area that works with Schein” which clearly indicates that Mr. Cohen was aware, in 2013, that Schein did not have a strict no-buying-group policy like Benco. (CX 0061).

To the extent that Mr. Cohen held such a belief, there is no evidence that his belief was based on any communication from Schein explaining its buying group policy. (Cohen, Tr. 845 (Mr. 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”); CX 8015 (Cohen, Dep. at 201 (“I don’t recall ever hearing from anyone at Schein what Schein's policy was on buying groups.”)); CX 0301 (Cohen, IHT at 225 (“Q. Do you recall any communications with Mr. Sullivan that gave you the impression that Schein does not sell to GPOs? A. No specific communications around that.”)); see also SRF 674-75 (based on a lack of scuttlebutt), 676 (no independent recollection)). Complaint Counsel fails to cite any documents leading up to, memorializing, or post-dating any alleged communication

informing Mr. Cohen of Schein's buying group policy to indicate that Mr. Cohen's opinion was based on anything more than the "word on the street." (CX 0301 (Cohen, IHT at 217)).

Therefore, Complaint Counsel cannot rely on the evidence cited here as "a clear admission" by Mr. Cohen "of the agreement" because there is no evidence that Mr. Cohen was ever informed by Schein about any buying group policy. (CC Br. 47, *see also* 26, 43, 59).

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Complaint Counsel in the proposed finding blatantly misstates Chuck Cohen's testimony and attempts to instead replace Cohen's actual testimony with Complaint Counsel's strained interpretation, taken out of context, and distorted to fit Complaint Counsel's own narrative, which is not supported by the actual evidence in the case.

Chuck Cohen's actual testimony was:

Q. Your understanding was that in 2013 you were not competing against Schein and Patterson for buying groups; is that correct?

A. Again, we compete to win dentists all the time, and I'm not quite sure that I understand the question. We -- our longstanding policy was that we don't recognize buying groups or offer discounts to buying group members, simply because they're in a buying group, and we compete with the -- we compete in the market to win the customers.

(Cohen, Tr. 569).

Complaint Counsel then goes back to Cohen's investigational hearing – where Cohen's testimony again does not support Complaint Counsel's fictional narrative. At his investigational hearing, Cohen's actual testimony was:

Q. Your understanding was that in 2013 you were not competing against Schein and Patterson for buying groups.

A. In 2013, just like in 1996, we weren't competing with anybody for buying groups.

(Cohen, IHT at 296).

678. Likewise, in 2014, Cohen understood that no distributor, neither Benco, Schein, nor Patterson had aligned with a buying group. (Cohen, Tr. 570; CX0301 (Cohen, IHT at 150) (“Q. In 2014, did you understand that no big distributor had aligned with a buying group? A. Well, ‘big’ is a relative term, but in 2014, no distributor – Benco, Schein – neither Benco, Schein, nor Patterson had aligned with a buying group.”)).

Schein's Response:

The asserted fact mischaracterizes the evidence. Mr. Cohen testified time and again that he did not know Schein's policy regarding buying groups (Cohen, Tr. 870 (Cohen did not “know what Schein's policies or practices were with respect to buying groups”); RX 1137 (Cohen, Dep. at 334-35 (“Q. Are you aware of Henry Schein's policy regarding doing business with buying groups? THE WITNESS: No.”)); CX 8015 (Cohen, Dep. at 489-90 (“I don't recall ever hearing from anyone at Schein what Schein's policy was on buying groups. Q. Do you know what Schein's policy is with respect to doing business or not doing business or offering discounts or not offering discount to buying groups? A. I do not.”)); CX 0301 (Cohen, IHT at 216 (“As far as their overall policy, I don't know.”))).

At trial, Mr. Cohen testified that he did not know if Patterson or Schein was working with buying groups, only that Benco did not. (Cohen, Tr. 570 (“in 2014, you believed that neither Benco, Schein nor Patterson had aligned with a buying group; right? A. I can't say

that one way or the other. I know we had not aligned with a buying group.”)). Unsatisfied with this testimony, Complaint Counsel sought to impeach Mr. Cohen with his Investigational Hearing. (Cohen, Tr. 570). At Mr. Cohen’s Investigational Hearing he was shown notes taken by a consultant, Mr. Grover, from a Distributor Leadership Council meeting. (CX 0301 (Cohen, IHT at 141-50 (“DLC is a distributor, it’s a group of distributors, noncompeting distributors. We get together twice a year to facilitate a group, and we share notes and learn from each other and try to share best practices.”)); CX 0052). In the notes there is a bullet point indicating that a small distributor had “aligned with a buying club; no big distributor has done it yet.” (CX 0052-003). Mr. Cohen did not recall the meeting, did not write the notes, and other attendees were talking about buying clubs, as such the notes fail to reflect Mr. Cohen’s opinion at the time of the meeting or impeach his trial testimony. (CX 0301 (Cohen, IHT at 148-49 (“I don’t recall specifically. The notes are in front of me, so I think we did, but I don’t recall anything about it specifically...there were others in the room, and as I mention down below, Brad talked about his experience with a buying group....”))).

There is no evidence that Mr. Cohen’s understanding was based on any communication from Schein regarding its buying group policy. (Cohen, Tr. 845 (Mr. 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”); CX 8015 (Cohen, Dep. at 490 (“I don’t recall ever hearing from anyone at Schein what Schein’s policy was on buying groups.”)); CX 0301 (Cohen, IHT at 225 (“Q. Do you recall any communications with Mr. Sullivan that gave you the impression that Schein does not sell to GPOs? A. No specific communications around that.”)); *see also* SRF 676). Complaint Counsel fails to

cite any documents leading up to, memorializing, or post-dating any alleged communication informing Mr. Cohen of Schein's buying group policy to indicate that Mr. Cohen's opinion was based on anything more than the "[w]ord on the street." (CX 0301 (Cohen, IHT at 217)).¹¹ Therefore, Complaint Counsel cannot rely on the evidence cited here as evidence that "Benco executives understood Schein was no longer working with buying groups between 2012 and 2015." (CC Br. 26, 43).

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Complaint Counsel in the proposed finding misstates Chuck Cohen's testimony and attempts to instead replace Cohen's actual testimony with Complaint Counsel's strained interpretation, taken out of context, and distorted to fit Complaint Counsel's own narrative, which is not supported by the actual evidence in the case.

Chuck Cohen's actual testimony was:

Q. Okay. And in 2014, you believed that neither Benco, Schein nor Patterson had aligned with a buying group, right?

A. I can't say one way or the other. I know we had not aligned with a buying group.

(Cohen, Tr. 570).

¹¹ Regardless of Mr. Cohen's opinion, it is clear that Schein was working and negotiating with buying groups in 2014. (Cavaretta, Tr. 5593; Puckett, Tr. 2231; Guggenheim, Tr. 1859-60; R. Johnson, Tr. 5479; Maurer, 4940-42).

679. Benco reached out to Schein to discuss buying groups on no fewer than six occasions during the period from 2011 through 2014. (CCFF ¶¶ 661-664 (Cohen informed Sullivan of Benco's no buying group policy); ¶¶ 955-972 (11 minute 34 second call between Cohen and Sullivan on January 13, 2012); ¶¶ 944-1004 (text message between Cohen and Sullivan on March 26, 2013); ¶¶ 1005-1119 (18 minute call between Benco's Ryan and Schein's Foley on October 1, 2013); ¶¶ 1022-1048, 1050-1051 (8 minute and 35 second call between Cohen and Sullivan on March 25, 2013); ¶¶ 1061-1071 (text message between Cohen and Sullivan on March 27, 2013)).

Schein's Response:

False.

Complaint Counsel does not cite to any record evidence in support of this asserted fact, just to its own proposed findings. Schein incorporates its responses to those specific findings here. (SRF 661-64, 944-1119).

The first supposed communication in which "Cohen informed Sullivan of Benco's no buying group policy" is does not exist. Complaint Counsel does not cite to any specific communication. Instead, it cites only to its own proposed findings, which in turn refer to Mr. Cohen's testimony relating to ADC. (SRF 661-64). At trial, Mr. Cohen was clear on the timing: he only talked to Mr. Sullivan about buying groups once – ***in 2013***. (Cohen, Tr. 844 ("Q. And aside from ADC [in 2013], you have never had any conversation with Mr. Sullivan about any buying group? A. That is correct.")). As such, Mr. Cohen's testimony cannot possibly support an inference that the conspiracy started earlier or that there was a *separate* communication where Benco disclosed its policy. Moreover, Mr. Sullivan consistently testified that he was not told Benco's policy. (*See* SRF 661-664). In fact, Mr. Sullivan was not even aware that Benco had a no-buying-group policy. (Sullivan, Tr. 4259).

The second alleged communication is a January 13, 2012 call between Mr. Cohen and Mr. Sullivan. (CC Br. 25 & n.213). But there is no evidence the call related to buying groups. As Mr. Cohen testified, the call related to employment matters. He could say that

“with confidence” based on the surrounding telephone records that indicated he made calls to his employment counsel before and immediately after the call with Mr. Sullivan. (SF 1436-39). While Complaint Counsel seeks a different inference, the only direct evidence of what was actually discussed – testimony from Mr. Sullivan and Mr. Cohen – is uniform in that neither Unified Smiles nor any buying group ever came up. (SF 1422, 1436-40; Cohen, Tr. 747; Sullivan, Tr. 4218-19).

The third alleged communication was a March 25, 2013 call at Mr. Cohen’s suggestion (again, unsolicited). (CC Br. 25 & n.213). As Complaint Counsel concedes, this unsolicited call came about because Mr. Cohen was “uncertain” about whether ADC was a buying group, and he wanted to see if Mr. Sullivan knew anything about its structure. (CC Br. 33). But as soon as Mr. Cohen brought ADC up, Mr. Sullivan quickly put an end to the conversation:

[When Mr. Cohen] started talking about Atlantic Dental Care ... [h]e asked if I knew what they were, and I told him I did not. Then he started to tell me more about them, and I immediately stopped him, and I said, “Chuck, this is not a discussion that you and I should be having” ... [and] I cut off the discussion with him on that topic.

(Sullivan, Tr. 3946).

The fourth alleged “reach out” was an unsolicited text message from Mr. Cohen to Mr. Sullivan on March 27, 2013, after Benco had done more research on ADC. Having earlier raised the question of what ADC was, and Mr. Sullivan not knowing, Mr. Cohen was simply closing the loop. (Cohen, Tr. 722-23). The text message is entirely one-sided. It does not reflect any statement by Schein, any agreement by Schein, or any action by Schein consistent with any agreement.

The fifth alleged “reach out” was a March 26, 2013 unsolicited text message from Mr. Cohen to Mr. Sullivan regarding Dental Alliance. Schein had been working with Dental Alliance since July 2011 (*after* the start of the alleged conspiracy), and continued to do so with Mr. Sullivan’s express approval. (SF 1309-35; RX 2349; RX 2350). Mr. Cohen was just seeking “market intelligence.” (Cohen, Tr. 557). Regardless, Mr. Sullivan did not respond to the text but was concerned about Mr. Cohen’s continued effort to engage in a discussion about specific customers despite Mr. Sullivan’s prior warnings. So, Mr. Sullivan called Mr. Cohen to repeat his admonition and deliver “a much stronger message” that Mr. Cohen should not be discussing specific customers with him. (SRF 997-98; Sullivan, Tr. 4205-07).

The sixth alleged “reach out” was an unsolicited October 2013 call from Benco’s Mr. Ryan to Schein’s Mr. Foley. Just as Mr. Sullivan did with Mr. Cohen, when Mr. Ryan turned the topic to Smile Source, Mr. Foley ended the discussion and reported it to his boss, Mr. Muller. (SRF 1016-17; Foley, Tr. 4576, 4578-79; CX 0243; CX 0309 (Muller, IHT at 161)). Mr. Foley did not share any information about Schein’s policies, practices, or plans concerning buying groups generally or Smile Source specifically. (SRF 1016; Foley, Tr. 4579).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding. None of the individual findings cited in this proposed finding contain

evidence of Benco reaching out to Schein “to discuss buying groups on no fewer than six occasions during the period from 2011 through 2014.

Again, Complaint Counsel’s proposed finding does not match the actual evidence. The only communications that Chuck Cohen has ever even had with anyone at Schein about buying groups is limited to one exchange with Tim Sullivan about Atlantic Dental Care (“ADC”), which was not actually a buying group. (Cohen, Tr. 715). Complaint Counsel’s unsupported inferences, conjecture, and speculation cannot support a finding of fact.

680. Through communications with Schein, Benco’s executives gained the understanding that Schein had a policy against recognizing buying groups during the conspiracy period. (*See* CCF ¶¶ 675-678,).

Schein’s Response:

False.

Complaint Counsel cites no record evidence to support this finding. It only cites other proposed findings, which -- as set forth in Schein’s specific replies -- also fail to support its characterization of the evidence.

Substantively, the evidence does not establish that Schein had a policy against recognizing buying groups during the alleged conspiracy period. (SF 141-55, 159-60). Nor does the evidence establish that Benco gained *any* understanding of Schein’s buying group policies or practices. Mr. Cohen specifically testified that he did not know what Schein’s policies or practices were. (Cohen, Tr. 845). He also testified that Schein never disclosed its policies or practices to Mr. Cohen. (Cohen, Tr. 845; CX 8015 (Cohen, Dep. at 417); RX 1127 (Cohen, Dep. at 366)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding. None of the individual findings cited in this proposed finding contain evidence that “Benco’s executives gained the understanding that Schein had a policy against recognizing buying groups during the conspiracy period.” Benco never gained such understanding. Moreover, this statement is false – Schein did not have such a policy and, in fact, did business with buying groups. (HSFF ¶¶ 120-58).

681. Benco’s understanding that Schein did not work with buying groups during the conspiracy period was contrary to market intelligence Benco received. (CCFF ¶¶ 670-673, 683-684).

Schein's Response:

The asserted fact is based on the false premise that Benco had “[an] understanding that Schein did not work with buying groups.”

Complaint Counsel cites no record evidence to support this finding. It only cites other proposed findings, which -- as set forth in Schein’s specific replies – also fail support its characterization of the evidence.

Substantively, Mr. Cohen testified that he did not have knowledge of Schein’s buying group policies or practices, and that Schein never disclosed its policies or practices to him. (Cohen, Tr. 845; CX 8015 (Cohen, Dep. at 417); RX 1127 (Cohen, Dep. at 366)).

While there are examples in which Mr. Cohen (or others) at Benco received information from customers and others (whether accurate or not) suggesting that Schein

might be working with, or competing for, buying groups, there is no indication that this information was “contrary” to any understanding Mr. Cohen or Benco had about Schein’s policies or practices. In fact, Mr. Cohen consistently testified that his understanding of Schein’s buying group policies and practices was informed by market intelligence gathered from customers, or what he called “scuttlebutt.” (CX 0301 (Cohen, IHT at 217)). While at his IHT Mr. Cohen did not recall hearing any such “scuttlebutt” – and therefore drew an inference during his IHT that Schein was not working with buying groups – Mr. Cohen’s recollection was refreshed when he was shown the market intelligence. (CX 0301 (Cohen, IHT at 217)). As he testified, he was aware that, by the end of 2011, Schein was working with at least three buying groups. (CCFF 670 (Dental Cooperative), 672 (“at least three buying groups”), 673 (Smile Source), 683 (Unified Smiles)).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding. None of the individual findings cited in this proposed finding contain evidence that supports Complaint Counsel’s statement of opinion in this proposed finding.

682. Benco’s sales team informed Cohen and Ryan that Schein was doing business with buying groups. (CCFF ¶¶ 666-673, 683-684; *see also* Cohen, Tr. 851-852, 967; CX1039 at 001; CX1038 at 001; CX1052 at 001; CX0061 at 001).

Schein's Response:

From time to time, Mr. Cohen received information (which may or may not have been accurate) from his sales team suggesting that Schein was doing business with, or competing for, the business of buying groups.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding. None of the individual findings cited in this proposed finding contain evidence that supports Complaint Counsel's statement of opinion in this proposed finding.

683. On January 11, 2012, Cohen received an email from a Benco territory representative (Michael Paquette) informing him of market intelligence that Schein would be participating in the buying group Unified Smiles. (CX1052; Cohen, Tr. 501-503).

Schein's Response:

Schein does not dispute that an industry participant (and perhaps customer), Dr. Aksu, told his Territory Representative, Michael Paquette, that he "thought that Schein would be" participating in a new "buying consortium" called Unified Smiles. Schein notes, however, that this information was incorrect. Three weeks earlier, Mr. Foley had previously explained that it could not offer Unified Smiles the DSO pricing it was seeking. (CX 2062; Foley, Tr. 4691-93).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit and testimony.

First, the cited exhibit does not support the proposed finding. It contains no credible market intelligence at all. The cited exhibit only contains a Benco territory representative mentioning a "thought" of a dentist. (CX1052).

Second, the cited testimony similarly does not support the proposed finding. Chuck Cohen's actual testimony was:

Q. And so here Mr. Paquette is mentioning Schein there; right?

A. Yes.

(Cohen, Tr. 503).

684. On March 25, 2013, Chuck Cohen received an email from a Benco sales representative (Jamie Kasinski) informing him of market intelligence that Schein worked with a buying group called Dental Alliance. (CX0061 at 001; Cohen, Tr. 556-557, 967).

Schein's Response:

The asserted fact misrepresents the evidence. The asserted fact implies that Mr. Cohen was informed by Jamie Kasinski that Schein was working with a buying group when in fact, Mr. Cohen was well aware of Schein working with the buying group, he'd just forgotten the group's name. Mr. Cohen drafted the March 25, 2013 email to Jamie Kasinski asking for the name of the group he knew that Schein was working with in Jamie Kasinski's area. (CX 0061 (Subject: Buying Group. "What's the name of the buying group in your area that works with Schein?")). This was not Mr. Cohen receiving "market intelligence," it was Mr. Cohen getting the name of a Schein buying group partner he forgot from a Benco employee familiar with the buying group.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit and testimony.

Chuck Cohen was "always skeptical about what customers say, who they're working with, who they're not working with." (Cohen, Tr. 522-23). With respect to the information regarding Dental Alliance, Chuck Cohen made it clear in his trial testimony that the only market information he obtained was Dental Alliance itself saying it worked with Schein. (Cohen, Tr. 557 (Q. And Mr. Kasinski responded with the name of the buying group that was working with Schein; right? A. That said they were working with Schein.))).

685. INTENTIONALLY LEFT BLANK.

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

No response required.

B. Schein Ensured Compliance With the Agreement Internally.

686. Following communications with Benco, Schein initiated a no buying group strategy. (CCFF ¶¶ 345-350, 661-664, 717-954

Schein's Response:

False.

Complaint Counsel cites no record evidence to support this finding. It only cites other proposed findings, which -- as set forth in Schein's specific replies -- also fail to support their characterization of the evidence.

Substantively, Schein never had a "no buying group" strategy. Schein addressed buying groups on a case-by-case basis. Schein's decision to partner with buying groups that could deliver incremental volume and drive compliance (and to avoid those that could not) was established unilaterally, without consultation or communication with Benco, and occurred long before the start of the alleged conspiracy period. (*See, e.g.*, SF 189-217 (discussing the 2010 Guidance arising out of the Pugh Dental Alliance relationship)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1. Schein Historically Worked With Buying Groups.

687. Schein had worked with some buying groups prior to 2011. (Sullivan, Tr. 3912-3914; CCF ¶¶ 432-453).

Schein's Response:

Schein worked with buying groups prior to 2011, during 2011, and after 2011.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

688. For example, Schein had a contract with a buying group called Smile Source from 2008, as well as the Dental Cooperative of Utah from 2007. (Sullivan, Tr. 3912-3914; CX0174 at 001 (2014 email discussing end of relationship with Utah Co-op after 8 years of working together); CX8034 (Cavaretta, Dep. at 68)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

689. On September 15, 2010, Sullivan emailed his boss, Jim Breslawski about supplying Smile Source, and Sullivan wrote: "[N]either of us support concept of buying groups. Whereas it may benefit SM to some extent, the risk to overall HSI (due to having 40% share in market) for margin erosion, image, as well as other competitors then following suit and huge price war breaks out." (CX2113 at 001; Sullivan Tr. 3921).

Schein's Response:

No response, other than to note that the cited email is from before the alleged conspiracy. See SRF 432 for a fuller discussion of CX 2113. (*See also* SRF 436).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

690. On September 15, 2010, Sullivan identified to his boss the potential downsides of Schein discounting to Smile Source: (1) discounting to Smile Source could lead to margin erosion; (2) discounting to Smile Source could have a negative impact on Schein's image; and (3) discounting to Smile Source could lead to other competitors then following suit and a huge price war breaking out. (Sullivan, Tr. 3921-3922; CX2113 at 001).

Schein's Response:

No response, other than to note that the cited email is from before the alleged conspiracy period. See SRF 432 for a fuller discussion of CX 2113.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

691. In spite of the risks of discounting to Smile Source, Sullivan did not want to lose Smile Source as an account customer in September 2010. (Sullivan, Tr. 3922-3923; CX2113 at 001).

Schein's Response:

The asserted fact is duplicative of CCFF 432, 448, 449, and 450. Schein incorporates its responses to those findings by reference here. (SRF 432, 448-50)

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

692. In the same email dated September 15, 2010 (CX2113), Sullivan wrote: "[N]either of us wants to lose [Smile Source] as an account. They are \$1 million and growing." (CX2113 at 001; Sullivan, Tr. 3922-3923).

Schein's Response:

This asserted fact is duplicative of CCFF 432, 448, 449, and 450. Schein incorporates its responses to those findings by reference here. (SRF 432, 448-50) Schein notes that Mr. Sullivan testified he did not have knowledge on the amount of business Schein was doing with Smile Source, and therefore did not know if Smile Source was doing \$1 million of business with Schein at the time. (Sullivan, Tr. 3923).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

693. Sullivan testified that Smile Source was doing, or had the potential to bring in, \$1 million in revenue to Schein at the time of his September 15, 2010 email (CX2113). (Sullivan, Tr. 3923). Sullivan saw value in the fact that Smile Source was \$1 million and growing. (Sullivan, Tr. 3923).

Schein's Response:

This asserted fact is duplicative of CCFF 432, 448, 449, and 450. Schein incorporates its responses to those findings by reference here. (SRF 432, 448-50) In response to Complaint Counsel's question, "\$1 million was the revenue that Smile Source

was bringing in to Schein?” Mr. Sullivan testified, “I believe so, that’s right, or the potential. I’m sorry, I believe that was the potential of what they – their offices could purchase. I don’t know that that’s what they were doing with Schein at the time. I don’t know.” (Sullivan, Tr. 3923).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

694. On September 15, 2010, Sullivan also wrote: “I am inclined to ‘allow’ this account to join (not that it’s up to me/us) and see what happens. After all, Scott and HSD (per Hal) only get about 30% of this accounts [sic] business today. So if theory works, we would get 100% at lower margins, but all parties win in overall GP \$’s.” (CX2113 at 001; Sullivan, Tr. at 3923-3924).

Schein’s Response:

This asserted fact is duplicative of CCFF 438. Schein incorporates its responses to that finding by reference here.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

695. Sullivan’s September 15, 2010 email (CX2113) identified that, “working with Smile Source, could bring Schein more of [an individual] dentist’s business” at lower margin. (Sullivan, Tr. 3924). Sullivan testified that he was in favor of testing the Smile Source model because “even

though Schein would get lower margin, Schein would get more gross profit dollars.” (Sullivan, Tr. 3924).

Schein’s Response:

The asserted fact is imprecise. In response to Complaint Counsel’s question, “And Schein working with Smile Source could bring Schein more of this dentist’s business?” Mr. Sullivan testified, “*That was the theory* we wanted to test, yes.” (Sullivan, Tr. 3924 (emphasis added); *see also* SRF 432). As Dr. Marshall’s analysis showed, the theory did *not* work, and Schein lost money by doing business with Smile Source in 2010. (SF 1722-35; RX 3058; Marshall, Tr. 3073-75, 3121-22).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

696. On February 23, 2011, Sullivan explained to buying group Smile Source that he was very excited about Smile Source’s “business model.” (CX2899 at 001 (Statement of Sullivan: “I remain very excited about our future together and the business model you have created. As we discussed, your approach to your members lines up extremely well with our approach to them as customers.”); Sullivan, Tr. 3931-3932).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

697. Sullivan's February 23, 2011 email (CX2899) followed a meeting between Schein and Smile Source the day before. (Sullivan, Tr. 3931).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

698. At the time of Sullivan's February 23, 2011 email (CX2899), Smile Source had executives and an office. (Sullivan, Tr. 3931).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

699. Following this email, Sullivan and Cohen attended the Chicago Dental Society Midwinter Meeting, held February 24-26, 2011 in Chicago, IL. (CCFF ¶ 358; CX8015 (Cohen, Dep. at 40-41)).

Schein's Response:

There is no evidence of any connection between the Chicago Dental Society Midwinter Meeting and Mr. Sullivan's email to Smile Source. There is thus no basis for Complaint Counsel's lead-in phrase, "following this email."

Nor does the evidence support the assertion that "Sullivan and Cohen attended the Chicago Dental Society Midwinter Meeting" in 2011. Mr. Cohen testified that he "typically go[es]," but "[does]n't recall specifically missing one or not missing one." (CX 8015 (Cohen, Dep. at 41)). As to whether he might "see" Mr. Sullivan at meetings he attended, Mr. Cohen testified that "I sometimes see him, sometimes not," defining "see" as "see out of the corner of my eye, like walking past the Schein booth and seeing Tim Sullivan in the booth." (CX 8015 (Cohen, Dep. at 42)).

The asserted fact is thus irrelevant and the citations to it in Complaint Counsel's Post-Trial Brief are misleading. There is no evidence that would support an inference that, where Mr. Sullivan and *maybe* Mr. Cohen attended the Chicago Dental Society Midwinter Meeting in February 2011, such attendance precipitated a meeting or even a communication by Mr. Sullivan with Mr. Cohen. Complaint Counsel cites no evidence that would support an inference that any communications between Mr. Sullivan and Mr. Cohen at this industry event would involve a substantive communication or pertain to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the event that would bear on the substance or purpose of any meeting or communications between Mr. Sullivan and Mr. Cohen at the event. Complaint Counsel's citations in its Post-Trial Brief to industry event attendance as circumstantial evidence of an agreement requires inferences

that there were discussions about buying groups at these events, which is nothing more than pure speculation. (See CC Br. 62, 107, 109, 111).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

700. By the second half of 2011, Sullivan's tone regarding buying groups had changed. (CCFF ¶¶701-707; see also CCFF ¶¶ 709-716, 729-732).

Schein's Response:

False, and vague as to time period. Complaint Counsel cites no record evidence to support this finding. It only cites other proposed findings, which – as set forth in Schein's specific replies – also fail to support its characterization of the evidence.

Substantively, as Mr. Sullivan testified, his tone towards buying groups has ***never changed***. He always has been, and is still to this day, skeptical of buying groups. (Sullivan, Tr. 4085 (“I have always been and I am to[o] today very skeptical about the value that buying groups can bring both to Henry Schein or to its members I’ve seen some work, and we’ve taken a chance and we’ve engaged with some, and many we don’t see work.”)). Indeed, Mr. Sullivan confirmed that, as of December 2011, his views on buying groups had not changed as he still remained “skeptical,” just as he was in September 2010 when evaluating whether Schein should continue its relationship with Smile Source. (Sullivan, Tr. 4103, 4133).

Complaint Counsel ignores documents and testimony prior to 2011 where Mr. Sullivan expresses the same “tone regarding buying groups” as in 2011 and beyond. (*Compare* CX 2296-001 (Jan. 2010: “I do not support us opening Buying Clubs”), CX 2451-001 (Mar. 2010: “not interested in GPOs. The risk is much greater if we do sign th[a]n if we don’t.”), CX 2111-003 (Sept. 2010: “that’s the Buying Group formula that doesn’t work for HSD”), *and* CX 2113 (Sept. 2010: neither Mr. nor Mr. Muller “support the concept of buying groups”), *with* CCFF 705, 709, 713, *and* 729). There is no evidence that Mr. Sullivan’s tone towards buying groups changed in late 2011.

Further, Mr. Cavaretta, who worked closely with Mr. Sullivan, confirmed that he did not notice any change in Mr. Sullivan’s behavior regarding buying groups during the 2011-2015 time frame. (Cavaretta, Tr. 5530). In fact, Mr. Sullivan directed Mr. Cavaretta to come up with a strategy to work with buying groups during the alleged conspiracy period. (Cavaretta, Tr. 5530-31).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

701. On July 17, 2011, Sullivan responded to an email chain with senior Schein executives, including Breslawski, Bergman, Mlotek, and Muller regarding the buying group Synergy. (CX0185 at 001; Sullivan, Tr. 3940).

Schein’s Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

702. Breslawski was Sullivan's boss at the time of the email (CX0185). (Sullivan, Tr. 3942).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

703. Bergman, chairman and CEO of Henry Schein, was Breslawski's boss at the time of the email (CX0185). (Sullivan, Tr. 3942).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

704. Mlotek was an executive vice president of Henry Schein, Inc. responsible for business development. (Sullivan, Tr. 3942).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

705. On July 17, 2011, Sullivan informed his boss, Breslawski, along with Bergman, Mlotek, and other Schein executives (CX0185), "I don't think you will ever see a full service dealer get involved with GPOs." (CX0185 at 001; Sullivan, Tr. 3943).

Schein's Response:

Mr. Sullivan testified that his statement in the email was an exaggeration because, as Schein was working with buying groups at the time, "[c]learly we are already doing that." (CX 0311 (Sullivan, IHT at 191)). At the time of the email, Schein had established relationships with Smile Source, the Dental Co-Op of Utah, Dentists for a Better Huntington, among others. (SF 229, 583, 625, 679, 719).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

706. When Sullivan wrote “GPOs” in CX0185, he was referring to buying groups. (Sullivan, Tr. 3943).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

707. At the time he wrote the email in CX0185, Sullivan had knowledge that Schein had entered into a number of discounting arrangements with buying groups. (Sullivan, Tr. 3943).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

708. By December 2011, Schein’s practice of working with buying groups had changed. (CCFF ¶¶709-727).

Schein’s Response:

False. Complaint Counsel cites no record evidence to support this finding. It only cites other proposed findings, which – as set forth in Schein’s specific replies – also fail to support its characterization of the evidence.

Substantively, the evidence does not support a conclusion that Schein changed its behavior with regard to buying groups by December 2011, or even changed its behavior at all. To the contrary, Schein consistently evaluated buying group opportunities on a case-by-case basis, doing business with some but not all, before and after 2011. (SF 159-182). Indeed, Schein signed up a new buying group (MeritDent) immediately after Complaint Counsel claims the conspiracy began (SF 973-75), and Schein continued to do business with existing and new buying groups throughout the alleged conspiracy period (SF 144, 150, 159, 1384).

Thus, Complaint Counsel's asserted fact is not supported by the weight of the evidence. *First*, Schein did not have a "practice of working with buying groups" before December 2011. Rather, Schein's practice has always been to selectively work with buying groups that made business sense after evaluating opportunities on a case-by-case basis. (SF 159-82). Before December 2011, Schein turned down buying groups such as CF Dental, Synergy Dental, and Business Intelligence Group, while it engaged with others such as Comfort Dental, Intermountain Dental Associates, and Advantage Dental. (SF 206-07, 212-16, 222, 377-94, 446-67, 493-511, 732-48). Internal Schein documents stretching back to 2002 express skepticism towards buying groups. (*See, e.g.*, RX 2405-001 (2002: "[W]e have held a pretty firm line on saying NO to virtually all of them.... [T]his type of GPO would kill the margins for both manufacturers and distributors.... [T]here would be no increased volume and just lower costs.... In my opinion we need to stop this effort."); CX 2296-001 (2010: "I do not support us opening Buying Clubs."); CX 2503-001 (2010: "I do not believe in selling to Buying Groups – and we have closed some down already...."); CX 2451-001 (2010: "[N]ot interested in GPOs. The risk is much greater if

we do sign th[a]n if we don't.”); CX 2113-001 (2010: neither Mr. Sullivan nor Mr. Muller “support [the] concept of buying groups.”)).

Second, there was no change in Schein’s behavior. Schein continued signing up new buying groups after December 2011. On December 22, 2011, for instance, Mr. Cavaretta outlined a proposal to do business with the MeritDent buying group, and Schein entered into an agreement with MeritDent on February 7, 2012. (SF 973, 975-76). As another example, Schein signed up the Schulman Group in April 2013. (SF 1095-97).

Third, Schein continued its existing buying group relationships after December 2011. These included, among others, Advantage Dental, Breakaway, Comfort Dental, the Denali Group, the Dental Co-Op of Utah, Dental Partners of Georgia, Dentists for a Better Huntington, Intermountain Dental Associates, Long Island Dental Forum, OrthoSynetics, and Steadfast. (SF 282, 380, 412-13, 438, 554-58, 583-624, 625, 679, 687, 719, 725, 737, 745, 940, 945-46, 1029, 1202, 1206).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

709. On December 7, 2011, Sullivan informed his direct report, Steck, and other Schein employees that he did not want to lead in getting buying groups started in dental. (CX2456 at 001; Sullivan, Tr. 3944). Specifically, on December 7, 2011, Sullivan wrote an email with the subject: “Follow up on Dental GPO,” and stated: “I am still of position that we do NOT want to lead in getting this initiative started in dental. I think that it is a very slippery slope.” (CX2456 at 001 (emphasis in original); Sullivan, Tr. 3943-3944).

Schein's Response:

Mr. Sullivan's email must be understood in context, which is entirely omitted from the asserted fact. Mr. Sullivan's statement was in response to a request to start a buying group with the PEARL network at NYU. As Schein's Steve Kess, Vice President of Global Professional Relations, explained, given "[t]he brand ... position of HSD and [J]SM ... [w]ith almost 40% market share," contracting with a national GPO "could be a disaster to our pricing and [gross profit] structure." (SF 1079; CX 2456-002). Mr. Naftolin, who brought the opportunity to Schein, conceded it "looks somewhat as a losing proposition on the dental side...." (CX 2456-002). Mr. Sullivan echoed these sentiments. Far from indicating a change of position, he relayed that he was "*still* of [the] position that we do NOT want to lead in getting this initiative started in dental," as it is "a very slippery slope," and "[a]t the end of the day, [Schein] provide[s] package discount 'deals' to those that *control buying*." (SF 1080; CX 2456-001 (emphasis added)). The idea that Schein would do business with buying groups that could drive compliance (*i.e.*, control buying), rather than pure "price-only" member models, was not new but had its origins in the Guidance that Mr. Muller, Mr. Foley, Mr. Steck, and Mr. Sullivan developed and agreed to in early 2010. (SF 208-11; Foley, Tr. 4638-41 (if a buying group "could drive compliance, then ... they could be a good opportunity for Schein")). Indeed, under the 2010 Guidance, Schein "continue[d] to work with groups." (CX 8025 (Sullivan, Dep. at 196)).

But "[s]imply being a 'member,'" as Mr. Sullivan explained in the same email cited by Complaint Counsel, "has historically provided little value or incentive to drive change in purchasing loyalty at the local GP [general practitioner] practice level, yet causes all sorts of issues for those members and local area non-members who expect the same." (SF 1081; CX 2456-001). Thus, Mr. Sullivan's "slippery slope" comment was a clear reference

to the risk of cannibalization posed by buying groups, and particularly by price-only buying groups.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

710. In this December 7, 2011 email (CX2456), Sullivan referred to a GPO as a slippery slope. (Sullivan, Tr. 3944; CX2456 at 001).

Schein's Response:

This is a restatement of CCFF 709, and Schein incorporates its response to CCFF 709 here. (SRF 709). Consistent with the 2010 Guidance, Mr. Sullivan's "slippery slope" comment was a clear reference to the risk of cannibalization posed by buying groups, and particularly by price-only buying groups.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

711. This was not the only time that Sullivan used the term "slippery slope" to refer to a GPO. (Sullivan, Tr. 3944).

Schein's Response:

No response, other than to note that Mr. Sullivan's "slippery slope" comment was a clear reference to the risk of cannibalization posed by buying groups.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

712. On December 22, 2011, Sullivan had a meeting with Cavaretta, Steck, and Chatham regarding a buying group based in Las Vegas, Merit Dent. (Cavaretta, Tr. 5579-5580 ("I don't remember the specific conversation, but I wrote it in the e-mail, so I had to have a conversation with them"); Sullivan, Tr. 3975-3977; CX2457 at 001; CX2458 at 001).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

713. On December 22, 2011, Cavaretta wrote, "I just met with Tim, Dave and John about the Merit Dent group. As you can imagine they feel the same as we do that we don't want to be the first company to open the floodgates to the dangerous world of GPOs." (CX2458 at 001). Cavaretta's email (CX2458) referred to a meeting with Sullivan, Steck, and Chatham. (Cavaretta, Tr. 5579).

Schein's Response:

Complaint Counsel excludes Mr. Cavaretta's trial testimony about this email, as well as the second half of the email containing the proposal Mr. Cavaretta wanted to make to MeritDent. As he explained, his statement that Schein did not want "to be the first company to open the floodgates to the dangerous world of GPOs," reflected the fact that Schein did not have a specific growth strategy regarding buying groups nor were buying groups part of Schein's main strategy at the time. (Cavaretta, Tr. 5580; *see also* Sullivan, Tr. 4242). However, this does not mean that Schein was not working with buying groups at the time or was not open to such relationships. (Cavaretta, Tr. 5582). To the contrary, Schein had multiple buying group relationships as of the date of the email.

Despite Schein's legitimate concerns regarding buying groups (Cavaretta, Tr. 5581), Mr. Cavaretta nevertheless proceeded to lay out a potential proposal to MeritDent in the very same email cited by Complaint Counsel. (CX 2458 ("This is what I propose we do and I would like your thoughts")). Schein subsequently offered a buying group program to MeritDent, which culminated in a contract in February 2012. (CX 2458; Cavaretta, Tr. 5582; SF 972-77). Thus, the asserted fact and cited document and testimony do not indicate a change in Schein's approach to buying groups, as Complaint Counsel claims, but rather its continuation.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

714. Cavaretta wrote his email (CX2458) within a few hours of a meeting that took place with Sullivan. (Sullivan, Tr. 3978; Cavaretta, Tr. 5579-5580 (“I don’t remember the specific conversation, but I wrote it in the e-mail, so I had to have a conversation with them.”)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

715. Sullivan did not recall what he said at the December 22, 2011 meeting with Cavaretta. (Sullivan, Tr. 3978).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

716. After December 22, 2011, Cavaretta was promoted at Schein. (Sullivan, Tr. 3978).

Schein’s Response:

While Mr. Cavaretta was promoted after 2011, Complaint Counsel fails to specify when or any reason to connect Mr. Cavaretta’s subsequent promotion to the date December 22, 2011. Indeed, the only evidence of a promotion given to Mr. Cavaretta after 2011 is

when he was promoted to Vice President of Sales for the Western Area in 2015. (CX 0305 (Cavaretta, IHT at 30)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

2. By December 21, 2011, Schein "no longer participate[d] in Buying Groups."

717. In December 2011, Janet Knysz was interested in created a buying group called Unified Smiles. (Foley, Tr. 4549).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

718. In December 2011, Knysz approached Schein regarding partnering with Unified Smiles. (Foley, Tr. 4545 (Knysz was communicating with Foley regarding a potential relationship with Unified Smiles); CX2062 at 004-005).

Schein's Response:

No response, other than to note that Unified Smiles had zero members at the time Ms. Knysz approached Mr. Foley in December 2011. (Foley, Tr. 4685-86).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

719. On December 21, 2011, Foley wrote to Knysz of Unified Smiles: "[U]nless you have some 'ownership' of your practices Henry Schein considers your business model as a Buying Group, and we no longer participate in Buying Groups." (CX2062 at 001; Foley, Tr. 4545). Foley testified that was the first time he told Knysz of Unified Smiles that Henry Schein did not participate in buying groups. (Foley, Tr. 4545-4546).

Schein's Response:

Complaint Counsel fails to provide necessary context of Schein's experience with Ms. Knysz leading up to Mr. Foley's email, and thus mischaracterizes the evidence. The full context is set forth in SF 1286-1308. In a nutshell, when Mr. Foley met with Ms. Knysz, Ms. Knysz presented Mr. Foley with a copy of the "proprietary pricing" that Schein offered to the DSO Great Expressions, which Ms. Knysz used to own. (SF 1287-91). The pricing was based on Great Expressions' stature as Schein's fifth-largest corporate customer. (SF 1291). Yet Ms. Knysz demanded the same pricing for Unified Smiles even though Unified Smiles had "no customers whatsoever." (SF 1291). Moreover, Mr. Foley learned that Ms. Knysz was not entirely truthful. Her representation that Unified Smiles would "administer operations the same way as [Great Expressions] with all purchases running through [its] corporate office" turned out not to be true, as it became apparent Unified Smiles would be a price-only buying group with no demonstrable mechanism of compliance. (SF 1292-93; Foley, Tr. 4543-44).

Based on this, Mr. Foley explained to Ms. Knysz that absent “some ‘ownership’” of the individual locations, Schein would consider Unified Smiles to be a “buying group” and could not extend DSO pricing to her. (SF 1295-97). Still, Ms. Knysz was adamant about receiving Great Expressions (large DSO) pricing, even though Unified Smiles did not have any members. (SF 1298; Foley, Tr. 4685-86). Mr. Foley’s statement that Schein “no longer participates in Buying Groups” was designed to end the discussions with Ms. Knysz rather than continue to “argue” and try to explain why Unified Smiles could not receive DSO pricing. (SF 1300). At the time, of course, Special Markets was still participating with buying groups. (SF 1300). Schein also continued to establish relationships with buying groups after December 21, 2011. (SF 1300). Indeed, only two months later, Schein entered into a relationship with MeritDent buying group. (SF 969-77).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

720. On December 21, 2011, Foley turned down Unified Smiles informing Knysz of Schein’s new policy that it “no longer participate[d] in Buying Groups.” (CX2062 at 001; Foley, Tr. 4545, 4549 (“Q. Did Schein bid for Unified Smiles’ business after this e-mail? A. No. I ended the conversation with her.”)).

Schein's Response:

This asserted fact is essentially the same as CCFF 719, and Schein incorporates its response to that finding here. (SRF 719). As discussed above, Schein did not have any new policy regarding buying groups as of December 21, 2011.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

721. Foley's email referred to Unified Smiles as a buying group. (Foley, Tr. 4545 ("Q. You're referring –are you referring to Unified Smiles as a buying group in that last sentence? A. Yes."); CX2062 at 001).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

722. On December 21, 2011, Foley wrote: "Buying Groups cause a lot of friction within our private dentist segment as it leads to unwarranted lower pricing for EXISTING customers." (CX2062 at 001 (emphasis in original); Foley, Tr. 4546). By this sentence in CX2062, Foley meant that Unified Smiles would cannibalize private practice dental practices that were currently doing business with Schein. (Foley, Tr. 4546).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

723. Foley sent Unified Smiles Schein's minimal requirements for ownership to be considered a DSO. (CX2062 at 002; Foley, Tr. 4546-4547).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

724. To be a DSO, Schein required Unified Smiles to make the business and operational decisions of the practice. (CX2062 at 001-002; Foley, Tr. 4549).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

725. Foley informed Unified Smiles that it would not work with Unified Smiles unless it met Schein's requirements to be a DSO. (CX2062 at 001-002; Foley, Tr. 4545-4549).

Schein's Response:

Complaint Counsel's asserted fact is overbroad and contrary to the weight of the evidence. As described in more detail in SRF 719, Ms. Knysz was demanding DSO pricing that was reserved for Schein's largest corporate customers. (SRF 719; SF 1291). In response, Mr. Foley informed Ms. Knysz of the minimum requirements to obtain Schein's DSO pricing. (SF 1294). But Mr. Foley did not say Schein would only work with Unified Smiles if it was a DSO. Mr. Foley also offered discounted pricing to the not-yet-formed Unified Smiles buying group, but Ms. Knysz was "adamant not to take that pricing." (SF 1298; Foley, Tr. 4692). Mr. Foley's ultimate decision to turn down Unified Smiles had nothing to do with the fact that Ms. Knysz wanted to form a buying group. (Foley, Tr. 4691-92).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

726. Foley wrote in CX2062 that if Unified Smiles could meet the requirements for a DSO, "[w]e'd be happy to work with you under this type of arrangement." (CX2062 at 001).

Schein's Response:

CCFF 726 is simply a quote from the email that Complaint Counsel cites in CCFF 725. Schein incorporates its response to CCFF 275 here. (SRF 725). In a nutshell, Ms. Knysz was adamant about securing DSO pricing for Unified Smiles. However, in order to qualify for pricing that Schein offered to DSOs like Great Expressions, Ms. Knysz's group needed committed volume so that Schein could negotiate pricing and chargebacks from manufacturers. (SRF 719, 725). Based on the pricing requested by Ms. Knysz, Mr. Foley sent her the minimal requirements of a DSO and informed her that Schein would "be happy to work with you under this type of arrangement." (CX 2062-001). He did not say, however, that it was the only arrangement under which Schein would be willing to work with Unified Smiles. (SRF 725).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

727. Following the email chain, CX2062, Schein did not bid for Unified Smiles' business. (Foley, Tr. 4549 ("Q. Did Schein bid for Unified Smiles' business after this e-mail? A. No. I ended the conversation with her.")).

Schein's Response:

No response, other than to note that Mr. Foley decided not to bid on Unified Smiles on December 21, 2011 and was the sole decision maker. (Foley, Tr. 4692; *see also* SRF 719).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

3. In February 2012, Sullivan Informed Employees He Wanted to "KILL the Buying Group Model."

728. In or around January 2012, Schein's relationship with Smile Source ended. (Sullivan, Tr. 3935-3936).

Schein's Response:

Schein's relationship with Smile Source ended because Smile Source fired Schein. (SF 1114; Sullivan, Tr. 4144).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

729. On February 2, 2012, Sullivan wrote to Steck, Foley and other Schein employees regarding Smile Source: "Let's really take this serious and get after it. I'm really less concerned about the actual revenues, although very important too, rather more about what we can do to KILL the buying group model!!" (CX0199 at 001 (emphasis in original); Sullivan, Tr. 3936-3937).

Schein's Response:

Complaint Counsel attempts to assert that the inference that Schein had switched to an anti-buying group position can be drawn from this email. (CC Br. 27 ("Sullivan's anti-buying group position....")). However, this is not supported by the weight of the

evidence. CX 0199 was written after Smile Source fired Schein and moved to Burkhart. (SF 1111, 1114, 1352). After the firing, Mr. Sullivan wrote to Smile Source: [REDACTED]
[REDACTED]
[REDACTED] (RX 2090-001).

Of course, Mr. Sullivan's desire to look for ways to rekindle the partnership with Smile Source did not mean Schein ceased competing for the business of Smile Source members. That is what CX 0199 is about. In the email, three weeks after Smile Source had fired Schein, Mr. Sullivan expressed concerns that the team had not more quickly compiled a list of Smile Source members. (*See* CX 0199-003; Sullivan, Tr. 3936-37, 4145-46). He needed to motivate his team to keep competing despite the loss of the Smile Source account, so he wrote, "Let's really take this serious[ly] and get after it. I'm really less concerned about the actual revenues, although very important too, rather more about what we can do to KILL the[ir] buying group model!!" (CX 0199-001; Sullivan, Tr. 4146).

Mr. Sullivan's email merely reflects the legitimate desire to compete for and retain business that may have been at risk as a result of Smile Source's decision to end its relationship with Schein and partner with Burkhart. (Sullivan, Tr. 3932-33, 3935-37, 4144-46). Mr. Sullivan testified that, "when Smile Source terminated us ... I definitely wanted to kill – you know, go after ... Smile Source's model, and the customers that they were now attempting to switch to someone else." (Sullivan, Tr. 3932-33, 3935-37, 4144-46 ("We wanted to keep the business.")).

Contrary to Complaint Counsel's assertions, Mr. Sullivan's email reflects an executive trying to motivate his team to compete to retain business that was at risk due to Smile Source's decision to switch to Burkhardt. (Sullivan, Tr. 3932-33, 3935-37, 4144-46). It does not reflect any special animus towards buying groups generally, does not reflect any "change in Schein's buying group posture," and does not support an inference of a conspiracy to boycott buying groups. (SF 1144). Indeed, it is consistent with Mr. Sullivan's reservations towards buying groups expressed in 2010 and interest in testing the theory with Smile Source. (SRF 695, 700).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

730. In CX0199, Sullivan directed his team to "track the Smile Source customers" and attempt to "keep the business" from those customers. (Sullivan, Tr. 3936; CX0199 at 001).

Schein's Response:

The asserted fact is essentially the same as CCFF 729, and Schein incorporates its response to that finding here. (SRF 729).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

731. In CX0199, Sullivan informed his team that he was less concerned about the “actual revenues” from the Smile Source members and “more about what we can do to KILL the buying group model!” (CX0199 at 001; Sullivan, Tr. 3936-3937). When Sullivan wrote “actual revenues,” in CX0199, he was referring to revenues from Smile Source members. (Sullivan, Tr. 3937; CX0199 at 001).

Schein’s Response:

This asserted fact is essentially the same as CCFF 729, and Schein incorporates its response to that finding here. (SRF 729).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

732. If Schein lost an independent dentist or DSO customer, Sullivan would not tell his team that he wanted to see what could be done to “kill their business model,” but instead Schein would “work [its] tail off to show them [Schein’s] value . . . to earn their business back.” (Sullivan, Tr. 3933-3935).

Schein’s Response:

The asserted fact is imprecise, misleading, argumentative, and irrelevant. Complaint Counsel asked, “And if you wanted to win the customer back, you wouldn’t tell your team that you wanted to see what you could [do] to kill their business model, right?” (Sullivan, Tr. 3933-34). Mr. Sullivan asked for an important clarification: “Whose business model? The private practice dentist? ... The dentist’s business model?” Ms. Kahn: “The dentist.” (Sullivan, Tr. 3934). With that clarification, Mr. Sullivan answered that they would not try to kill the business model that makes up the bulk of Schein’s

customers. “There’s no model there to kill ... [W]e would be out there to earn their business in any way possible.” (Sullivan, Tr. 3935; *see also* SRF 729). That is precisely what Mr. Sullivan wrote in CX 0199: work to earn the business of independent dentists in any way possible. A buying group, however, is not a customer but an intermediary. It does not purchase supplies. As such, Mr. Sullivan’s testimony quoted in CCFF 732, which related to the actual customer, has no relevance to buying groups.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

4. Following Sullivan’s Guidance, Schein Executives Directed the Salesforce to Refuse to Sell to Buying Groups.

733. Schein executives instructed the salesforce that Schein wanted to avoid buying groups. (CCFF ¶¶ 743-954).

Schein’s Response:

False. Complaint Counsel cites no record evidence to support this finding. It only cites other proposed findings, which – as set forth in Schein’s specific replies which Schein incorporates here – also fail to support its characterization of the evidence.

Substantively, there is no evidence to support this proposed finding, as every Schein trial witness denied any instruction not to do business with buying groups. (SF 1358-85). To the contrary, issues were repeatedly raised regarding Schein’s buying group business due to the conflicts it created with FSCs, manufacturers, and other customers. (SF 98-103, 108-09; *see, e.g.*, SF 194-98, 287-90, 189-90). In response, Schein executives did not avoid

buying groups but rather found ways to continue buying group business despite the conflicts. For example, this is what happened with Smile Source and Dental Gator. (SF 224-33, 285-89, 301-08).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

734. Schein employees understood that Sullivan had directed employees that Schein should avoid working with, or selling to, buying groups. (CCFF ¶¶ 709-716, 754-758, 772-781, 793-807, *see also* CCFF ¶¶ 728-732, 836-838, 840-860).

Schein's Response:

False. Complaint Counsel cites no record evidence to support this finding. It only cites other proposed findings, which – as set forth in Schein's specific replies which Schein incorporates here – also fail to support its characterization of the evidence.

Substantively, there is no evidence to support this asserted finding of fact, as every Schein trial witness denied any instruction not to do business with buying groups. (SF 1358-85). To the contrary, Schein's sales force repeatedly raised issues with Schein's buying group business due to the conflicts created with FSCs, manufacturers, and other customers. (SF 97-111). In response, Schein executives did not avoid buying groups, but rather found ways to continue buying group business despite the conflicts. For example, this is what happened with Smile Source and Dental Gator. (SF 224-33, 285-89, 301-08).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

735. Sullivan personally directed Schein employees to refuse to bid on buying groups. (CCFF ¶¶ 709-716, 728-732, 754-758, 772-781, 793-807, 836-838, 840-860).

Schein's Response:

False. Complaint Counsel cites no record evidence to support this finding. It only cites other proposed findings, which – as set forth in Schein's specific replies which Schein incorporates here – also fail to support Complaint Counsel's characterization of the evidence.

Substantively, there is no evidence to support this asserted finding of fact, as every Schein trial witness denied any instruction from Mr. Sullivan or any other Schein executive not to do business with buying groups. (SF 1358-85). Mr. Sullivan testified that he never instructed Schein's sales force to avoid selling to buying groups and is not aware of anybody at Schein ever giving such instructions. (SF 1362). To the contrary, Mr. Sullivan personally *sought out* buying group business, particularly with Smile Source. (SF 895-97, 900-10, 1160-62, 1181-85). Indeed, Schein provided discounts to or competed for the business of new buying groups for Mr. Sullivan's "entire 21 years at Schein." (SF 1364).

Nor did Mr. Sullivan have the final say about whether or not HSD would do business with a buying group. (SF 1387). When Mr. Sullivan was approached by local HSD sales teams regarding buying group opportunities, Mr. Sullivan may have given his opinion, but "it would be up to ... them" to make a decision. (SF 1388). Mr. Sullivan was often overruled, or took no part in buying group decisions. (SF 1389-90). For example,

even though Mr. Sullivan thought the ADC opportunity “smell[ed] bad[,]” the HSD local team (including Michael Porro and Bobby Anderson) made the decision to “go for it” and bid on ADC as a buying group. (SF 1389).

Moreover, Mr. Sullivan had no authority over Special Markets employees, who continued doing business with buying groups and pursuing new buying groups throughout the relevant period. (SF 4, 6, 28-30, 34).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

736. Sullivan informed employees of Henry Schein that he viewed buying groups with disfavor. (CCFF ¶¶ 709-716, 728-731, 754-758, 772-781, 793-807, 836-838, 840-860).

Schein’s Response:

False. Complaint Counsel cites no record evidence to support this finding. It only cites other proposed findings, which – as set forth in Schein’s specific replies which Schein incorporates here – also fail to support its characterization of the evidence.

Substantively, Complaint Counsel mischaracterizes the evidence. Mr. Sullivan testified that he has always been *skeptical* of buying groups, not that he viewed them with “disfavor” as Complaint Counsel alleges. (SF 160). While Mr. Sullivan was aware of and expressed the challenges that buying groups presented (*i.e.*, cannibalization, FSC conflicts, margin erosion), Schein still entered into buying group partnerships when it made business sense. (SF 160).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

737. Henry Schein employees understood that Schein had a policy of not working with buying groups during the late-2011 to 2015 period. (CCFF ¶¶ 743-954).

Schein's Response:

False. Complaint Counsel cites no record evidence to support this finding, but instead relies on its other proposed findings, which – as set forth in Schein's specific replies – also fail to support Complaint Counsel's characterization of the evidence. Schein incorporates its response to those proposed findings here. (SRF 743-954).

Substantively, there is no evidence to support an assertion that Schein ever had a policy of not working with buying groups, let alone during the alleged period of late-2011 to 2015; nor is there evidence that Henry Schein employees ever had such an understanding. The evidence shows the precise opposite. Every Schein witness to testify at trial denied giving and/or receiving any instruction not to do business with buying groups. (Sullivan, Tr. 4019-20; Cavaretta, Tr. 5531-34, 5592; Meadows, Tr. 2580, 2578, 2594-95; Foley, Tr. 4602; Steck, Tr. 3709-10; Titus, Tr. 5193, 5247-48). Further, Mr. Sullivan never implemented any policy at Schein not to do business with, or to not give discounts to, buying groups. (SF 1363; Sullivan, Tr. 4086-87). As the evidence shows, Schein provided discounts to and competed for the business of new buying groups during Mr. Sullivan's "entire 21 years at Schein." (E.g., SF 1364; Sullivan, Tr. 4020-21).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

738. Sullivan was involved in the decision-making process with regard to all buying group decisions, including those relating to Special Markets. (Sullivan, Tr. 3998-3999).

Schein's Response:

Not true. When asked whether HSD always had a voice in internal discussions about buying groups, even if the groups were with Special Markets, Mr. Sullivan testified that he "wouldn't use the term 'always,' no." (Sullivan, Tr. 3998; *see also* Sullivan, Tr. 3919 ("not on every single one, but on certain ones ... that were brought to our attention ... [s]ome were just done locally without our knowledge")). Mr. Sullivan explained:

Well, it goes back to the internal conflict we had. There were groups within HSD, Henry Schein Dental, there were groups within Special Markets, and during this period ... we set some guidelines earlier in the 2010 or so time frame to help figure out how to start working it, and we were modifying it as we learned more. So there were still some that Special Markets would approach or they would approach them, and there were still some that HSD was involved with. We were starting to get more collaborative and starting to work better together, so we are starting to collaborate more together on making decisions on where they should go, which was good, but there wasn't always agreement.

(Sullivan, Tr. 3998). Moreover, the evidence shows that Mr. Sullivan was not involved in all buying group decisions, even those in HSD. (*See, e.g.*, SF 615-16, 1231-32, 1301-02, 1390). Consequently, the evidence establishes that Mr. Sullivan was ***not*** involved in the decision-making process with regard to *all* buying group decisions.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

739. Sullivan was involved in buying group decisions and buying group discussions relating to Special Markets even though he was President of Henry Schein Dental. (Sullivan, Tr. 3998-3999).

Schein's Response:

This asserted fact is just a repackaging of CCFF 738, and Schein incorporates its response to that finding here. (SRF 738; Sullivan, Tr. 3919 ("not on every single one, but on certain ones ... that were brought to our attention ...")).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

740. Even though Dental Gator was a Special Markets customer, Sullivan was involved in decisions about what to do about Dental Gator. (Sullivan, Tr. 3997-3998).

Schein's Response:

This asserted fact is incomplete and misleading because it does not explain *why* Mr. Sullivan became involved in that instance. Mr. Sullivan was involved in decisions about how to handle Dental Gator because its relationship with Special Markets was causing conflicts with HSD's FSCs, which were Mr. Sullivan's responsibility. (Sullivan, Tr. 3997;

SF 287-89). Thus, Complaint Counsel's assertion that Mr. Sullivan's involvement was "even though" Dental Gator was under Special Markets is misleading.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

741. Cavaretta sometimes worked directly with Sullivan regarding buying groups, even though he reported to Steck. (Steck, Tr. 3840).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

742. Meadows sometimes worked directly with Sullivan regarding buying groups, even though he reported to Steck. (Steck, Tr. 3840).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

a) Schein Instruction to Refuse to Sell to Buying Groups.

743. On December 21, 2011, Foley wrote to a buying group, Unified Smiles, that Schein "no longer participate[s] in Buying Groups." (CX2062 at 001; Foley, Tr. 4545).

Schein's Response:

This asserted fact is essentially the same as CCFF 719 and 720, and Schein incorporates its responses to those proposed findings here. (SRF 719-20). In a nutshell, Mr. Foley's statement was "poorly worded," and did not reflect Schein's nuanced views about buying groups. (Foley, Tr. 4691). His short statement was merely an attempt to swiftly end discussions with Ms. Knysz who had been very aggressive, made material misstatements, and made Mr. Foley feel "uneasy." (Foley, Tr. 4684-85). As Mr. Foley testified and the evidence demonstrates, his statement was not literally true – even if directionally correct for the type of buying group Ms. Knysz was proposing (Foley, Tr. 4690) – as Schein was working with buying groups at the time and continued to do so after this email. (Foley, Tr. 4690-91). Indeed, Mr. Foley negotiated a contract with the Dental Partners of Georgia, a buying group, five months later in May 2012. (SF 676, 679-680; Foley, Tr. 4610-12; RX 2543).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

744. Foley forwarded his email to the buying group to Rhonda Durante. (CX2062 at 001).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

745. Durante was an SAM who reported directly to Randy Foley. (Foley, Tr. 4542). Schein refers to strategic account managers in Special Markets as SAMs. (CX0311 (Sullivan, IHT at 111)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

746. Foley forwarded his email to Durante to keep her in the loop as she would be responsible for calling on the account if they were a DSO. (Foley, Tr. 4547).

Schein's Response:

To the extent Unified Smiles would have qualified for DSO pricing, then Ms. Durante—a Special Markets employee—would have called on the account. (Foley, Tr. 4547). However, there is no support for any inference that Mr. Foley was providing an instruction to Ms. Durante, a Schein Strategic Account Manager, in CX 2062. Complaint Counsel elicited no testimony from Mr. Foley to that effect, despite introducing the exhibit at trial. In fact, at trial, Mr. Foley denied ever providing an instruction to any Schein employee not to do business with a buying group. (SF 1379; *see also* Foley, Tr. 4652).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

747. Steck created an activity report for the dates of November 14 through December 30, 2011. (CX0201 at 001; CX0310 (Steck, IHT at 128-129) (document created in the 2011/2012 timeframe)). The activity report stated: "Have had two internal calls and one external call on partnering with the Florida Dental Association. This is the classic 'buying group' approach that we aren't buying into." (CX0201 at 001).

Schein's Response:

Complaint Counsel mischaracterizes the evidence by failing to acknowledge that Schein did compete for the business of the Florida Dental Association ("FDA") buying group and offered it discounts, but the FDA chose a different supplier instead. (SF 750-55). While Schein had concerns about the FDA's inability "to commit volume for their members or give [Schein] any kind of minimum purchase levels," and was skeptical that FDA members working with other distributors would switch to Schein, it prepared a

“value-added” offer that included seminars for members and increased discounts to members who made purchase commitments. (SF 753-54; CX 0310 (Steck, IHT at 133-34 (“we offered that if a customer signed up on a plan we would normally offer a \$25,000 customer that they could get that same with a \$15,000 commitment.”))).

Schein’s efforts and offer to work with the FDA demonstrate Schein’s willingness to engage with new buying groups, despite its skepticism and concerns, and is inconsistent with Complaint Counsel’s contention that Schein instituted a no-buying-group policy and instructed its sales force not to engage with new groups. (See CC Br. 27-29).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

748. Steck testified that “we” in the sentence “This is the classic ‘buying group’ approach that we aren’t buying into” (in CX0201) refers to Schein Dental. (CX0310 (Steck, IHT at 133)). Steck testified that “classic buying group” (in CX0201) referred to a group of dentists looking for a group discount “for no particular reason and no particular commitment.” (CX0310 (Steck, IHT at 134-135)).

Schein’s Response:

No response, other than to note that Mr. Steck was merely expressing that price-only buying groups that lacked the ability to drive compliance did not typically align with Schein’s value proposition.

Patterson’s Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

749. Steck's activity reports were usually sent to Sullivan. (CX0310 (Steck, IHT at 129)).

Schein's Response:

No response, other than to note that (i) there is no evidence that the particular report cited in CCFF 747 was sent to Mr. Sullivan, and (ii) Mr. Sullivan was not part of Schein's sales force. Complaint Counsel does not present any evidence that Mr. Steck's activity report was ever distributed to Schein's sales force.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

750. On January 26, 2012, Cavaretta wrote to Melanie Bingham and Hight regarding IDA: "It is dangerously close but I told him we would not do business with a GPO." (CX0168 at 001; Cavaretta, Tr. 5641).

Schein's Response:

False and misleading.

Intermountain Dental Associates ("IDA") is a buying group that Schein did business with throughout the relevant period. (SF 732-48).

The cited quote omits the next sentence in which Mr. Cavaretta makes it clear that Schein did business with IDA because it could force compliance. The full text of the email

is “[i]t is dangerously close but I told him we would not do business with a GPO. The difference here is that they will force any customer to purchase from Schein which is more along the lines of a corp account.” (CX 0168-001). Notably, this is a buying group account that Schein opened in May 2010, following the 2010 Guidance, where Mr. Foley noted in reference to IDA – at least a year before the start of the alleged conspiracy – that, “[w]hen Hal [Muller] and I met with Tim [Sullivan] and Dave [Steck] we decided [that] on Buying Groups ... they need to ... have complete control of purchasing policy that would force the distributor purchases to Schein.” (CX 2153-002).

Moreover, there is no support for any inference that Mr. Cavaretta was providing an instruction to Ms. Bingham, a Schein FSC, in CX 0168. Complaint Counsel elicited no testimony from Mr. Cavaretta to that effect, despite introducing the exhibit at trial. In fact, at trial, Cavaretta denied ever providing an instruction to any Schein employee not to do business with a buying group, referring to Complaint Counsel’s allegation that Schein instructed its sales force to reject buying groups as “false.” (SF 1369, 1371).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

751. On January 26, 2012, Cavaretta then wrote: “The difference here is that they will force any customer to purchase from Schein which is more along the lines of a corp account.” (CX0168 at 001; Cavaretta, Tr. 5642). By “corp account,” Cavaretta meant corporate practice or a DSO. (Cavaretta, Tr. 5642).

Schein's Response:

Mr. Cavaretta was highlighting that Schein partnered with IDA's buying group because it could drive compliance by "forc[ing] any customer to purchase from Schein...." (CX 0168-001). Schein was not saying that the IDA buying group was a corporate account or a DSO.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

752. Bingham was a field sales consultant ("FSC") who reported through Cavaretta at the time of the email CX0168. (Cavaretta, Tr. 5641-5642).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

753. In response, on January 26, 2012, Hight wrote to Cavaretta and Bingham that even if a group forced their members to buy from Schein, Special Markets would not work with them because "they really look like a GPO which we don't do." (CX0168 at 001).

Schein's Response:

The asserted fact is incomplete because it does not include Ms. Hight's testimony on what she meant by her statement. Ms. Hight testified that her statement that "[IDA] really look[s] like a GPO which we don't do" simply meant that it was not within her personal purview, as her small team was focused on "growing DSO business and community health center business and institutional business." (CX 8022 (Hight, Dep. at 186)). This testimony is supported by the fact that Schein had established a relationship with IDA's buying group by extending the group the same pricing that it extended the DSO arm of IDA. (SF 744). In any event, Complaint Counsel cites to no support for the inference that Ms. Hight's statement somehow was meant as an instruction to Schein's sales force, nor did it elicit any testimony to that effect.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

754. On February 20, 2012, Foley wrote to Debbie Torgersen-Foster, "Honestly, within Schein we have a few buying groups (BG) that we wish we didn't have. There's a large one under HSD in Utah and we used to have one in Special Markets called Smile Source." (CX0238 at 001; Foley, Tr. 4553; *see also* CCFF ¶ 2047).

Schein's Response:

No response, other than to note that Mr. Foley is highlighting that Schein was working with buying groups at this time.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

755. Torgersen-Foster was a SAM who reported directly to Foley. (Foley, Tr. 4553; CX8003 (Foley, Dep. at 132)). Schein refers to strategic account managers in Special Markets as SAMs. (CX0311 (Sullivan, IHT at 111)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

756. On February 20, 2012, Foley wrote to his direct report: Torgersen-Foster, "When existing Schein customers enroll, it simply erodes margins. When the BG markets their reduced spend, existing customers come to Schein and say, 'I don't want to join their group but I want their pricing' (per Tim Sullivan). So, this is a corporate decision, not to participate in these." (CX0238 at 001; Foley, Tr. 4554-4556).

Schein's Response:

The email refers to a buying group – Pro ABC – that Schein did do business with, and was opened by Special Markets. (CX 0238-002). Ms. Foster was relaying a question from another entity – a consulting group that wanted to pass along Schein discounts to its clients – about why Schein was doing business with Pro ABC. Mr. Foley expressed his

opinion that Schein had a few buying groups that did not make sense, and then noted that – in reference to “[t]he issue here” – Pro ABC “markets a reduced supply spend” (*i.e.*, markets the discount), to “cover[] their ‘marketing fee’” (*i.e.*, the middleman tax), but then “existing customers” complain and ask for the same “pricing.” (CX 0238-001). As such, Mr. Foley was simply relaying the fact the buying groups cannibalize existing sales and create conflicts with non-members.

There is no support for the inference that Mr. Foley was providing an instruction to Ms. Foster, a Schein Regional Account Manager, in CX 0238. In fact, Ms. Foster is not seeking instruction, but simply wanted to know why Pro ABC had been signed up. Moreover, Complaint Counsel elicited no testimony from Mr. Foley to that effect, despite introducing the exhibit at trial. At trial, Mr. Foley denied providing an instruction to any Schein employee not to do business with a buying group and clarified that there was never any corporate decision not to participate in all buying groups. (SF 1379-80). Both Special Markets and HSD provided discounts to buying groups the entire time Mr. Foley was employed by Schein. (SF 143-44). Mr. Foley testified that he could have “phrased [it] better” and was generally saying that price-only buying groups like Pro ABC are not buying groups that Schein is interested in because they are not able to drive compliance. (Foley, Tr. 4556, 4729). Mr. Foley also testified that he sent the email to Ms. Foster because he wanted her to move on to something more important, not that he was trying to disseminate an alleged policy that Schein did not work with buying groups. (Foley, Tr. 4729).

Patterson’s Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

757. Sullivan informed Foley that buying groups could cannibalize sales and reduce margins, and commented to Foley that "a buying group with reduced pricing would simply reduce that existing margin, so there's cannibalization." (Foley, Tr. 4555).

Schein's Response:

No response other than to note that Mr. Sullivan's concerns regarding cannibalization and reduced margins reflect unilateral business reasons for not wanting to partner with certain buying groups.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

758. Foley wrote regarding the end of the Henry Schein and Smile Source relationship: "Tim Sullivan is happy that we are less one more BG." (CX0238 at 001). Foley was referring to buying group when he wrote "BG." (Foley, Tr. 4554).

Schein's Response:

At most, Mr. Foley's comment constitutes speculation about Mr. Sullivan's state of mind, and thus, is not reliable or admissible for the truth of the matter asserted. Indeed, Mr. Foley testified that his statement was nothing more than a "flippant" comment based on his frustration of moving Smile Source from Special Markets to HSD. (Foley, Tr. 4728). Mr. Foley wanted to keep the Smile Source account in Special Markets and was

“territorial” about the group, which came across through what he described as “territorial anger” in his email. (Foley, Tr. 4728). At trial, Mr. Foley confirmed that Mr. Sullivan never communicated to him in any fashion that he was happy that Smile Source fired Schein. (Foley, Tr. 4728). In fact, Mr. Sullivan repeatedly expressed his interest in renewing Schein’s partnership with Smile Source. (RX 2090; CX 2580; RX 2328).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

759. On February 21, 2012, Foley received an email from Torgersen-Foster in which she wrote: “When you have a moment (ha, ha) can you take a look at the following presentation I made up using a bunch of the emails and documents you have given me? I am meeting with the Charlotte and Raleigh teams this Thurs and want to make sure it makes sense. Thanks boss!” (CX2065 at 001; Foley, Tr. 4557-4558). The subject of the email was: “Presentation To HSD.” (CX2065 at 001). Torgersen-Foster attached a document titled, “HSD BG vs. DSO document for Meetings.docx.” (CX2065 at 001).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

760. On February 21, 2012, Foley received a presentation from Torgersen-Foster in which she identified definitions of DSO, buying group, and large practice group “using a bunch of the emails and documents [Foley gave her].” (CX2065 at 001; Foley, Tr. 4557-4558).

Schein’s Response:

To the extent Complaint Counsel cites this evidence (or the proposed finding) for the truth of the matter asserted (*i.e.*, Ms. Foster’s email reflects information gathered from Mr. Foley), such evidence is pure speculation based on hearsay. Moreover, there is no support for the inference that Mr. Foley was providing any instruction to Ms. Foster. At trial, Mr. Foley denied providing an instruction to any Schein employee not to do business with a buying group. (SF 1379).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

761. Torgersen-Foster wrote to Foley on February 21, 2012: “Definition of a Buying Group: NEITHER SM NOR HSD WOULD TAKE ON: –An organization or group [o]f dentists that get together to leverage better pricing from a distributor, share best practices and/or network. –No centralized billing; dentists are individually paying their own bills –Dentists and support staff are not employed by one company or LLC –The lead person or entity is leasing equipment and supplies to the dentist.” (CX2065 at 002 (emphasis in original)). In this sentence, SM refers to Special Markets and HSD refers to Henry Schein Dental. (CX8001 (Torgersen-Foster, Dep. at 57); CX2065 at 002).

Schein’s Response:

Complaint Counsel mischaracterizes the evidence, ignoring Ms. Foster’s testimony on what she meant by her statement in CX 2065. Ms. Foster testified that this document was prepared for meetings with local FSCs and she is not sure if she even used this

presentation. (CX 8001 (Foster, Dep. at 51-54)). Specifically, Ms. Foster testified that the statement “neither SM nor HSD would take on” meant that at the field level, when sales representatives were getting leads, they should not be making decisions, but should instead be passing these leads up to the regional managers to determine if the buying groups were true win-win opportunities for Schein. (CX 8001 (Foster, Dep. at 58)). Indeed, “none of the field people, the feet on the street, were allowed to do anything and take [buying groups] on without running things up the chain.” (CX 8001 (Foster, Dep. at 60)). Consequently, Complaint Counsel lacks support for its assertion that this document somehow reflected an instruction to Schein’s sales force.

In any event, Mr. Foley testified that as written, Ms. Foster’s statement was inaccurate because both SM and HSD had a number of buying groups that they were actively working with at the time Ms. Foster wrote her email to Mr. Foley. (Foley, Tr. 4730).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

762. Foley would normally correct his direct report if he did not agree with something his direct report had written. (Foley, Tr. 4559).

Schein’s Response:

No response, other than to note that Mr. Foley could not recall if he had any type of follow-up with Ms. Foster on CX 2065. (Foley, Tr. 4559-60).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

763. Foley received this email from Torgersen-Foster, but he did not recall making any corrections to Torgersen-Foster's definitions. (Foley, Tr. 4559-4560; CX2065 at 001).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

764. Torgersen-Foster created the presentation attached to CX2065 to review it with the salesforce: "I created the document so I would have something to review with the teams. It was part of my job to meet with the local teams and help support them." (CX8001 (Torgersen- Foster, Dep. at 47-48); CX2065 at 002).

Schein's Response:

No response, other than to note that Ms. Foster could not recall if she actually presented this document to Schein's sales force. (CX 8001 (Foster, Dep. at 54 ("Again, I don't even remember if I ended up using it."))).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

765. When preparing the presentation, Torgersen-Foster tried to make sure that the presentation accurately reflected the emails that Foley had given to her. (CX8001 (Torgersen-Foster, Dep. at 53-54)).

Schein's Response:

This asserted fact is essentially the same as CCFF 760, and Schein incorporates its response to that finding here. (SRF 760).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

766. On March 28, 2012, Cavaretta wrote to Steve Dutson, a Regional Manager: "I want to avoid a GPO situation." (CX2563 at 001). Cavaretta's email was in reference to MeritDent. (CX2563 at 001; Cavaretta, Tr. 5649).

Schein's Response:

There is no support for the inference that Mr. Cavaretta was providing any instruction to Mr. Dutson, a Schein Regional Manager, in CX 2563. First, Complaint Counsel elicited no testimony from Mr. Cavaretta to that effect, despite introducing the exhibit at trial. In fact, at trial, Mr. Cavaretta denied ever providing an instruction to any Schein employee not to do business with a buying group, and characterized Complaint Counsel's allegation that Schein instructed its sales force to reject buying groups as "false."

(SF 1369, 1371). Moreover, Schein did not “avoid a GPO situation[;]” rather, Schein developed a “solution” for them. (CX 2653-001; Cavaretta, Tr. 5651). Specifically, Schein had entered a relationship with and provided discounts to MeritDent. (SF 976; Cavaretta, Tr. 5650 (confirming that Schein “did have an agreement with [MeritDent] and we are still doing business with MeritDent.”)).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

767. On April 10, 2012, Foley received an email from his direct report, Torgersen-Foster in which she wrote to Foley, Durante, and Troy Neil: “Neither HSD or Special Markets will participate in buying groups of any kind. They just erode our margins and rarely bring any new business to the table.” (CX2003 at 001; Foley, Tr. 4561). In CX2003, Torgersen-Foster told Neil that Schein did not do business with buying groups of any kind. (Foley, Tr. 4561).

Schein’s Response:

Complaint Counsel takes this email out of context. Ms. Foster is responding to an email from Mr. Neil asking about what Schein can do to help a study club of about 50 doctors to create a buying group. (CX 8001 (Foster, Dep. at 78-79)). Ms. Foster testified that in 2012, Schein did not have the resources to assist anyone in creating or starting a buying group like it does today, and that is where her response was coming from. (CX 8001 (Foster, Dep. at 80-81)). Indeed, outside of that context, CX 2003 does not make sense because at this time, Schein had established relationships with numerous buying groups. (Foley, Tr. 4656). In fact, Ms. Foster was personally involved in a number of Schein’s buying group relationships, including Ciraden and Dental Partners of Georgia.

(Foley, Tr. 4656). Further, Mr. Neil was the HSD Regional Manager in Georgia, so he was also aware of Schein's relationship with the Dental Partners of Georgia buying group. (Foley, Tr. 4655-56). Accordingly, Complaint Counsel provides no support for its inference that Ms. Foster's email was somehow an instruction to Schein's sales force to not participate with buying groups.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

768. Foley testified that he would correct Torgersen-Foster if he thought she was making inaccurate statements about Schein's policies in her email (CX2003). (Foley, Tr. 4562). He did not correct Torgersen-Foster's April 10, 2012 email (CX2003). (Foley, Tr. 4562).

Schein's Response:

Irrelevant and incorrect.

As an initial matter, a generic statement from a witness that they "would correct" an inaccuracy is not reliable evidence that an email that the witness received is accurate absent some affirmative act of disagreement. While, in response to a leading question, any witness would say that they would correct an inaccurate statement, the reality is that many statements in many emails are not corrected for a variety of reasons. The failure to correct a statement, therefore, does not lead to a presumption of accuracy.

CX 2003 relates to a "study club" that was seeking to form a buying group. Troy Neil, a Schein Regional Manager reached out to Ms. Foster asking for information. But Mr. Neil provided no indication that the study club would be able to drive compliance or

that it could offer Schein any consideration in exchange for an additional price discount. Ms. Foster responded that neither HSD nor Special Markets would participate in buying groups of any kind, as they “just erode our margins and rarely bring any new business to the table. Sorry.” (CX 2003-001). Ms. Foster, however, had no responsibility for HSD, and had no personal knowledge of HSD’s practices. In response, Mr. Neil did not indicate that the proposed “study club” was different or that it could drive compliance. Given this lack of information, Mr. Foley clarified that Special Markets “say[s] no” to such buying groups because they had done business with “a few and it only led to issues.” (CX 2003-001). As noted, this refers to Pugh Dental Alliance and Smile Source, both pre-alleged conspiracy situations in which FSCs complained about Special Markets’ buying group contracts. (*E.g.*, S. Br. 20-26).

Importantly, Schein had just signed an agreement with MeritDent a month prior to Ms. Foster’s email, demonstrating that her statement, “neither HSD or Special Markets will participate in buying groups,” was incorrect. (RX 2393).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

769. Later in the email chain (CX2003), Foley responded to Neil, Torgersen-Foster, and Durante regarding buying groups: “We get a lot of these requests and have to say no. Did a few and it only led to issues.” (CX2003; Foley, Tr. 4562).

Schein's Response:

Complaint Counsel takes this email out of context. Mr. Foley testified that he was referencing requests from “study groups of dentists wanting us to help them open up or create a buying group.” (Foley, Tr. 4657). As Mr. Foley pointed out, the buying group that Mr. Neil was inquiring about did not even exist, and Schein “did not have the manpower to help create it for them.” (Foley, Tr. 4657-58). Consequently, Mr. Foley’s response was in line with the 2010 Guidance because there was no indication that the yet-to-be-formed group could drive compliance. (Foley, Tr. 4657). Despite introducing this document at trial, Complaint Counsel elicited no testimony from Mr. Foley that his response was meant as an instruction not to do business with buying groups, and the record evidence contradicts any such inference.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

770. Neil, Torgersen-Foster and Durante all reported to Foley. (Foley, Tr. 4560-4561; CX8003 (Foley, Dep. at 266)).

Schein's Response:

This statement is not true. Troy Neil was a Regional Manager for HSD and did not report to Mr. Foley, who was in Special Markets. (Foley, Tr. 4561).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

771. On June 8, 2012, Hight wrote to her boss, Foley, and Titus regarding a telephone call with Sunrise Dental: "I explained that we do not accommodate GPOs" (CX2423 at 004). In a later email in the same chain (CX2423), Hight wrote on June 21, 2012: "I have not budged of course on how a customer needs to be structured and very adamant about no GPO type situation." (CX2423 at 002).

Schein's Response:

The asserted fact mischaracterizes the email. Ms. Hight was working with Sunrise Dental – a buying group – to structure a contract, and was in the "process right now of setting up a customer formulary for them." (CX 2423-002).

As Ms. Hight explained, she was not conveying that Schein had a policy to not work with buying groups. Instead, Ms. Hight was simply referring to her purview within Special Markets and the types of relationships she managed, which consisted of DSOs. (CX 8022 (Hight, Dep. at 95-96)). If Sunrise wanted to enter into a Prime Vendor Agreement with Special Markets that was dependent on agreements negotiated with vendors, it was required to be a DSO; otherwise, manufacturers may not honor the pricing agreed to. (CX 8022 (Hight, Dep. at 98); *see also* SF 655, 659 (explaining the issue in relation to Dental Gator)). As a result, Complaint Counsel points to nothing to support that this statement represents an instruction from Mr. Foley, and the asserted fact is not true.

Mr. Steck, who reported directly to Mr. Sullivan, had previously approved Sunrise Dental and tried to work with Special Markets to "work this out." (CX 2955-001; Steck, Tr. 3733-74).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

772. In July 2012, Jake Meadows was the Northwest Zone Manager and Acting Regional Manager. (Meadows, Tr. 2421).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

773. On July 17, 2012, Meadows wrote to a Henry Schein field sales consultant, Patty Delikat: "I have to tell you Ron and Dan made a decision that is against what Tim Sullivan has directed us to do in regards to supporting Buying groups. We do not want our customers organizing and creating what are known as GPOs it takes the value away from the distributor." (CX0170 at 001; Meadows, Tr. 2424).

Schein's Response:

There is no support for any inference that Mr. Meadows was providing an instruction to Patty Delikat, a Schein FSC, in CX 0170. First, Complaint Counsel elicited no testimony from Mr. Meadows to that effect, despite introducing the exhibit at trial. In fact, at trial, Mr. Meadows denied ever providing an instruction to any Schein employee

not to do business with a buying group, and clarified that he “never got direction from Tim Sullivan not to do business with buying groups.” (SF 1377-78).

Moreover, in writing to an FSC that regional managers “made a decision that is against what Tim Sullivan has directed us to do in regards to supporting Buying groups[.]” Mr. Meadows meant only that HSD “regional managers, FSCs and zone managers were not supposed to be gathering or presenting offers to buying groups or building offers for buying groups” at that time, because Special Markets had primary responsibility for buying groups and establishing buying group formularies. (SF 1376; Meadows, Tr. 2474-76, 2636-39). This was not an attempt to disseminate a no-buying-group policy as Complaint Counsel alleges. If Schein had such an alleged policy, Mr. Meadows would not have needed to waste his time asking a “standard group of questions” to evaluate the opportunity: “Who[] is the leader here with [this] group? How many offices is this? ... Were the service discounts approved, by who? How much will each office buy?” (SF 234; CX 0170; Meadows, Tr. 2468).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

774. At the time Meadows wrote this email (CX0170), he reported to Steck, who reported to Sullivan. (Meadows, Tr. 2424).

Schein’s Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

775. At the time of this email (CX0170), Delikat reported directly to Meadows. (Meadows, Tr. 2422).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

776. Delikat was seeking Meadows's permission regarding a buying group that she was putting together in CX0170. (Meadows, Tr. 2421).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

777. The decision Meadows referenced in his email (CX0170) was “a decision that Ron and Dan had made was to build a presentation or build an offer for a buying group.” (Meadows, Tr. 2425).

Schein’s Response:

Incomplete. Mr. Meadows testified that his statement, “I have to tell you Ron and Dan made a decision that is against what Tim Sullivan had directed us to do in regards to supporting Buying groups,” was “getting at the fact that Henry Schein Dental regional managers, FSCs and zone managers were not supposed to be gathering or presenting offers to buying groups or building offers for buying groups.” (Meadows, Tr. 2475-76). The problem presented by the FSCs’ decision to present an offer to a buying group was due to the fact that Special Markets had primary responsibility for buying groups at this time, given its ability to create customer formularies for independent dentists. (Meadows, Tr. 2471-74).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

778. Meadows testified that he would not have misled Delikat regarding what Sullivan directed. (Meadows, Tr. 2425-2426).

Schein’s Response:

No response, other than to note that Mr. Meadows testified that he “never got direction from Tim Sullivan not to do business with buying groups.” (SF 1377).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

779. Meadows testified that he would not make up false guidance regarding what Tim Sullivan directed. (Meadows, Tr. 2426).

Schein's Response:

This asserted fact is essentially the same as CCFF 778, and Schein incorporates its response to that finding here. (SRF 778).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

780. Meadows referred to buying groups as GPOs in this email chain (CX0170). (Meadows, Tr. 2426).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

781. Meadows used the terms buying group and GPO interchangeably. (Meadows, Tr. 2426).

Schein's Response:

In some cases, Mr. Meadows used the term buying group and GPO interchangeably.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

782. On September 24, 2012, Bingham, a field sales consultant wrote to Cavaretta: "Everyone keeps saying we don't do GPO's." (CX0169 at 001).

Schein's Response:

The quote is misleading, as it omits the next sentence. The full text is "Everyone keeps saying we don't do GPO's. [S]o what is the dental co-op of Utah?" The Dental Co-Op of Utah is a buying group Schein did business with.

To the extent Complaint Counsel cites this email (or the proposed finding) for the truth of the matter asserted (*i.e.*, that Schein did not do business with buying groups or that Schein's sales force was instructed not to do business with buying groups), such evidence is unreliable hearsay and contradicted by the weight of the evidence showing Schein's business with buying groups. Complaint Counsel failed to call Ms. Bingham – an FSC –

at trial. Moreover, evidence establishes that Schein executives never instructed the field sales force not to do business with buying groups. (SF 1358-85).

The cited email is about Intermountain Dental Associates (“IDA”), which had both a DSO component with owned locations and buying group component with unowned locations. The email reflects concerns about IDA arbitraging the prices IDA’s DSO gets to practices that IDA did not own. As previously noted, Schein had approved IDA – even for independent practices – because they could control purchasing. (SF 732-48).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

783. On September 24, 2012, Cavaretta wrote to a field sales representative: “The Co-op is exactly what we are trying to avoid.” (CX0169 at 001). Co-op refers to the Dental Co-op in Utah. (CX0305 (Cavaretta, IHT at 155)).

Schein’s Response:

The asserted fact and citations are misleading. Schein was doing business with the Dental Co-Op at this time (during the alleged conspiracy), but the relationship was becoming more challenging as the Dental Co-Op entered into competitive relationships that took the parties out of alignment. (Cavaretta, Tr. 5601-02; CX 0305 (Cavaretta, IHT at 155-57); *see also* SF 591-96). Moreover, there is no support for any inference that Mr. Cavaretta was providing an instruction to a Schein FSC in CX 0169. First, Complaint Counsel elicited no testimony from Mr. Cavaretta to that effect. In fact, at trial, Mr. Cavaretta denied ever providing an instruction to any Schein employee not to do business

with a buying group and characterized Complaint Counsel's allegation that Schein instructed its sales force to reject buying groups as "false." (SF 1369, 1371).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

784. On September 24, 2012, Andrea Hight wrote to three Schein employees: "We need to make sure they are clear we don't do GPOs as that subject keeps coming up. (CX0169 at 002).

Schein's Response:

Ms. Hight was addressing a specific situation concerning IDA and ways to prevent the IDA DSO from arbitraging the prices it receives to dentists that were not part of IDA. (See CX 0169). Schein also did business with the IDA buying group. Ms. Hight's comment was based on the fact that at this time buying groups were not within her purview as her small team was focused on "growing DSO business and community health center business and institutional business." (CX 8022 (Hight, Dep. at 186)).

Thus, there is no support for any inference that Ms. Hight was disseminating an instruction she had received from Schein executives regarding doing business with buying groups. (See SF 143, 148, 150, 152, 154, 1358-85).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

785. On May 29, 2013, Cavaretta wrote: "We try to avoid buying groups at all costs and therefore don't really recognize them." (CX2509 at 001; Cavaretta, Tr. 5640).

Schein's Response:

The asserted fact is misleading and omits necessary context. Mr. Cavaretta's statement that Schein doesn't "really recognize [buying groups]" was merely an explanation to a Special Markets employee for why, if HSD "manages customers who are buying groups," its "account data" systems do not "track [those groups] specifically." (CX 2509-001). Moreover, in the email, Mr. Cavaretta was addressing a very specific type of buying group, in which the group takes title to the supplies, makes one or two purchases a year, and presumably warehouses them before reselling to individual members, and noting that such a buying group was not a type with which Schein had a relationship. (CX 2509-001; Cavaretta, Tr. 5655-56). Complaint Counsel has not identified any buying group fitting that description that approached Schein for a contract.

Accordingly, there is no support for any inference that Mr. Cavaretta was providing an instruction of any kind to the recipients of the email – Schein Special Markets and Schein Canada employees – in CX 2509. Complaint Counsel elicited no testimony from Mr. Cavaretta to that effect despite introducing the exhibit at trial. In fact, at trial, Mr. Cavaretta denied ever providing an instruction to any Schein employee not to do business with a buying group and characterized Complaint Counsel's allegation that Schein executives instructed its sales force to reject buying groups as "false." (SF 1369, 1371).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

786. The subject of the May 29, 2013 email (CX2509) was: "How do you define buying groups?" (CX2509 at 001; Cavaretta, Tr. 5639).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

787. Cavaretta wrote this May 29, 2013 email (CX2509) to two employees of Henry Schein: Toh who worked in Special Markets and Campbell who worked in Henry Schein Canada. (Cavaretta, Tr. 5640).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

788. On December 20, 2013, Foley wrote to Francis Keefe regarding Unified Smiles: “It’s a buying group that we do not participate with, as with all buying groups.” (CX2073 at 001; Foley, Tr. 4552). “It’s” (in CX2073) referred to Unified Smiles. (Foley, Tr. 4552).

Schein’s Response:

As noted in CCFF 789, Mr. Keefe was an employee of a manufacturer partner, not Schein. Mr. Keefe was simply asking what Schein’s “approach” was to buying groups, referring to an email he had received about Unified Smiles. (CX 2073-001). Mr. Foley had previously turned down Unified Smiles, and testified that his statement was more limited to “price only” buying groups like Unified Smiles. (CX 2073; Foley, Tr. 4725). Mr. Foley also confirmed that he was not trying to communicate that Schein had a policy not to do business with all buying groups. (Foley, Tr. 4725). There was never such a policy at Schein, and Mr. Foley’s response to Mr. Keefe merely noted that Schein does not do business with price-only buying groups like Unified Smiles. (Foley, Tr. 4725-26).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

789. At the time of the email (CX2073), Keefe was Foley’s counterpart at Colgate, a manufacturer partner. (Foley, Tr. 4550).

Schein’s Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

790. On June 10, 2014, Cavaretta wrote to Titus: "Thanks for leading the charge on this KT. GPO's are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers. Nice job!" (CX2216 at 001; Cavaretta, Tr. 5596). Meadows and several other Schein employees were also included in the "To" field of the email. (CX2216 at 001).

Schein's Response:

This email simply reflects the fact that Steadfast rejected Schein's offer for an exclusive relationship, and so Schein sought to retain its existing customers following termination. (SF 1220-25, 1240-41).

The evidence demonstrates that Schein entered into a relationship with Steadfast sometime in 2011 or 2012 (during the alleged conspiracy). (SF 1202-04). In 2014, in connection with Schein's formation of the Mid-Market group, Ms. Titus began evaluating Schein's relationship with Steadfast. Schein determined that Steadfast was reallocating business to Schein's competitors and that Schein's business with Steadfast was down nearly 50%. (SF 1219). After this discovery, Ms. Titus tried to salvage Schein's relationship with Steadfast by seeing if they could develop a "win-win" relationship through an exclusive partnership. (SF 1220). However, Steadfast steadfastly refused to engage Ms. Titus in discussions and her repeated attempts to open a dialog were met with "radio silen[ce]." (SF 1224; CX 0255). As a result, Schein elected to terminate its relationship with Steadfast but reiterated that, if Steadfast was "interested in exploring an

exclusive relationship with Henry Schein, we would welcome revisiting a mutually beneficial partnership.” (SF 1234-35; CX 2216-002; Titus, Tr. 5261). There is no evidence that Schein ended its relationship with Steadfast because it was a buying group. To the contrary, Ms. Titus explained that Schein wanted a *closer, exclusive* relationship with Steadfast, but was out of options due to Steadfast’s refusal to engage and reallocation of Schein business to Schein’s competitors. (SF 1234-37).

Mr. Cavaretta testified that his statement in CX 2216 was to commend Schein for being able to maintain the business from the individual members of Steadfast because there was a risk that the business would go to someone else when Schein stopped doing business with the group. (Cavaretta, Tr. 5596-98). As Mr. Cavaretta would later find out, Schein’s business actually improved after terminating its partnership with Steadfast. (Cavaretta, Tr. 5597-98). Accordingly, the evidence cited in support of this asserted fact does not support an inference that Schein had a policy not to work with buying groups.

There is also no support for any inference that Mr. Cavaretta was providing an instruction to any Schein employees in CX 2216. Complaint Counsel elicited no testimony from Mr. Cavaretta to that effect despite introducing the exhibit at trial. In fact, at trial, Mr. Cavaretta denied ever providing an instruction to any Schein employee not to do business with a buying group and characterized Complaint Counsel’s allegation that Schein executives instructed its sales force to reject buying groups as “false.” (SF 1369, 1371).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

791. On June 10, 2014, Titus sent an email to Jon Staples, the CEO of Steadfast, and stated: “Effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders.” (CX2216 at 002; Titus, Tr. 5255 (Staples is CEO for Steadfast)).

Schein’s Response:

To the extent Complaint Counsel is using CX 2216 to infer that Schein had a policy not to work with buying groups, the evidence does not support such an inference. Schein incorporates its response to CCFF 790 in that regard. (SRF 790). In a nutshell, Schein made numerous attempts to salvage its relationship with the Steadfast buying group after determining it had “gone south” and was no longer mutually beneficial. (SF 1220-29). However, Schein’s attempts were met with “radio silen[ce].” (SF 1224). After it became clear that Steadfast was not going to engage with Schein, Schein decided to terminate the relationship because Steadfast was: (1) redirecting business to Schein’s competitors; (2) not offering any value added services; (3) not allowing Schein to engage with Steadfast customers; and (4) not willing to compromise or negotiate with Schein to find a win-win solution. (SF 1225).

Further, there is no support for any inference that Ms. Titus was disseminating an alleged policy that Schein did not work with buying groups in CX 2216. First, Complaint Counsel elicited no testimony from Ms. Titus to that effect. In fact, at trial, Ms. Titus confirmed that Schein never had such a policy and that Complaint Counsel’s allegations were “personally diminishing because [she] spent so much of [her] career at Henry Schein working with buying groups.” (SF 1384; Titus, Tr. 5192).

Patterson’s Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

792. Cavaretta sent his June 10, 2014 email within hours after Schein terminated its relationship with Steadfast. (CX2216 at 001; Cavaretta, Tr. 5596).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

793. Pacific Group Management Service ("PGMS") is a buying group. (Titus, Tr. 5310-5311).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

794. On June 12, 2014, Titus wrote to her boss, Cavaretta regarding PGMS: "[T]his is (yet another) potential hybrid-GPO partner, but only with a carefully crafted deal that guarantees compliance, exclusivity and the opportunity to market Schein business solutions. I sent them some

tough questions thinking it would scare them off, but alas, they raised the stakes by moving to Dir of Ops.” (CX2809 at 002; Titus, Tr. 5316-5317). Titus acknowledged that she wrote this email. (Titus, Tr. 5316-5317).

Schein’s Response:

No response other than to note that Ms. Titus sent the group discovery questions to enable Schein to better evaluate PGMS’s business model and its ability to drive compliance. (SF 1053-54). These questions eventually became “standard” in Schein’s evaluation of buying groups. (SF 1055).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

795. On July 16, 2014, Titus wrote to Glenn Showgren, Brian Brady, Cavaretta, and Nicole Lena: “I s/w Joe today about the agreement. Tim was not in favor of it.” (CX2219 at 001; Titus, Tr. 5314-5315). Titus testified that her email referenced the PGMS agreement; “s/w” meant “spoke with”; “Tim” referred to Tim Sullivan. (Titus, Tr. 5314-5315; CX2219).

Schein’s Response:

This is hearsay within hearsay. Ms. Titus did not speak with Mr. Sullivan. (Titus, Tr. 5227-29, 5315-16). Mr. Cavaretta did, and Mr. Cavaretta made the decision not to partner with PGMS. (SF 1068-73).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

796. Titus informed her colleagues, including her boss, Cavaretta, that Sullivan was not in favor of the PGMS buying group agreement. (Titus, Tr. 5315-5316; CX2219 at 001).

Schein's Response:

As noted in SRF 795, this is hearsay within hearsay. At trial, Ms. Titus clarified that Mr. Sullivan was “not telling us not to proceed but that he had concerns” about PGMS. (Titus, Tr. 5315). Complaint Counsel points to no reliable evidence that Mr. Sullivan made the decision not to enter into a relationship with PGMS. Instead, the evidence demonstrates that Mr. Cavaretta asked Mr. Sullivan what he thought Schein should do about the PGMS relationship and Mr. Sullivan told him “whatever you want to do we do.” (SF 1070; Cavaretta, Tr. 5609). Mr. Cavaretta, not Mr. Sullivan, ultimately made the decision not to partner with PGMS. (SF 1072; Cavaretta, Tr. 5609-10).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

797. Titus did not personally speak with Sullivan, but she was sharing information in CX2219 that she learned from Cavaretta. (CX2219 at 001; Titus, Tr. 5315).

Schein's Response:

Schein incorporates its responses to CCFF 795 and 796 here. (SRF 795-96).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

798. On July 16, 2014, Titus also wrote to Cavaretta regarding turning down PGMS: "Just delivered the news moments ago to Kathy Khalik. She was absolutely gracious, but clearly devastated. I explained if there was a time in the future they become an MSO that could demonstrate compliance, we would be pleased to revisit." (CX2219 at 002). Titus explained that if PGMS became an MSO, Schein would be willing to work with them. (CX8010 (Titus, Dep. at 208-209); CX2219 at 002).

Schein's Response:

Complaint Counsel mischaracterizes the evidence. As Ms. Titus explained, "the decision not to pursue the agreement with PGMS was [because] they could not provide us with compliance," not because the group was a buying group instead of a MSO. (CX 8010 (Titus, Dep. at 209)). PGMS's inability to guarantee compliance was highlighted by the fact that Dr. Luque, a key leader of PGMS, would not agree to do business with Schein even if Schein agreed to partner with PGMS. (SF 1063; Titus, Tr. 5224-25). This was a red flag to Schein because "if the leader of the organization was unwilling to vote with his dollars, how could he influence his member group to do the very same." (Titus, Tr. 5224-25; SF 1064). Ultimately, PGMS "[could not] guarantee that its members w[ould] purchase from Schein" and therefore was lacking the key element of compliance. (SF 1065). As Mr. Cavaretta (who made the decision not to partner with PGMS) testified, Schein's decision not to partner with PGMS had nothing to do with PGMS being a buying group. (SF 1077; Cavaretta, Tr. 5610).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

799. On July 17, 2014, Titus wrote to Showgren and Kevin Upchurch: "We had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this and sent to Joe for review. It went to Tim and he shot it down. I think the meta msg is officially, GPO's are not good for Schein." (CX2235 at 001; Titus, Tr. 5310-5311; *see also* Sullivan, Tr. 3982-3985 (discussing CX2235)). Titus testified that "Tim" referred to Tim Sullivan; and "Msg" meant message. (Titus, Tr. 5311, 5313). Titus attached a document titled, "Pacific Group Management Services and Henry Schein Inc, Prime Vendor Agreement (attachment named "PacificGroupManagementServicesHSagreement 071014.docx") to her July 17, 2014 email. (CX2235 at 001, 002-009).

Schein's Response:

As Ms. Titus testified she "never spoke to Tim [Sullivan]" personally about PGMS, nor was she told that Mr. Sullivan did not want to work with PGMS. (SF 1073; Titus, Tr. 5192-93, 5227-29, 5315-16). Mr. Cavaretta, not Mr. Sullivan, ultimately made the decision not to partner with PGMS. (SF 1072; SRF 796; Cavaretta, Tr. 5609-10). When confronted with Ms. Titus's email at his deposition, Mr. Sullivan noted he had no recollection of shooting PGMS down, because he never did. (CX 8025 (Sullivan, Dep. at 225-26)).

No one at Schein ever instructed Ms. Titus not to do business with buying groups. (SF 1383; Titus, Tr. 5193). Indeed, Ms. Titus went on to spearhead the negotiations with Klear Impakt beginning in January 2015. (SF 816-832).

Ms. Titus explained that her comment in CX 2235, "I think the meta msg is officially, GPO's are not good for Schein," was only in the context of PGMS and the valid concerns that Schein had about it not being a healthy business relationship. (Titus, Tr. 5313-14). Indeed, when asked if she believed that the message from Tim Sullivan was that GPOs are not good for Schein, Ms. Titus responded, "At least this one" and only in the

context of the PGMS agreement. (CX 8010 (Titus, Dep. at 150)). As Mr. Sullivan noted, Ms. Titus's email as drafted "misstates my position" and "[t]hat's not our strategy." (CX 8025 (Sullivan, Dep. at 226-28)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

800. PGMS was willing to be exclusive with Schein. (Titus, Tr. 5311; CX2235 at 001). Titus viewed exclusivity as a positive for Schein. (Titus, Tr. 5311).

Schein's Response:

While PGMS was willing to be exclusive with Schein, which Ms. Titus viewed positively, if PGMS could not deliver sales to Schein, "it was an empty promise and there was no return on investment." (SF 1075; Titus, Tr. 5226). Moreover, exclusivity and compliance are related but distinct concepts. Exclusivity refers to a buying group's contract with a vendor; compliance refers to members' contract/relationship with a vendor. To deliver incremental volume, there should be both exclusivity and compliance. PGMS offered the former, but not the latter. (See SRF 798).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

801. At the time Titus wrote her email in CX2235, it was her understanding that Tim Sullivan had shot down the PGMS agreement. (CX2235 at 001; Titus, Tr. 5313; CX8010 (Titus, Dep. at 151)). At trial, Titus was asked: “As of the time that you wrote this email [CX2235], it was your understanding that Tim Sullivan had shot down a PGMS agreement,” to which Titus answered, “No.” (Titus, Tr. 5312-5313). Titus’s trial testimony is directly contradictory to her testimony at her deposition. (CX8010 (Titus, Dep. at 151) (“Q. So as of the time that you wrote this e-mail [CX2235], it was your understanding that Tim Sullivan had shot down a PGMS agreement? A. Yes.”)). Titus’s trial testimony is also contradicted by her email, CX2235. (CX2235 at 001 (“We had a GPO prospect called PGMS. Very intriguing, willing to be exclusive. I created this and sent to Joe for review. It went to Tim and he shot it down.”)).

Schein’s Response:

Regardless of what Ms. Titus *believed* at the time she wrote CX 2235, she never spoke to Tim Sullivan about PGMS. (SF 1073; Titus, Tr. 5227-29, 5315-16). Instead, Mr. Cavaretta discussed the PGMS opportunity with Mr. Sullivan. (SF 1068; Cavaretta, Tr. 5608-09; Sullivan, Tr. 3983-84). The evidence indicates that Mr. Cavaretta told Mr. Sullivan that he did not think that Schein should partner with PGMS because there was no alignment, PGMS could not enforce compliance, and PGMS did not have a value proposition. (SF 1069; Cavaretta, Tr. 5609). Mr. Cavaretta asked Mr. Sullivan what he thought and Mr. Sullivan told him “whatever you want to do[,] we do.” (Cavaretta, Tr. 5609). Consequently, there is no evidence that Mr. Sullivan instructed others at Schein not to do business with PGMS.

There is no contradiction between Ms. Titus’s deposition and trial testimony, nor do they conflict with her email in CX 2235. Schein discussed CX 2235 in SRF 799 and incorporates that response here. At her deposition, Ms. Titus testified that she had no understanding of what Mr. Sullivan actually said about PGMS. (CX 8010 (Titus, Dep. at 152-53)). She said the same thing at trial. (Titus, Tr. 5312 (“I had no knowledge of Tim personally shutting anything down.”)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

802. As of the date Titus wrote her email in CX2235, she felt that the message from above was that GPOs are not good for Schein. (CX2235 at 001; Titus, Tr. 5313-5314; CX8010 (Titus, Dep. at 149)). At trial, Titus was asked, "So on the date that you wrote this e-mail [CX2235], you felt that the message from above was that GPOs are not good for Schein," to which Titus answered, "That's incorrect." (Titus, Tr. 5313-5314). Titus's trial testimony is directly contradictory to her testimony at her deposition (CX8010 (Titus, Dep. at 149) ("Q. On the date that you wrote this e-mail, you felt that the message from above was that GPOs are not good for Schein? A. Yes, and that statement was not – I did not have intimate knowledge, it was what I was thinking it meant.")). Titus's trial testimony is also contradicted by her email, CX2235. (CX2235 at 001 ("I think the meta msg is officially, GPO's are not good for Schein.")).

Schein's Response:

This asserted fact is essentially that same as CCFF 799 and Schein incorporates its response to CCFF 799 here. There is no contradiction between Ms. Titus's deposition and trial testimony, nor do they conflict with her email in CX 2235. Schein discussed CX 2235 in detail in SRF 799 and incorporates that response here. At her deposition, Ms. Titus testified that she had no understanding of what Mr. Sullivan actually said about PGMS and that her comment in CX 2235 about a "meta msg" came from "this particular GPO [which] was not a good fit." (CX 8010 (Titus, Dep. at 152-56 (explaining her comment applied to "[p]oorly crafted GPOs where there is no commitment from the customer for exclusivity or for compliance [and] [n]ot GPOS in general")))). She said the same thing at trial. (Titus, Tr. 5314 (explaining the comment was "[o]nly in the context to PGMS"))).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

803. Sullivan reviewed the PGMS agreement in concept with Cavaretta. (Sullivan, Tr. 3983-3984).

Schein's Response:

Mr. Sullivan testified that he did not review the actual PGMS agreement itself, but rather talked "in generalities with Joe [Cavaretta] about the concepts to include." (Sullivan, Tr. 3984).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

804. INTENTIONALLY LEFT BLANK

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

No response required.

805. Titus would not have purposely misled her colleagues, Showgren and Upchurch, regarding Tim Sullivan. (Titus, Tr. 5312).

Schein's Response:

The asserted fact is incomplete and irrelevant. While most people do not purposely set out to mislead colleagues, that does not mean that the author of a document is not speculating, nor does it suggest that the author has personal knowledge of the information relayed. Ms. Titus, Mr. Cavaretta, and Mr. Sullivan each testified that Ms. Titus never had a direct communication with Mr. Sullivan about PGMS. (SF 1068-73). Thus, Ms. Titus's comments about Mr. Sullivan's views are not reliable evidence.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

806. On July 18, 2014, Upchurch, a Zone Manager, wrote to Cavaretta, Titus, and Harmon: "The Co-Op is turning into a GPO (even if they don't think they are one now), from what KT has observed in Texas, NM and from Tim S., HSD does not want to enter the GPO world." (CX2211 at 002).

Schein's Response:

Ms. Titus explained that Complaint Counsel's interpretation of CX 2211 makes no sense, as Schein was doing business with buying groups on the date of this document. (Titus, Tr. 5248). Instead, Mr. Upchurch was confused about the term "GPO." (CX 8010 (Titus, Dep. at 266-67)). In most cases, Schein personnel used the term "GPO" and "buying group" interchangeably. (Steck, Tr. 3741; Sullivan, Tr. 3901; CX 8010 (Titus,

Dep. at 248)). But in some cases, like this one, Schein personnel used “GPO” to refer to the type of organization, common in medical markets, that negotiates directly with manufacturers and uses distributors primarily as fulfillment organizations. (CX 8010 (Titus, Dep. 248, 267)). In dental markets, however, buying groups typically negotiate with distributors, which in turn negotiate with manufacturers. (SF 655-63, 591-94; *see also* RX 2405-001 (“We have always contended that Schein is a GPO and negotiates the best prices for our customers ...”)). The Dental Co-Op was morphing from a traditional dental buying group into the type of GPO that negotiates directly with manufacturers. (Titus, Tr. 5239). It is that type of group that Schein was particularly uninterested in, as it disintermediates Schein from the manufacturer-customer relationship, and turns the group into a direct competitor of Schein. (CX 2227-004; CX 0311 (Sullivan, IHT at 118-22)). As Ms. Titus wrote to Colgate’s Mr. Keefe, the Dental Co-Op’s decision to negotiate directly with direct-selling manufacturers “portends the empowerment of the GPO infiltration in the dental space and, as this scenario illustrates, the dilution of the influence of Distribution.” (CX 2227-004).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

807. In response, Cavaretta wrote: “Thanks Kev. I understand the GPO issue as I’m working with KT on other issues in the Western Area also.” (CX2211 at 001).

Schein's Response:

This is simply a different quote from the same email cited in CCFF 806, which Schein addressed in detail in response to that proposed finding. (SRF 806). Mr. Cavaretta's response simply reflects the fact that, at the time, he and Ms. Titus were working on developing a more uniform strategy towards working with buying groups. (SF 267; Cavaretta, Tr. 5530-31).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

808. On August 29, 2014, Titus wrote to her boss, Cavaretta: "It doesn't help to have a GPO policy if SM is opening up these consulting groups." (CX2220 at 001).

Schein's Response:

At the time of this email, Mr. Cavaretta and Ms. Titus were working on developing a more uniform strategy towards working with buying groups pursuant to Mr. Sullivan's request. (SF 267; Cavaretta, Tr. 5530-31). Schein did not have a GPO policy on the date that Ms. Titus wrote the email. (Titus, Tr. 5232). As Ms. Titus explained, HSD was in the midst of developing such a strategy in order to create a uniform offering to buying groups, and HSD would need the cooperation of Special Markets. (Titus, Tr. 5232 ("we were building something that we hoped would set the standard for evaluating buying groups throughout our organization."); SF 271-82). To the extent Complaint Counsel seeks a counterfactual inference that Schein had a policy not to do business with buying groups,

the evidence does not support such an inference, as CCFF 2220 indicates the opposite, that Schein was developing a policy on how *to do* business with buying groups.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

809. On September 8, 2014, Sullivan wrote to Muller and his boss, Breslawski regarding Kois: "I still believe this is slippery slope and have yet to see a successful one in dental and don't plan to take the lead role. Watching closely." (CX2469 at 002; CX8025 (Sullivan, Dep. at 295)).

Schein's Response:

The asserted fact is misleading and mischaracterizes the evidence.

The email was written over a month *before* Kois reached out to Schein to see if Schein was interested in further discussions. (CX 8025 (Sullivan, Dep. at 295-98)).

Mr. Sullivan testified that, at the time CX 2469 was written, he did not want to take the lead role in proactively "putting something together with Kois if it was going to be a price-only" type buying group. (CX 8025 (Sullivan, Dep. at 297)). Moreover, Mr. Sullivan's only information about the group was based on a newsletter Dr. Kois had sent his tribe – *not* to Schein – and from a quick read, Mr. Sullivan believed that Kois was looking for a volume discount and nothing more. (CX 8025 (Sullivan, Dep. at 295-96)).

When the Kois Buyers Group finally did reach out to Schein over a month later in late October 2014, Mr. Sullivan welcomed discussions with the group and Schein evaluated the Kois opportunity with the "entire senior management team." (CX 4310-001; SF 895-97, 914). After an initial discussion, Mr. Sullivan was "very interested in learning more

about [the Kois] initiative as it certainly seems very unique” to anything he had heard thus far and requested more time to do his homework and figure out next steps. (SF 897; RX 2602). But, Mr. Ahmed, on behalf of the Kois Buyers Group, insisted on moving forward with a deal before providing Schein with the information Mr. Sullivan requested. (SF 899-909; RX 2602). Before negotiations with Schein concluded, Dr. Kois decided to move forward with Burkhart. (SF 913-14).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

810. On September 14, 2014, Foley wrote to Muller and Peter Jugoon (President of Schein dental in Canada): “As with other buying groups we continue to say no (at least try to).” (CX2079 at 001; Foley, Tr. 4649-4650).

Schein’s Response:

In CX 2079, Mr. Foley was responding to an email from Mr. Jugoon about Synergy Dental Partners, which Schein had declined to do business with in March 2010, a year before Complaint Counsel claims the conspiracy began. (SF 212-16; CX 2451). Mr. Foley reported that the local team had “vetted” the opportunity to see if it would be a good fit for Schein. (Foley, Tr. 4650). Schein determined that it would not be a good fit because the group allowed a member to buy from any vendor, the distributor was required to pay a fee back to the buying group, and the group presented a high risk for cannibalization. (Foley, Tr. 4651). Complaint Counsel mischaracterizes the document because, as Mr. Foley, testified his statement was narrow in that it was specifically referring to groups like

Synergy Dental Partners that did not bring much to the table. (Foley, Tr. 4651). Mr. Foley confirmed at trial that he was not attempting to communicate an across the board policy at Schein not to do business with buying groups. (Foley, Tr. 4652). In fact, about a year later, Mr. Foley reached out to Mr. Jugoon about a buying group opportunity for OrthoSynetics in Canada. (Foley, Tr. 4653).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

811. On October 8, 2014, Russ Baker exchanged emails with Scott Janszak and others regarding Dental Gator. (CX0260 at 002-004).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

812. Baker then wrote to Titus and Hight, and other Schein employees: "I recently had a conversation with Kathleen regarding this group and they are nothing more than a GPO. It is my understanding that this violates our policy as we do not engage with GPO's." (CX0260 at 002).

Schein's Response:

To the extent Complaint Counsel seeks to admit Mr. Baker's email for the truth of the matter, such an attempt is improper as the statement is hearsay and Mr. Baker was not called to testify at trial. There is no evidence that Mr. Baker had personal knowledge of Schein's buying group policies, practices, or plans.

As Ms. Titus testified, Mr. Baker's statement was not accurate. (Titus, Tr. 5339). Ms. Titus explained that Mr. Baker was mistaken because Schein worked with buying groups for "the entire time" that she worked for Schein and there was never a policy not to engage with buying groups. (Titus, Tr. 5339). Ms. Titus explained that Mr. Baker was a Regional Manager and did not have knowledge or exposure to buying groups in general. (Titus, Tr. 5339). This is supported by the fact that the email deals with the Dental Gator buying group, Schein did business with Dental Gator at the time of the email, and continued to do so after. (SF 668-75).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

813. Baker was a Schein regional manager for one of the Southeastern states. (Titus, Tr. 5319).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

814. In October 2014, Meadows was Eastern Area Sales Director. (Meadows, Tr. 2426-2427).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

815. As Eastern Area Sales Director, Meadows reported directly to Steck, and Steck reported to Sullivan. (Meadows, Tr. 2416; Steck, Tr. 3675-3676).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

816. On October 25, 2014, Meadows wrote to Jeff Reichardt: "Do not forward. Quick note. I've received a few FSC phone calls over the last few weeks regarding group purchasing organizations (GPO). Just for clarity, we are NOT participating in any GPOs regardless of what

they promise to bring us. We can discuss on Monday EA call.” (CX2354 at 001 (emphasis in original); Meadows, Tr. 2427).

Schein’s Response:

Complaint Counsel fails to cite to Mr. Meadow’s explanatory testimony. As he explained, this email was meant to “calm the troops” in the midst of conflicts that Schein’s buying group business was causing with its FSCs. (Meadows, Tr. 2597-98). FSCs were complaining to Schein management that they thought Schein’s business with buying groups was going to eliminate their roles or lower their commissions. (Meadows, Tr. 2596-98). This was understandable because FSCs are paid on commission based on gross profit from a particular customer. (SF 97). Therefore, if a buying group negotiates an extra 10% discount and signs up the independent dentist, the FSC’s commission declines by one-third. (SF 98). Consequently, Mr. Meadows’ email was not an instruction as to what the Schein field sales force could or could not do with buying groups. (Meadows, Tr. 2597). Mr. Meadows simply wanted the Schein sales team to know that Schein was not signing up buying groups with the intention of eliminating or decreasing the role of FSCs. (Meadows, Tr. 2597). Aware that his email could be misconstrued by the sales team (in the same way Complaint Counsel does), Mr. Meadows asked Mr. Reichardt to “not forward” his email on to the sales team and instead to wait and explain the situation over the phone so that the message would not be misinterpreted. (Meadows, Tr. 2597-98). Indeed, at this time, Schein was embarking on formulating a uniform buying group strategy to help alleviate the internal conflicts its buying group business was causing. (SF 277-78, 284, 294-95). And Schein continued doing business with buying groups. (SF 282-83).

Patterson’s Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

817. In that email (CX2354), FSCs referred to field sales consultants. (Meadows, Tr. 2427). "EA call" referred to Eastern area call. (Meadows, Tr. 2598).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

818. Meadows testified that FSCs were calling him directly regarding group purchasing organizations at the time of this October 2014 email (CX2354). (Meadows, Tr. 2427).

Schein's Response:

No response, other than to note that FSCs were calling to express concerns about the adverse impact that buying groups would have on their commissions. (Meadows, Tr. 2466 ("I was trying to ... calm everyone down [to make clear that] we are not out signing up buying groups to get rid of the FSC position.")). As such, the asserted fact is inconsistent with Complaint Counsel's theory that FSCs wanted to do business with buying groups and were instructed not to.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

819. Meadows testified that "group purchasing organizations" refers to buying groups in his October 24, 2014 email (CX2354). (Meadows, Tr. 2428; CX2354 at 001).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

820. FSCs reported to zone managers who reported to Meadows in October 2014. (Meadows, Tr. 2427).

Schein's Response:

Incorrect. FSCs reported to Regional Managers. Regional Managers reported to Zone Managers and Zone Managers reported to Meadows in October 2014. (Meadows, Tr. 2427).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

821. Reichardt was a Zone Manager in October 2014. (Meadows, Tr. 2431).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

822. It was part of Meadows' job to provide instructions to Reichardt. (Meadows, Tr. 2431).

Schein's Response:

Mr. Reichardt reported to Mr. Meadows. The statement that it was "part of Meadows' job to provide instructions to Reichardt" is vague.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

823. Meadows would not expect Reichardt to ignore any of Meadows' direction or instruction. (Meadows, Tr. 2431).

Schein's Response:

Irrelevant. Mr. Meadows' legitimate expectation that the people who work for him follow his instructions is simply how businesses (and the world) works. It is not relevant to the issues in this case.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

824. Meadows would not make up false guidance or instruction to lead Reichardt astray. (Meadows, Tr. 2431).

Schein's Response:

Irrelevant. No business manager would make up false guidance or instructions. The fact that Mr. Meadows shares that view is neither surprising nor relevant to the issues in the case.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

825. At the time of his deposition, Meadows did not recall writing this email chain (CX2354), and he could not think of anything that would refresh his recollection as to what he meant by the words that he used in the email chain. (Meadows, Tr. 2432-2433; CX8016 (Meadows, Dep. at 147-148)).

Schein's Response:

No response, other than to note that the proposed finding does not mean there was in fact nothing that could refresh Mr. Meadows' recollection.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

826. Meadows informed Reichardt that "we" are not participating in GPOs regardless of what those GPOs promised to bring. (Meadows, Tr. 2433).

Schein's Response:

This asserted fact is essentially the same as CCFF 816 and Schein incorporates its response to that proposed finding here. In short, Mr. Meadows' email was designed to "calm the troops" because FSCs were raising alarms that Schein's buying group business threatened their jobs and livelihood. (Meadows, Tr. 2597-98). At the time, Schein was developing a uniform buying group strategy and offering to help alleviate those conflicts while at the same time continuing its business with new and existing buying groups. (SRF 816).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

827. In November 2014, Meadows was Eastern Area Sales Director. (Meadows, Tr. 2434). As Eastern Area Sales Director, Meadows reported directly to Steck, and Steck reported to Sullivan. (Meadows, Tr. 2416; Steck, Tr. 3675-3676).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

828. On November 5, 2014, Meadows wrote to Robert Anderson III, copying Steck, Sullivan, and Porro, and stated: "We do not currently participate with GPOs nor do we want to, we will address these issues as they come up but it's important to continue pointing the team towards business solutions and individual relationships." (CX2358 at 001; Meadows, Tr. 2435-2436).

Schein's Response:

In search of an inference, Complaint Counsel takes the email completely out of context.

On November 5, 2014, Regional Manager Bobby Anderson wrote an email to Zone Manager Michael Porro copying Eastern Area Director Jake Meadows. (CX 2358-002). Mr. Anderson was highlighting the fact that ADC, which was being supplied by Benco, was receiving lower prices directly from a major dental manufacturer, 3M. Mr. Anderson further noted that Schein had previously bid for ADC, but had lost the contract to Benco. (CX 2358-001). Mr. Anderson was *not* looking to submit a new offer to ADC, but rather was looking for "advice" on how to deal with the 3M situation, since 3M was

discriminating in price against Schein's interest. (CX 2358-001). Mr. Meadows responded that he was planning on talking to 3M to address "this issue." Mr. Meadows further urged Mr. Anderson to "continue pointing the [Schein] team towards business solutions and individual relationships." (CX 2358-001).

While Mr. Meadows also notes that "[w]e do not currently participate with GPOs nor do we want to," he goes on to note that Schein "will address these issues as they come up." (CX 2358-001). This statement does not support Complaint Counsel's case for two reasons. *First*, Mr. Meadows was clearly talking about GPOs that negotiate directly with manufacturers, as they do in medical, and not basic buying groups. Schein has generally not contracted with medical-like GPOs that negotiate directly with manufacturers. As such, even the blanket statement that Schein does not participate with GPOs does not further Complaint Counsel's case, because Mr. Meadows was not talking about buying groups as Complaint Counsel defines them.

Second, the email notes that, while Schein does not want to do business with GPOs, it "will address these issues as they come up." (CX 2358-001). This does not establish a blanket policy against doing business with buying groups. Instead, it reflects that Schein takes a deliberate, rational, and unilateral strategy to evaluating such groups. Indeed, at this time, Schein had recently started doing business with Dental Gator.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

829. Anderson III was a regional manager at the time of this November 5, 2014 email chain (CX2358). (Meadows, Tr. 2434). At the time of this November 5, 2014 email chain (CX2358), Anderson reported to Michael Porro who reported to Meadows. (Meadows, Tr. 2434-2435).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

830. Meadows's email to Anderson III, in which he wrote, "We do not currently participate with GPOs nor do we want to" included Sullivan and Meadows's boss, Steck. (CX2358 at 001; Meadows, Tr. 2436).

Schein's Response:

This asserted fact is essentially the same as CCFF 828 and Schein incorporates its response to that finding here. (SRF 828). There was no request to work with GPOs, and the buying group at issue had rejected Schein's offer a year prior. Mr. Meadow's comment was simply designed to focus Mr. Anderson's efforts on selling the full line of products and services Schein offers directly to the members of ADC.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

831. Meadows testified that when he wrote, “this GPO” in CX2358, he was referring to Atlantic Dental Care. (Meadows, Tr. 2436-2437).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

832. Meadows testified that he did not know whether Atlantic Dental Care owned the practices and there was “misinformation” about the business model of the group. (Meadows, Tr. 2435). Meadows knew that Atlantic Dental Care was a group of dentists. (Meadows, Tr. 2435).

Schein’s Response:

No response, other than to note that Mr. Meadows was not involved in the initial bidding for ADC and thus does not have personal knowledge.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

833. Later in the email chain (CX2358), Meadows then wrote an email to Sullivan and Steck, taking Anderson III off the email chain: “I’ve got this. Another GPO fight. Unless there is another dialogue you’d like to see from me to the team, we’re forging ahead!” (CX2358 at 001; Meadows, Tr. 2437).

Schein's Response:

As noted in SRF 828, which Schein incorporates here, there is no support for the inference Complaint Counsel seeks that in CX 2358, Mr. Meadows was disseminating a policy that Schein did not work with buying groups. (SRF 828). *First*, Complaint Counsel failed to elicit any testimony as to what Mr. Meadows meant by his statement, despite introducing this document to him at trial. At trial, Mr. Meadows testified that he was not aware of any policy at Schein not to do business with buying groups. (Meadows, Tr. 2467).

Second, the substance of the email relates to a “fight” with 3M regarding the pricing it was allowing Benco to extend to ADC but was not offering to Schein, which Mr. Anderson believed was causing Schein to lose customers. (CX 2358-002). More broadly, the email chain is in the context of competing for the business of ADC members despite having lost the contract to Benco and ADC’s focus on price-only offers. Mr. Meadows reported that he spoke to 3M regarding its pricing and that 3M was supposed to be “coming back with some type of response on this type of issue.” (CX 2358-001). Mr. Meadows then told Mr. Porro and Mr. Anderson to have their team focus on “business solutions and individual relationships” as a way to compete for ADC members. (CX 2358-001). Therefore, Mr. Meadows was simply conveying to his team that he was working on the pricing issue and they should be focusing on promoting Schein’s value proposition in order to compete for ADC members. Mr. Meadows forwarded his email to Mr. Steck and Mr. Sullivan to inform them of the pricing issues with 3M, the competitive strategy for ADC members (despite ADC’s price-only focus), and the local team’s focus on employing Schein’s value proposition. (CX 2358; SRF 828).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

834. Meadows did recall receiving a response from Sullivan with a different dialogue that Sullivan wanted Meadows to deliver to the team. (Meadows, Tr. 2437).

Schein's Response:

No response, other than to note Complaint Counsel presumably meant to write "Meadows did not recall...."

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

835. On November 12, 2014, Cavaretta wrote to a Regional Manager, Dave Jacklin: "I haven't heard anything but at this point we are not playing in the GPO space." (CX2234 at 001; Cavaretta, Tr. 5592-5593).

Schein's Response:

The asserted fact cites the document out of context.

CX 2234 begins with an October 24, 2012 email that appears to be from Dr. Kois to various "tribe" members, noting his plan to create a buying group and seeking information, including the amount that each tribe member purchases from Schein. (CX 2234). Ms. Titus asserts that she had been "assured by Hal" Muller that "we are NOT in negotiations with KOIS." (CX 2234-002). While Special Markets was not involved in the

negotiations, just three days earlier, Kojs had reached out to Schein to initiate negotiations, which, for Schein, were led by Mr. Sullivan and Mr. Chatham. (RX 2197; RX 2602). Ultimately, the Kojs Buyers Group chose Burkhart as its supplier. (CX 4251). A Schein FSC learned that Kojs intended to announce its decision, but prior to the announcement, Schein did not know who Kojs had chosen to partner with. So, Regional Manager Dave Jacklin asked whether anyone else within Schein had “hear[d] anything.” (CX 2234-002). Mr. Cavaretta replied that he hadn’t “heard anything,” and noted that it probably wasn’t Schein because “we are not playing in the GPO space.” (CX 4251). Mr. Cavaretta, however, was not involved in the negotiations with the Kojs Buyers Group either. As Mr. Cavaretta testified, his comment that “we are not playing in the GPO space” simply reflected that, at this time, Schein was in the middle of strategic planning around buying groups, but had not made a decision to affirmatively seek out new buying group partners. (Cavaretta, Tr. 5592-93). That was all the Regional Manager needed to know at that point. (Cavaretta, Tr. 5592-93). Notably, that strategy was formalized within a month, when, in December 2014, Schein made it a “strategic priority” to develop a uniform buying group offering. (CX 2144; CX 2475).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

836. On July 1, 2015, Sullivan wrote: “So Dental Gator is now a friend? The Dec ‘offsite’ last year I left with a goal to see if we could get Hal to shut it down, but knew that could be a challenge due to the parent company being a EDSO of ours in SM.” (CX0246 at 001).

Schein's Response:

Complaint Counsel mischaracterizes the evidence. Dental Gator caused internal conflicts between Special Markets and HSD, but they nevertheless were able to resolve these issues: Special Markets continued its relationship with Dental Gator under a new pricing structure. (SF 647-74). Despite any internal issues, HSD never pressured or asked Special Markets to shut down or dissolve Dental Gator. (SF 657; CX 0306 (Foley, IHT at 198); CX 8003 (Foley, Dep. at 351, 418); CX 8022 (Hight, Dep. at 192)). In fact, Mr. Sullivan agreed to accept Mr. Muller's proposal to allow Dental Gator to continue getting discounts that were not available to other, similarly situated independent dentists, despite resistance from his own team. (CX 2370; CX 2372; CX 2144).

Complaint Counsel's reliance on CX 0246 is misplaced. The email chain begins with a note from Hal Muller to Tim Sullivan, noting that "new Dental Gator accounts are now being set up under the [HSD] PG-plan and assigned to HSD-MM." (CX 0246-003). Mr. Muller was, therefore, raising an issue concerning the conflicts between Special Markets and HSD, namely whether Dental Gator accounts should be in Special Markets (as they had been previously) or whether they should be moved to HSD. Mr. Sullivan forwarded the email to Mr. Cavaretta to get information concerning Schein's current relationship with Dental Gator. Mr. Cavaretta explained the rationale for keeping new Dental Gator members under an HSD plan. Mr. Sullivan, however, still did not understand whether the decision to keep new Dental Gator members under an HSD plan was "because it's good for the customer" or whether it is because "it's good for HSD." (CX 0246-001). It was in this context that Mr. Sullivan asked whether Dental Gator is now a friend, given that he had previously had a "goal to see if we could get Hal to shut it down." (CX 0246-001). The reference to that prior goal simply reflected the serious conflicts that the field

had raised about Dental Gator the prior year. As Mr. Sullivan testified, his short-hand reference to his “goal” of shutting down Dental Gator referred only to the fact that Dental Gator was arbitraging DSO pricing to which “they should not have had access,” and that practice is what he wanted to shut down. (Sullivan, Tr. 4255-56).

Mr. Sullivan never had the goal to shut down Special Markets’ relationship with Dental Gator. (SF 658; Sullivan, Tr. 4255-56). Nor did Schein ever “shut down” its discounting to Dental Gator. (SF 672-73). Instead, Special Markets grandfathered all existing Dental Gator members and maintained their current pricing, which was the same DSO-pricing that MB2 members were receiving. (SF 663). Schein gave new Dental Gator members formulary pricing with discounts that were “competitive” for independent dentists. (SF 663).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

837. Sullivan testified at trial that his July 1, 2015 email (CX0246) related to Dental Gator; “Dec” meant December; “EDSO” referred to elite DSO; “SM” referred to Special Markets; and Hal referred to Hal Muller. (CX0246; Sullivan, Tr. 3996-3997).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

838. Sullivan approached Muller to discuss shutting down Dental Gator at an offsite meeting in December 2014. (CX0246 at 001; Sullivan, Tr. 3996-3997; CX0309 (Muller, IHT at 176)).

Schein's Response:

This asserted fact is essentially the same as CCFF 836 and Schein incorporates its response to that proposed finding here.

In addition, Complaint Counsel ignores the contemporaneous emails about Mr. Sullivan's statements about Dental Gator. The issue arose when, on October 21, 2014, Mr. Cavaretta raised concerns about Dental Gator, and recommended that Schein no longer allow Dental Gator to offer members DSO pricing. (CX 2761-001 ("Don't allow this to be used any longer.")). Mr. Sullivan expressed skepticism of the need or ability to shut down Dental Gator, noting that shutting down Dental Gator would mean having to "close down" other buying groups or DSOs with buying group arms. (CX 2761-001). Instead, Mr. Sullivan simply wanted to "create stronger alignment" between HSD and Special Markets. (CX 0244-001). A month later, additional concerns were raised by the field, including by Zone Manager Michael Porro and Eastern Area Director Jake Meadows. (CX 2034). When they raised their concerns to senior management, including Mr. Sullivan, "[n]o one [was] giving an immediate direction but agreed there was a conflict." (CX 2034-001). When Mr. Muller made a proposal to offer new Dental Gator members special HSD pricing under the "G plan," Mr. Sullivan noted that this "[s]ounds like a good compromise." (CX

2370-001-02). This directly contradicts the asserted fact that Mr. Sullivan tried to shut down Dental Gator.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

839. On January 7, 2015, Muller sent notes to his boss, Breslawski, and Sullivan; the notes state in part: "Buying Groups: Do we keep saying no?" (CX2141 at 001-002).

Schein's Response:

Complaint Counsel's selective quotation from the cited document is misleading. Complaint Counsel ignores the next line of the document where Mr. Muller acknowledges that Schein is actively bidding on and working with buying groups. (CX 2141-002 (listing Dental Gator and Smile Source)). Complaint Counsel failed to elicit any testimony from Mr. Muller on this document at his deposition and did not call Mr. Muller at trial, so it is unclear whether Mr. Muller was talking about Special Markets, which no longer had primary responsibility for buying groups, or Schein as a whole. Moreover, Mr. Muller clarified that these were "just my thoughts for discussion." (CX 2141-001). Indeed, Mr. Muller's thoughts indicated there was still "[c]onfusion over who [was] doing what" and the need to "spell out a few more rules of engagement." (CX 2141-002). One such set of "rules" was a model buying group offering, something Schein had made a "strategic priority" at the end of 2014. (SF 295).

To the extent Complaint Counsel seeks a counterfactual inference from this proposed finding that Schein had a no-buying-group policy, such an inference has no support in the evidence or CX 2141.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

840. On March 9, 2015, Sullivan emailed regarding a potential meeting with the American Dental Association to discuss ways to help the association increase its membership. (Sullivan, Tr. 3986; CX2478 at 001). Sullivan wrote to Steck, Chatham, and others at Henry Schein: "No problem . . . just make sure he doesn't think this will include any sort of 'discount off supplies' program too. We are not going to create a buying group with ADA members." (CX2478 at 001; Sullivan, Tr. 3986-3987).

Schein's Response:

Because the ADA encompasses most dentists in America, a discount to all ADA members would be the equivalent of reducing catalog prices across-the-board, which would imply either that (i) existing prices are economically irrational, or (ii) the discounted prices would be economically irrational. In any event, there is no indication that the ADA was trying to set up a buying group. As the email notes, it was simply looking for ways that Schein could help "promote ADA membership." (CX 2478-002).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

841. On November 3, 2015, Sullivan wrote to Meadows: "You slid me a note about this group during the SM Budget Meeting. I had just informed Hal (and team) that we do not have plans to open up new Buying Groups, but have a plan ready to roll if needed. Did we just recently add Klear Impact? Who are they, where, etc." (CX0176 at 001-002; Sullivan, Tr. 3980-3981; *see also* Meadows, Tr. 2438-2439; CX2392 at 002).

Schein's Response:

The quoted document is taken out of context and is from *after* the alleged conspiracy period. To the extent Complaint Counsel seeks an inference from this proposed finding about Schein's conduct or policies during the alleged conspiracy, such an inference is plainly improper. It is also unsupported by the evidence.

The context of Mr. Sullivan's email to Mr. Meadows was a budget meeting dealing with the question of how to budget for buying groups. (SF 811; Sullivan, Tr. 4128-29). Mr. Sullivan had not budgeted for additional buying groups for the year, so Mr. Meadows slid him a note saying Klear Impakt should be included. (SF 812; Sullivan, Tr. 4128-30). Mr. Sullivan testified that "when he slide me the note, I didn't know what the plans were for Klear Impakt." (SF 813; Sullivan, Tr. 3981-82). In responding to Mr. Sullivan's question, Mr. Meadows copied Mr. Cavaretta, who reminded Mr. Sullivan that "[w]e did discuss this group over the summer and agreed that we were safe using the G Plan," which was a pricing plan for buying groups. (SF 814; CX 2392-001; Sullivan, Tr. 4130).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

842. Meadows testified that "Hal" in CX2392 referred to Hal Muller, the president of the Special Markets Division. (Meadows, Tr. 2439).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

843. Sullivan attended a Special Markets budget meeting on or around November 2, 2015. (Sullivan, Tr. 3980-3981). That meeting was part of an overall executive planning meeting. (Sullivan, Tr. 3981).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

844. At the Special Markets Budget Meeting on or around November 2, 2015, Sullivan informed Muller and his team that Schein did not have plans to open up new buying groups. (CX2392 at 002; Meadows, Tr. 2439; Sullivan, Tr. 3981).

Schein's Response:

This asserted fact is essentially the same as CCFF 841, and Schein incorporates its response to that proposed finding here. In short, Mr. Sullivan's statement was within the context of a budget meeting, and simply reflects the fact that Mr. Sullivan had not budgeted for additional buying groups for the year. (SRF 841). Mr. Meadows slid him a note saying Klear Impakt should be included. (SRF 841).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

845. After Sullivan informed Muller and his team that Schein did not have plans to open new buying groups (at the November 2015 Special Markets Budget Meeting), Meadows slid Sullivan a note to let Sullivan know that Henry Schein Dental was having discussions with Klear Impakt. (Meadows, Tr. 2439; CX2392 at 002; CX0176 at 001; Sullivan, Tr. 3981).

Schein's Response:

This asserted fact is essentially the same as CCFF 841, and Schein incorporates its response to that proposed finding here. In short, Mr. Sullivan's statement was within the context of a budget meeting and simply reflects the fact that Mr. Sullivan had not budgeted for additional buying groups for the year. (SRF 841). Mr. Meadows slid him a note saying Klear Impakt should be included. (SRF 841).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

846. On November 3, 2015, Cavaretta wrote to Meadows regarding Meadows' note to Sullivan: "Did you slide the note to Tim on this?" (CX0176 at 001). The same day, Meadows wrote to Cavaretta regarding Meadows's note to Sullivan: "I really did think he was aware and I only sad sown thing [*sic*] because he was taking such a hard stand in front of everyone. Again sorry to catch you off guard." (CX2392 at 001; Meadows, Tr. 2440).

Schein's Response:

No response. (*See* SRF 841).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

847. When Meadows wrote, "sad sown thing" (CX2392), it was a typo and he meant to write, "said something." (Meadows, Tr. 2440).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

848. Meadows had the impression that Sullivan was taking a hard stand that Henry Schein Dental was not opening up buying groups. (Meadows, Tr. 2440).

Schein's Response:

The cited testimony simply quotes from a document, CX 2392, that Complaint Counsel takes out of context and is from *after* the alleged conspiracy period. To the extent Complaint Counsel seeks an inference from this proposed finding about Schein's conduct or policies during the alleged conspiracy, such an inference is plainly improper. It is also unsupported by the evidence. (See SRF 841).

Mr. Meadows' impression was formed at a budget meeting dealing with how to budget for buying groups. (SF 811; Sullivan, Tr. 4128-29). Mr. Sullivan's "hard stand" was simply that he had not budgeted for additional buying groups for the year, and Mr. Meadows slid him a note saying Klear Impakt should be included. (SF 812; Sullivan, Tr. 4128-30).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

849. Sullivan did not know about Schein's work with Klear Impakt at the time of the November 2, 2015 meeting. (Sullivan, Tr. 3981-3982).

Schein's Response:

False. Mr. Sullivan only testified that he did not know what Schein's *plans* were with respect to Klear Impakt on November 2, 2015. (Sullivan, Tr. 3981-82). More accurately, Mr. Sullivan did not recall Schein's work with, or plans regarding, Klear Impakt at the time of the November 2, 2015 meeting. As noted in subsequent emails, Mr. Cavaretta reminded Mr. Sullivan that "[w]e did discuss this group over the summer and agreed that we were safe using the G Plan," a pricing plan for buying groups. (SF 814; CX 2392-001; Sullivan, Tr. 4130).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

850. On November 3, 2015, Meadows wrote to Cavaretta: "He was going off about how we do not have any buying group agreements and that we will not do them. Soap boxing about HSD and buying groups." (CX0176 at 001; Meadows, Tr. 2441). When Meadows wrote, "he" in the November 3, 2015 email, he meant Tim Sullivan. (Meadows, Tr. 2441).

Schein's Response:

The asserted fact is outside the conspiracy period, irrelevant, and does not cite reliable evidence for what Mr. Sullivan actually said at the budget meeting. Mr. Meadows' email is hearsay. As Mr. Sullivan testified, Mr. Meadows' characterization of what Mr. Sullivan said was not accurate. (CX 0311 (Sullivan, IHT at 234-35); *see also* SRF 841).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

851. At the time of this email (CX0176), Meadows reported to Steck who reported to Sullivan. (Meadows, Tr. 2442).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

852. Meadows would not have made something up that Sullivan said. (Meadows, Tr. 2442).

Schein's Response:

Irrelevant. While Mr. Meadows would not have made something up, that does not mean his characterization of what was actually said at the meeting was accurate. Indeed, as Mr. Sullivan testified, Mr. Meadows' characterization of what Mr. Sullivan said at the November 2015 budget meeting was not accurate. (CX 0311 (Sullivan, IHT at 234-35); *see also* SRF 841).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

853. When Meadows recounted something that Sullivan said, he would have tried to be accurate. (Meadows, Tr. 2442).

Schein's Response:

The fact that Mr. Meadows tries to be accurate does not preclude him from making hyperbolic statements in emails to make a point. As Mr. Sullivan testified, Mr. Meadows' characterization of what Mr. Sullivan said at the November 2015 budget meeting was not accurate. (CX 0311 (Sullivan, IHT at 234-35); *see also* SRF 841).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

854. Meadows attended a meeting on or around November 3, 2015 in which Tim Sullivan was one of the speakers and Sullivan spoke regarding buying groups. (Meadows, Tr. 2442).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

855. On November 3, 2015, Graham Stanley sent meeting notes from a November 2, 2015 meeting to Breslawski, Sullivan, Steck, Cavaretta, Meadows, and other Schein management via email with the subject "Meeting notes: Nov 2." (CX0189 at 001). In that email, Stanley wrote: "Tim clearly set out that HS should not be first to cooperate with GPOs, but also don't want to be last." (CX0189 at 002; Steck, Tr. 3843 (all individuals copied on the email are in management positions at Schein)).

Schein's Response:

The cited document was written after the alleged conspiracy period and thus simply reflects Schein's (and Mr. Sullivan's) consistent approach to buying groups starting at least as far back as the 2010 Guidance, under which Schein would (and did) do business with buying groups that could drive compliance or otherwise bring value to Schein.

In any event, Complaint Counsel's proposed finding is not based on reliable evidence of what was actually said at the meeting. Mr. Sullivan testified that Mr. Stanley's notes were "poorly summarized" and did not "properly summarize [his] position" because the discussion was "how are we going to work with [buying groups], how have we done in the past, and how do we set a strategy for working with them in the future," whether it was through mandated purchases or something else. (CX 0311 (Sullivan, IHT at 218-19)). Consistent with Schein's approach to buying groups, Mr. Sullivan testified that what he stated at the meeting was more along the lines of Schein not wanting to take the lead in actively soliciting buying groups, but that when approached, Schein wanted to "understand what the benefits could be ... and how it's aligned with our strategy." (CX 0311 (Sullivan, IHT at 220-21)). Mr. Sullivan also identified other points from Mr. Stanley's notes that

were not completely accurate. (CX 0311 (Sullivan, IHT at 219-20)). At trial, Mr. Steck confirmed that Mr. Sullivan gave no instruction that HSD should not do business with buying groups. (Steck, Tr. 3856). In fact, just a couple months later, Mr. Sullivan would engage in active negotiations with Smile Source. (SF 1183-86).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

856. Stanley was Schein's chief financial officer at the time of this email (CX0189). (Steck, Tr. 3978-3979).

Schein's Response:

Incorrect. Mr. Stanley was not CFO for Henry Schein Inc., but of Schein's global dental business.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

857. Stanley's email in CX0189 reflected notes from a planning meeting that took place on November 2, 2015. (Steck, Tr. 3979).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

858. In those November 2, 2015 meeting notes (CX0189), "Tim" referred to Tim Sullivan. (Meadows, Tr. 2444; Steck, Tr. 3844).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

859. In those November 2, 2015 meeting notes, Stanley referred to buying groups as GPOs. (Meadows, Tr. 2444).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

860. In those November 2, 2015 meeting notes, “HS” referred to Henry Schein. (Sullivan, Tr. 3979).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

861. Schein required some of its DSO customers to agree that that they would not become a buying group. (CCFF ¶¶ 862-870; *see also* CCFF ¶¶ 1791-1794, 1795-1799).

Schein’s Response:

False. Complaint Counsel cites no record evidence to support this finding. It only cites other proposed findings, which – as set forth in Schein’s specific replies – also fail to support Complaint Counsel’s characterization of the evidence.

Substantively, Complaint Counsel mischaracterizes the evidence. Schein never required its DSO customers to agree that they would not become buying groups. Instead, the evidence demonstrates that Schein required some of its DSO customers to agree that they would not extend the pricing they received, which was negotiated with manufacturers based on committed volume, to non-owned offices affiliated with a DSO. (SF 390). As Mr. Foley explained, Schein was not allowed to extend DSO pricing to buying group members because “DSOs have specific vendor chargebacks in their pricing, and we cannot extend that to a buying group.” (Foley, Tr. 4700). Therefore, if a DSO wished to have

“some other model like a GPO or buying group, [it] would have to be negotiated separately and managed separately, either through Special Markets or HSD.” (CX 8022 (Hight, Dep. at 149)). Indeed, the purpose of Schein including clauses in its Prime Vendor Agreements (“PVAs”) was to define the scope of the agreement and who it would cover, not whether Schein would work with buying groups. (CX 8022 (Hight, Dep. at 189)).

Dental Gator is a perfect example of this. Schein developed a relationship with MB2, a DSO, in March 2014. (SF 648). According to the 2014 MB2 Agreement, “[d]ental practices which are not owned in whole or in part by MB2, must have a formal affiliate agreement in place with MB2.” (SF 648). However, the provision did not preclude MB2 from operating a buying group or preclude Schein from offering discounts to that buying group. (SF 648). If MB2 wanted to operate a buying group, Schein could offer discounts to that group under a separate sales plan. (SF 648). The evidence indicates that this is exactly what happened. (SF 663).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

862. RX2291 is the Prime Vendor Agreement between Advantage Dental DSO and Henry Schein. (Foley, Tr. 4566-4567). Foley signed the Prime Vendor Agreement on behalf of Schein. (Foley, Tr. 4567).

Schein’s Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

863. Schein's Prime Vendor Agreement for Advantage Dental DSO, specifies that discounts are only available to those dental practices that are owned or managed by Advantage Dental. (RX2291 at 002; Foley, Tr. 4567-4568). Foley testified regarding Paragraph 2 of the Agreement: "Basically all three categories want to have some type of ownership into the practice, show that these practices belong to the DSO component and they're not part of their buying group component." (Foley, Tr. 4567-4568).

Schein's Response:

The evidence does not support Complaint Counsel's assertion that RX 2291 is proof that Schein had a no-buying-group policy. (CC Br. 62 & n.505). There was never such a policy at Schein.

Schein included language that specified what types of offices the agreement covered because "[i]n order to give DSO pricing, based on our manufacturer partners' rules, they have to be DSOs. We cannot extend that pricing that we're offering and those rebates to the buying group." (Foley, Tr. 4567-68; CX 8003 (Foley, Dep. at 246 ("[T]he pricing and the rebate structures that we put in place for Advantage Dental were only applicable to the DSO segment of their business model."))). As Mr. Foley explained, Schein is "simply clarifying between the buying group and the DSO because they have an active buying group in place at the time of this contract." (Foley, Tr. 4568). This was an important distinction because Schein had an active relationship with Advantage Dental's

buying group through HSD. (Foley, Tr. 4568). Consequently, there is no support that this provision is evidence that Schein had a policy to not work with buying groups.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

864. On March 15, 2012, Foley sent Meadows an email with the subject, "Terms not to be a Buying Group" and he pasted paragraph 2 from the Prime Vendor Agreement for Advantage Dental DSO (RX2291). (CX2066 at 001-002; CX8003 (Foley, Dep. at 244) ("I'm sending him a cutout of Advantage Dental's proposal distinguishing between the DSO segment and that part that relates to a buying group for Advantage Dental. I'm not sure why Jake requested it, but this is straight out of Advantage's contract"); *see also* RX2291 at 002).

Schein's Response:

No response. (*See also* SRF 863 (explaining difference between Schein's business with Advantage Dental's DSO arm and its buying group arm); SF 378-93 (detailing Advantage Dental's buying group)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

865. On November 10, 2014, Foley wrote to Muller: "Advantage Dental also has a BG component. They do \$1.5M in merchandise with us for their owned practices and who knows how much with our competition on the BG practices. Similar PVA as with MB2, Advantage adheres to it by not bringing in the BG component." (CX2081 at 002).

Schein's Response:

This asserted fact is essentially the same as CCFF 863 and Schein incorporates its answer to that proposed finding here. Advantage Dental adhered to its DSO agreement by not extending its DSO pricing to its buying group component, which operated under a separate agreement with Schein. (SRF 863 (explaining difference between Schein's business with Advantage Dental's DSO arm and its buying group arm); SF 378-93 (detailing Advantage Dental's buying group)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

866. On October 21, 2014, Foley wrote an email to Sullivan, Muller, Cavaretta, and Steck regarding Dental Gator:

Dental Gator is owned by our EDSO, MB2 Dental. MB2 is a \$2M plus merchandise customer and recently became Dentrix Enterprise's largest software purchaser. Similar to Heartland Dental, MB2 goes after offices by setting them up as 'consulting practices' to win them eventually as MB2 owned offices. In the last few months, 10 practices have joined Dental Gator and 3 of them have converted to full MB2 ownership. Thus their model is working. In our prime vendor agreement we spelled out specific terms and restrictions about these consulting offices to prevent Dental Gator from being a typical GPO

(RX2294 at 001).

Schein's Response:

No response, other than to note that the reference to Dental Gator's model "working" was Mr. Foley's speculation, and was inconsistent with the opinions of HSD

field personnel, who believed that Dental Gator was simply cannibalizing existing HSD sales. (CX 2033 (Zone Manager Michael Porro noting that his local team “considers them the ‘enemy’ of sorts here”); CX 2360 (Mr. Porro noting that “[s]o far all the Gator gains have been good HSD customers,” meaning total cannibalization and zero incremental volume)).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

867. CX4001 is the 2014 Prime Dental Supplier and Equipment Agreement between MB2 and Henry Schein. [REDACTED]; Foley, Tr. 4573-4574). Foley signed the agreement on behalf of Schein. (Foley, Tr. 4573-4574; [REDACTED]).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

868. The 2014 Agreement between MB2 and Henry Schein states: “This agreement may not be used to grow any Group Purchasing Organization (GPO) type relationship which is defined as a relationship whose purpose is to generate revenue for the parent company by allowing others to benefit from the terms of the prime vendor relationship.” (CX4001 at 002; Foley, Tr. 4574).

Schein's Response:

As with many of Special Markets' contracts with DSOs, the MB2 agreement did not permit MB2 to arbitrage its DSO pricing to practices outside of MB2 due to manufacturer requirements. (SF 648). Schein included this language in its PVAs to ensure that the pricing it offered its DSO members was not being extended to other offices that were not part of the DSO due to restrictions from manufacturers. This provision was important because the pricing that Special Markets negotiated on behalf of DSOs was proprietary to the manufacturer, Schein, and the DSO. (Foley, Tr. 4696-97). MB2 was always free to open a buying group to which Schein could offer discounts under a separate sales plan (which it did). (CX 8022 (Hight, Dep. at 134, 136, 161-62)). The evidence is clear that MB2 did in fact form a buying group called Dental Gator. (SF 649).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

869. On August 13, 2014, Hight sent an email to Foley and two other Schein employees with the subject: "Updated Narrative and Draft PVA." (CX2878 at 001). Hight attached a draft Prime Vendor Agreement, which stated: "This agreement may not be used to grow any Group Purchasing Organization (GPO) type relationship." (CX2878 at 126).

Schein's Response:

This asserted fact is essentially the same as CCFF 863 and Schein incorporates its response to that proposed finding here. In a nutshell, Schein included this language in its PVAs to ensure that the pricing it offered its DSO customers was not being arbitrated to

other offices that were not part of the DSO, as DSO pricing was the result of specific volume commitments from the DSO and negotiations with manufacturers. DSOs were always free to open a buying group to which Schein could offer discounts under a separate sales plan, just as MB2 did with Dental Gator. (CX 8022 (Hight, Dep. at 134, 136, 161-62); SF 649).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

870. On June 9, 2014, Hight explained to a Schein employee that she spelled out "no gpo language" in an agreement with a DSO: "Right now I am drawn into a really tough situation with a \$3million a year customer that has sneakily created a gpo that I have to shut down. I did the initial negotiations with them for their business, fortunately I spelled out no gpo language in our agreement." (CX2426 at 001).

Schein's Response:

Complaint Counsel mischaracterizes the evidence. As Ms. Hight explained, she was not "shutting down a GPO." She "was closing out accounts that were in noncompliance of the sales plan related to the Prime Vendor Agreement. Once again, a very separate thing ... a customer can run a GPO or buying group.... This was about disenrolling the accounts that didn't fit." (CX 8022 (Hight, Dep. at 167)). DSOs were always free to open a buying group to which Schein could offer discounts under a separate sales plan, just as MB2 did with Dental Gator. (CX 8022 (Hight, Dep. at 134, 136, 161-62); SF 649).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

b) Schein Shut Down Two Profitable Buying Groups.

871. Titus was transferred from Special Markets to Henry Schein Dental in or around March of 2014. (Titus, Tr. 5287-5288). Upon her transfer to Henry Schein Dental, Titus started working in the mid-market division. (Titus, Tr. 5197-5198).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

872. After Titus was transferred to Henry Schein Dental in 2014, she reported to Cavaretta. (Titus, Tr. 5288).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

873. On May 8, 2014, Titus wrote to her boss, Cavaretta with a list of "hot topics," which listed "Breakaway, Dental Coop, SmileSource, Steadfast." (RX2385 at 001; Titus, Tr. 5295). These topics were taking up a significant portion of her time as of the date she wrote this email. (Titus, Tr. 5296). Titus wanted to speak with her boss about these four companies because they had a GPO component. (Titus, Tr. 5296).

Schein's Response:

First, it is important to note that Complaint Counsel now appears to concede that Breakaway has a "GPO component," despite their contrary assertions.

Second, while Ms. Titus's email lists these four buying groups, each arose as a "hot topic" for different reasons. In March 2014, the Steadfast conversation arose because a telesales representative noted that Steadfast had no FSC support and sales were abnormally low. (SF 1208-19; CX 0171). In May 2014, the Dental Co-Op issue arose because a manufacturer, Colgate, had complained to Ms. Titus about the Dental Co-Op's diversion of customers to P&G direct. (SF 594; CX 2239; Titus, Tr. 5237). Smile Source was on the list because Schein was in, or had recently completed, negotiations to supply Smile Source. (SF 1165; CX 2591). Breakaway Dental was on the list because Ms. Titus had taken over responsibility for the account but had "lost the historical thread on this entity" and wanted to learn more, recognizing that it "appears to be a solid partner and Schein supporter." (RX 2718-001).

Third, while the email lists these four buying groups, Complaint Counsel fails to include the portion of the document where Ms. Titus explains to Mr. Cavaretta, "We need to develop our policy on these Dental Management Companies that have a GPO

component.” (Titus, Tr. 5296). As Ms. Titus noted, in May 2014 (in the middle of the alleged conspiracy), Schein did not yet have a unified strategy on how to deal with buying groups. (SF 267, 271-72; Titus, Tr. 5215-16). Later that month, Ms. Titus and Mr. Cavaretta discussed buying groups and how Schein needed to create a document that could be distributed throughout HSD to aid in evaluating buying groups and to provide guidance on when a buying group relationship would make business sense for Schein. (SF 272). Therefore, the asserted fact is contrary to Complaint Counsel’s theory and supports Schein – Ms. Titus wanted to speak with Mr. Cavaretta to determine how best to serve buying groups.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

874. Shortly after Titus was transferred to Henry Schein Dental, she started doing some discovery on a group that Schein worked with called Steadfast Dental. (Titus, Tr. 5296-5297).

Schein’s Response:

The asserted fact is incomplete. Steadfast Dental was previously a Special Markets customer that was transferred to HSD with the creation of Mid-Market – falling under Ms. Titus’s responsibility. (SF 1202-04, 1207-08). In March 2014, a Schein telesales rep in Reno, Nevada discovered that no FSCs had been assigned to Steadfast members and forwarded this information on to Ms. Titus, who began some fact-finding on Steadfast to determine how Schein could help grow its business. (SF 1209).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

875. On March 25, 2014, Titus sent an email to Cavaretta and McLemore with the subject, "Buying Group STEADFAST DENTAL, do we shut this down?" and wrote: "We need to discuss this. . . I'm still in discovery on their DNA (we think it's a DSO called OMSP), but there is no question this is a buying group. They did \$150K last year. Rick H was asked repeatedly to deal with it, but nothing ever happened." (CX0171 at 001 (emphasis in original); Titus, Tr. 5301-5302). Titus reported to Cavaretta as of the time of this email, CX0171. (Titus, Tr. 5300). McLemore was a regional manager for Texas, where Steadfast was located. (Titus, Tr. 5300).

Schein's Response:

Complaint Counsel takes the cited email out of context. Ms. Titus received an inquiry from the Telesales rep, who noted that Steadfast members did not have FSCs assigned to their accounts. (CX 0171). Upon learning this, Ms. Titus began her investigation and discovered that Steadfast members had only purchased \$150,000 in 2013, and that "business for [those] customers is trending down." (CX 0171; CX 0255-005; SF 1218). Notably, Ms. Titus believed that Steadfast had its origins (or "DNA") as an outgrowth of a DSO, suggesting that the group may have been improperly arbitraging a Special Markets DSO contract. (CX 0171). She further noted that her (former) colleague "was asked repeatedly to deal with it, but nothing ever happened." (CX 0171-001). In light of these unremedied concerns, Ms. Titus then asked the question of whether Schein should consider shutting it down, but she also noted that her discovery about the nature of the group was ongoing. (CX 0171). Ultimately, Ms. Titus had further communications

with Steadfast in which she attempted to get Steadfast to address her concerns and offered to become Steadfast's exclusive distributor. (CX 0255).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

876. Steadfast Dental was a buying group. (Titus, Tr. 5297).

Schein's Response:

Ms. Titus testified that Steadfast was a "buying group with a procurement model," meaning that Steadfast would take orders and then allocate it among multiple distributors, siphoning sales that Schein would otherwise get. (Titus, Tr. 5250, 5299; CX 0255). The result was that, even though Schein had partnered with Steadfast, its sales had declined by 45%. (Titus, Tr. 5250, 5299; CX 0255).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

877. Titus sought permission from her superiors to "shut down" Steadfast Dental. (Titus, Tr. 5297).

Schein's Response:

Ms. Titus sought permission only after conducting a thorough investigation, discovering that Steadfast was affirmatively siphoning business away from Schein, and offering an exclusive partnership, which Steadfast ignored. (SF 1209-38).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

878. On June 10, 2014, Titus wrote to Staples, CEO of Steadfast: "After examination of your GPO business model we have concluded that continuation of our current relationship is counter to our business practices. Unfortunately, it is my duty to inform you that effective this Friday; 06/13/14, Henry Schein will no longer support the fulfillment of Steadfast Medical supply orders." (CX2216 at 002; Titus, Tr. 5260).

Schein's Response:

Complaint Counsel selectively quotes from Ms. Titus' email, unfairly leaving out the reason for the decision and her prior communications with Steadfast.

As Mr. Titus explained to Steadfast, she wanted to "have a better understanding of how [Steadfast] allocate[s] to the distribution network and discover if there is way to create a better collaboration that provides prosperity to all the stakeholders." (CX 0255-006). Ms. Titus further noted that "virtually all of [Steadfast's] members were set up as Henry Schein customers prior to them signing [up]" with Steadfast, and that "under Steadfast Medical, business for that same group of customers is trending down." (See SRF 790-91; SF 1223; RX 2201-002). Ms. Titus then noted that Schein is "not against having GPO partnerships," and has "[q]uite a number of them in which all parties are in a position to

win.” (CX 0255-005). After getting no response from Steadfast, Ms. Titus explained her concerns to others at Schein: “when we examined their business practices, it became clear that they were cannibalizing existing business and reallocating HS orders to our competitors.” (CX 2216-001; *see also* CX 2207 (noting, among other concerns, that Steadfast takes the order and then “arbitrarily allocate[s] [it] to a variety of suppliers, redistributing business that might have been earmarked for Schein.”)). Ultimately, Schein decided to end the relationship. But Complaint Counsel also leaves out the portion of Ms. Titus’ email to Steadfast in which she reiterated the offer of an exclusive relationship: “If at some future date you are interested in exploring an exclusive relationship with Henry Schein, we would welcome revisiting a mutually beneficial partnership.” (CX 2216-002).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

879. Titus sought to cease doing business with Steadfast because Steadfast’s “GPO business model” was “counter to [Schein’s] business practices.” (CX2216 at 002; Titus, Tr. 5260 (describing Steadfast’s business model in recommending that Schein cease working with Steadfast)). Steadfast’s GPO business model was in place for the entirety of Henry Schein’s relationship with Steadfast. (Titus, Tr. 5299-5300).

Schein’s Response:

The asserted fact is an incomplete and misleading statement of the reasons Schein ceased doing business with Steadfast. There is no evidence that Schein ended its relationship with Steadfast because it was a buying group, as Complaint Counsel attempts to infer. The evidence instead demonstrates that in an attempt to learn more information

about Steadfast, Ms. Titus exchanged phone calls and emails with Steadfast staff to learn more about the group. (SF 1211). Ms. Titus discovered that Steadfast was acting as a “procurement” agent by redirecting Schein orders to competitors. (SF 1212). Ms. Titus also uncovered that the percentage of business that Schein was doing with individual Steadfast customers had declined by about 50% from the prior year. (SF 1218). This presented a “big issue” for Schein because Steadfast effectively sought to “circumvent [Schein’s] interaction with the client, and attempt[ed] to prevent [Schein] from selling directly....” (SF 1214-15). Moreover, Steadfast was not only redirecting sales that could have gone to Schein, but it also interfered with Schein’s full-service distribution model by discouraging Schein from assigning FSCs to Steadfast accounts. (SF 1216). Consequently, the way Steadfast was operating was not in line with Schein’s core practice care model. (SF 1217).

Despite this decline in business and learning that Steadfast was reallocating Schein’s business, Ms. Titus still wanted to start a dialogue with Steadfast’s executive to see if they could salvage the relationship by coming to “an agreement of a win-win for both stakeholders.” (SF 1220-22). Ms. Titus was clear: Schein was “not against having GPO partnerships. Quite the contrary, we have a number of them in which all parties are in a position to win.” (RX 2201-002; SF 1223). Ms. Titus also told Mr. Staples that Schein did “not want to pull the plug on this fledg[li]ng relationship until both parties agree that our goals are counter to each other.” (RX 2201-002; SF 1223). Despite repeated attempts, however, Ms. Titus was unable to arrange a meeting with Steadfast, and eventually Jon Staples stopped responding. (SF 1224).

Only when it became clear Steadfast was not going to engage in negotiations with Schein and would continue taking sales away from Schein did Ms. Titus recommend that Schein cease its business with Steadfast. (SF 1225). While Ms. Titus was disappointed, she remained hopeful that Schein and Steadfast could revisit a mutually beneficial relationship at a later date. (SF 1235; Titus, Tr. 5261-62; CX 2216-002 (“If at some future date you are interested in exploring an exclusive relationship with Henry Schein, we would welcome revisiting a mutually beneficial partnership.”)). Thus, Schein’s problem with Steadfast’s “business model” was not that Steadfast was a buying group, but that Steadfast was intentionally hurting Schein’s business and refused to engage in mutually beneficial solutions to that problem.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

880. Schein ended its relationship with Steadfast even though Schein sold \$150,000 worth of supplies to Steadfast members in 2013. (CX0171 at 001; Titus, Tr. 5301-5302).

Schein’s Response:

The asserted fact is misleading.

First, \$150,000 in supplies is *de minimis*. At the time, Steadfast has “30 or so” members, so each member was purchasing less than \$5,000 in supplies, or about 10% of its requirements. (CX 0255-003). This is well below Schein’s general market share.

Second, in investigating Steadfast, Ms. Titus uncovered that although Schein had done approximately \$150,000 in sales in 2013, the actual percentage of business that Schein was doing with individual Steadfast customers had declined by about 50% from the prior year. (SF 1218-19; *see also* CX 0255). In fact, the evidence indicates that Schein's business with Steadfast members improved after terminating its partnership with Steadfast. (SF 1240-41). This also refutes Complaint Counsel's numerous general factual assertions that doing business with buying groups was always in Schein's interest. (*See, e.g.*, CCFF 1256-69).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

881. Titus considered \$150,000 of business to be a large client for Henry Schein. (Titus, Tr. 5302).

Schein's Response:

The asserted fact is vague, as was the leading question. \$150,000 is large for a *single* customer. Steadfast, however, was not a customer, but rather consisted of "30 or so" independent dentists, who were the customers. (CX 0255-003). \$150,000 over 30 dentists is a *de minimis* amount, and significantly lower than Schein's general market share. At trial, Ms. Titus was asked a vague, leading question of whether \$150,000 is large client for Schein. Ms. Titus agreed, but only "in perspective." (Titus, Tr. 5302). That is, it is

large compared to a single solo practitioner, but it is tiny compared to 30 independent dentists, and to what would be expected of a buying group consisting of 30 members.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

882. Titus received permission from her superiors to deliver the message to Steadfast Dental that Schein was terminating the relationship. (Titus, Tr. 5298).

Schein's Response:

Ms. Titus received permission only after conducting a thorough investigation, discovering that Steadfast was affirmatively siphoning business away from Schein, offering an exclusive partnership, which Steadfast refused, and explaining those reasons to her superiors. (SF 1209-38).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

883. Cavaretta made the decision to end Schein's relationship with Steadfast. (Cavaretta, Tr. 5595-5596).

Schein's Response:

Ms. Titus sought and received approval to end Schein's relationship from both Mr. Foley and Mr. Cavaretta. (SF 1225-33; Foley, Tr. 4678-80; Cavaretta, Tr. 5595-96).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

884. Foley also made the decision to end Schein's relationship with Steadfast. (Foley, Tr. 4680).

Schein's Response:

See SRF 883.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

885. After Schein ended its relationship with Steadfast, Titus' boss, Cavaretta praised her for "shut[ting] down" a GPO; on June 10, 2014, Cavaretta wrote: "GPO's are popping up like crazy so it is nice when we can shut one down and still keep the business from the individual customers." (CX2216 at 001).

Schein's Response:

The asserted fact is essentially the same as CCF 790 and Schein incorporates its response to that proposed finding here. In a nutshell, Mr. Cavaretta's commended Ms. Titus for being able to maintain the business of individual Steadfast members even after

ending a partnership with a detrimental buying group. (Cavaretta, Tr. 5596-97). Indeed, Schein's business actually improved after terminating its partnership with Steadfast. (Cavaretta, Tr. 5597-98).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

886. On February 10, 2014, Titus wrote to Keefe, an employee of Colgate: "The decision of HSD to treat them as a GPO is a legacy decision that I do not believe, if presented with the same circumstances today, HSD would have embraced." (CX2227 at 004; Titus, Tr. 5305-5306). Titus's statement in CX2227 related to the Dental Co-op of Utah. (CX2227 at 004; Titus, Tr. 5305).

Schein's Response:

The quoted email reflects the fact that the Dental Co-Op of Utah had, by February 2014, begun straying from the original contours of its relationship with Schein. The asserted fact is thus incomplete because Complaint Counsel fails to include the circumstances of Schein's relationship with the Dental Co-Op in 2014. As Ms. Titus testified, the circumstances in 2014 were that the Dental Co-Op was "going to Henry Schein customers and taking them off the Colgate plan that they were receiving from Henry Schein and redirecting them to Proctor & Gamble to buy their preventatives." (CX 8010 (Titus, Dep. at 126)). Schein, however, had an exclusive relationship with Colgate. (CX 8010 (Titus, Dep. at 126)). The Dental Co-Op's promotion of Proctor & Gamble was a change from its prior practice of treating Schein as its exclusive dealer. (SF 588).

Consequently, Schein's relationship with the Dental Co-Op had become problematic in 2014. (SF 591).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

887. Schein's decision to work with the Dental Co-op of Utah was a legacy decision. (Titus, Tr. 5305-5306).

Schein's Response:

The asserted fact is vague and misleading. Ms. Titus testified that the decision to treat the Dental Co-Op as "a legacy decision" referred to how the Dental Co-Op was set up in Schein's internal system. (Titus, Tr. 5306).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

888. Titus did not believe that HSD would have embraced the Dental Co-op in 2014. (Titus, Tr. 5305).

Schein's Response:

The asserted fact is essentially the same as CCFF 886 and Schein incorporates its answer here. In a nutshell, the proposed finding reflects the fact that the Dental Co-Op of

Utah had, by 2014, begun straying from the original contours of its relationship with Schein. Ms. Titus did not believe that Schein would have embraced a relationship with the Dental Co-Op in 2014 because the Dental Co-Op had aligned with Schein's competitors and was no longer willing to be in an exclusive partnership with Schein. (SF 595-96).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

889. Schein first started making sales to the Dental Co-op of Utah beginning in 2007. (CX2801 at 018 (Schein's Response to RFA ¶30 (Schein had a business arrangement with the Dental Cooperative of Utah regarding the sale of dental products and made sales in connection with that arrangement as early as 2007))).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

890. Shortly after Titus was transferred to Henry Schein Dental in March 2014, she started doing some discovery on a group that Schein worked with called the Dental Co-op of Utah. (Titus, Tr. 5304).

Schein's Response:

The asserted fact is misleading, as the transfer to HSD was not why Ms. Titus started doing discovery of the Dental Co-Op. Rather, her investigation of the Dental Co-Op was prompted by a complaint from Colgate, one of Schein's major suppliers. (CX 2239).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

891. The Dental Co-op of Utah was a buying group. (Titus, Tr. 5304).

Schein's Response:

No response. For a fuller explanation of the Dental Co-Op of Utah, see SF 581-633.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

892. Titus elevated the issue of whether to shut down the Dental Co-op of Utah to her superiors. (Titus, Tr. 5304).

Schein's Response:

The proposed finding is misleading because it ignores the fact that Ms. Titus first tried to explore ways to improve the relationship, including by offering to become the Dental Co-Op's exclusive distributor. (CX 2239; RX 2437).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

893. Schein stopped doing business with the Dental Co-op of Utah in 2014. (Titus, Tr. 5304; CX2801 at 018 (Schein's Response to RFA ¶31)).

Schein's Response:

Irrelevant, as Complaint Counsel does not point to any evidence that Schein's decision to stop doing business with the Dental Co-Op in 2014 had anything to do with an alleged agreement with Benco and Patterson, or the fact that it was a buying group. (SF 625-26). Rather, the evidence shows that rather than immediately terminate its relationship with the Dental Co-Op upon finding out that the Dental Co-Op had aligned with direct competitors, Schein remained "very interested in exploring a healthy sustainable relationship," and set up a meeting with the Dental Co-Op. (SF 598-602; CX 2239-001-02). The Dental Co-Op, however, informed Ms. Titus that it planned to add even more of Schein's competitors to the Dental Co-Op portfolio. (SF 611; Titus, Tr. 5243). In response, Ms. Titus proposed to Mr. Eberhardt (Dental Co-Op CEO) that the Dental Co-

Op sign an exclusive agreement with Schein, but his answer was a “definitive no.” (SF 612).

Ms. Titus reported internally that the Dental Co-Op was cannibalizing Schein’s business, and was not willing to be exclusive with Schein. (Titus, Tr. 5245-46; CX 2211-003). In July 2014, due to the Dental Co-Op’s refusal to enter into an *exclusive* relationship with Schein, Mr. Cavaretta determined that Schein’s relationship with the Dental Co-Op was no longer beneficial and decided to end the formal arrangement with the Dental Co-Op. (SF 615).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

894. Schein did more than a million dollars of business with the Dental Co-op of Utah in the 2014 time period. (Titus, Tr. 5305 (testifying that she thinks it was twice one million dollars’ worth of business); CX2227 at 002 (“I think HSD does over \$1M with the offices connected to this group”); CX2420 at 002 (“Dental COOP in Utah is a true GPO . . . the COOP does around \$2 million a year.”)).

Schein’s Response:

To the extent Complaint Counsel seeks an inference through this proposed finding that Schein’s relationship with the Dental Co-Op was a profitable one, there is no support for such an inference. Complaint Counsel’s expert, Dr. Marshall, did not analyze whether Schein’s relationship with the Dental Co-Op was profitable for Schein. (Marshall, Tr. 2969 [REDACTED]). While Mr. Eberhardt (Dental Co-Op CEO) represented that the Dental Co-Op had 400 members, those members

were only doing approximately \$2 million in sales with Schein. (SF 601). This sales volume caused concern for Schein because, while the average private practice dentist spends approximately \$35,000 per year on supplies, Dental Co-Op members were only spending on average approximately \$5,000 a year with Schein. (SF 601).

In any event, once Schein's relationship with the Dental Co-Op had ended, Schein received positive feedback and continued support from its customers and was able to retain its business with members of the Dental Co-Op, even though it was no longer aligned with the group. (SF 624-26).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

895. On July 29, 2014, Kyle wrote to Cavaretta regarding Dental Gator: "We really need to shut the Dental Gator down." (CX0175 at 001). Cavaretta responded to Dean Kyle: "I agree . . . as this is the second big GPO we will be shutting down. . . Co-op is the other." (CX0175 at 001).

Schein's Response:

The asserted fact is misleading. Mr. Cavaretta testified that by "shutting down" he meant "walking away from the business." (CX 0306 (Cavaretta, IHT at 194)). Mr. Cavaretta explained that Schein was walking away from its relationship with the Dental Co-Op because they "weren't in alignment anymore" and it didn't make sense for Schein to do business with the group as the Dental Co-Op rejected Schein's offer of an exclusive relationship. (CX 0306 (Cavaretta, IHT at 194); Titus, Tr. 5245-46; CX 2211-003).

The outcome with Dental Gator was different. Even though Schein experienced internal conflicts with its FSCs arising from Special Markets' relationship with Dental Gator, it never "shut down" the relationship and instead negotiated a solution and continued to do business with Dental Gator during the alleged conspiracy period. (SF 649-63).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

896. At her deposition, Titus testified that prior to moving to Henry Schein Dental, she had never terminated a relationship with any groups. (CX8010 (Titus, Dep. at 80); Titus, Tr. 5309). At trial, Titus testified as follows: "Q. When you were in Special Markets, you never terminated a relationship with any groups? A. I did." (Titus, Tr. 5309). This testimony is directly contradictory from her testimony at her deposition: "Q. Did you ever, prior to moving over to Henry Schein Dental . . . back when you're in special markets, did you ever terminate a relationship with any group? A. No." (CX8010 (Titus, Dep. at 80)).

Schein's Response:

The testimony is not contradictory. At trial, Ms. Titus stated that she believed she "misspoke" at her deposition, as she thought the context was limited to "buying groups" as opposed to any groups more broadly. (Titus, Tr. 5309).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

897. In 2014, Schein ended its relationship with the Dental Cooperative of Utah and Steadfast Dental, two buying groups Schein worked with prior to 2011. (CCFF ¶¶ 871-896).

Schein's Response:

First, the evidence is unclear as to precisely when Schein first started working with Steadfast, but it was sometime in 2011 or 2012. (SF 1202, 1627). Dr. Marshall's sales figures show that Schein "starting doing business with [Steadfast] during the alleged conspiracy period," so "it's not a legacy group." (SF 1627; Marshall, Tr. 2970).

Second, while Schein did end its relationships with Steadfast and the Dental Co-Op, it was only after each group (1) intentionally decided to siphon business away from Schein to Schein's competitors (SF 1219), and (2) declined Schein's offer to become its exclusive distribution partner (SF 1234-35; CX 2216-002; Titus, Tr. 5261).

Third, Schein continued to do business with many other buying groups.

Fourth, to the extent Complaint Counsel seeks an inference that Schein's termination of these two groups was somehow related to the alleged conspiracy, Complaint Counsel offers no evidence that Respondents reached an understanding that Schein would terminate two of the many buying groups it did business with more than three years after the start of the alleged conspiracy, and would do so without any communications relating to these two groups. Furthermore, to suggest that Schein was part of a conspiracy because it terminated relationships with two groups that were intentionally sending business to its competitors, and that were grossly underperforming the average spend per practice experienced by Schein, is illogical in the extreme.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

898. On April 14, 2014, Hight reported to Foley and Titus that the Dental Co-op in Utah is a "true GPO" and she stated that she informed Harmon, the individual who managed the Dental Coop relationship, "we are very careful about not going GPOs." (CX2420 at 002).

Schein's Response:

The asserted fact mischaracterizes the evidence. Jeff Harmon, a Regional Manager for HSD, reached out to Ms. Hight about the Dental Co-Op's desire to expand and qualify for Special Markets pricing. (CX 8022 (Hight, Dep. at 70)). However, because the Dental Co-Op was made up of private practice customers with no central ownership, it was not a DSO. (CX 8022 (Hight, Dep. at 70-72)). Therefore, when Ms. Hight said that Special Markets is "very careful about not doing GPOs" she "was referring to the Special Markets program for DSOs not being used" for others due to "a variety of business reasons," such as manufacturer requirements that such pricing be extended only to DSOs. (CX 8022 (Hight, Dep. at 72); SF 655).

Consequently, there is no evidence to support Complaint Counsel's attempt to cite Ms. Hight's statement as evidence of a no-buying-group policy at Schein. (CC Br. 28-29). Instead, Ms. Hight was merely reiterating that in 2014, Special Markets did not have primary responsibility for buying groups due to the creation of Mid-Market in HSD and that the Dental Co-Op, as currently structured, did not qualify as a DSO and could not receive that type of pricing. (CX 8022 (Hight, Dep. at 70-72)). Indeed, Mr. Foley's response to Ms. Hight's email was that "Per recent calls about Smile Source, which is nothing more than a GPO, HSD prefers they stay with HSD not SM." (CX 2420-001). As

Mr. Foley noted, Schein was indeed working with buying groups and open to more, as it was actively engaged in negotiations with Smile Source. (CX 2420-001).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

c) Sullivan Was Happy that Schein's Relationship with Smile Source Ended.

899. Schein contracted with buying group Smile Source in 2008. (Sullivan, Tr. 3914; RX3086 at 008 (Schein's Third Supplemental Response to IROG ¶1)).

Schein's Response:

No response. For a fuller explanation of Smile Source, see SF 223-33, 1105-86.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

900. Smile Source initially contracted with Schein's Special Markets division. (Steck, Tr. 3687; Foley, Tr. 4526; [REDACTED]).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

901. In early 2011, Muller and Sullivan decided to move the Smile Source account from Schein Special Markets to Henry Schein Dental because there was no central billing, central purchasing, and all of the members were private dentists. (Foley, Tr. 4526-4527, 4552-4555; CX0238 at 001; Steck, Tr. 3687 (Smile Source transferred internally from Special Markets to Henry Schein Dental because Smile Source members were private practices)).

Schein's Response:

Complaint Counsel mischaracterizes the evidence.

As an initial matter, the decision to transfer Smile Source from HSD to Special Markets occurred in October 2010, effective January 2011. (SF 229; CX 0238; CX 2113; CX 2115; CX 2454). So, the decision was made prior to the start of the alleged conspiracy.

Second, the transfer was prompted because an FSC, Scott Schenker, and his Regional Manager, Mike Finnan, expressed concerns in August 2010 about Smile Source, and the resulting loss of commissions. (SF 224; CX 2111). Mr. Finnan explained that the "customer is not a corporate accounts customers[,] [h]e is simply a solo practitioner," and noted the resulting conflict: "This appears to be another situation [where the group] is playing us against each other," and "[a]ll that can be accomplished by allowing this activity is deterioration in our [g]ross profit." (SF 224; CX 2111-010).

Third, the fact that Smile Source members were all private dentists, and there was no central billing, or central purchasing were factors that made Smile Source better suited to HSD than Special Markets. But ultimately, the transfer was driven by concerns about cannibalization, reductions in FSC commissions, and the shifting of revenue from one division of Schein to another. (CX 2113; CX 2114; CX 2115 (Mr. Foley explaining "the

issue the way I see it is it [is] [i]f they take on an HSD account that volume ... moves to [Special Markets] Not good.”); CX 2117-006-08).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

902. On February 20, 2012, Foley wrote: “Hal and I then met with Tim Sullivan and Dave Steck, and decided to move Smile Source to HSD. As there was no central billing, central purchasing and all 15 Smile Source customers were private dentists, we made this happen in January, 2011.” (CX0238 at 001). Foley’s email (CX0238) was about the decision to move Smile Source to HSD. (Foley, Tr. 4553-4554).

Schein’s Response:

The asserted fact is essentially the same as CCFF 901. The impetus for the decision to move Smile Source to HSD was conflicts with FSCs that arose in August 2010 because of the Smile Source relationship with Special Markets. (SRF 901).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

903. In October 2011, [REDACTED]

Schein's Response:

False. There was no restructuring of the Smile Source fee schedule. There are no internal Schein or Smile Source documents suggesting any such change in the Smile Source fee schedule. (SF 1126). The data also shows that discounts to Smile Source members remained constant from 2010 to 2012. (SF 1130).

Dr. Goldsmith's trial testimony is not only contradicted by the data, but also by his deposition testimony. At his deposition, Dr. Goldsmith stated that the meeting was an introductory meeting, and that "[n]othing of substance" was discussed. (CX 8039 (Goldsmith, Dep. at 16); *see also* Goldsmith, Tr. 2115-16 [REDACTED]).

Even if Dr. Goldsmith's trial testimony is to be believed, it does not support the proposed finding. Dr. Goldsmith testified that, in October 2011, Mr. Chatham mentioned that Schein [REDACTED] (Goldsmith, Tr. 1977-78). "Potentially" doing something is far different than "planning" to do it. And, as noted, there was no restructuring. Nor was there any attempt by Dr. Goldsmith to raise the issue either internally within Smile Source or with Schein.

Moreover, Goldsmith had already begun looking for alternative suppliers before his first meeting with Schein. (SF 1109, 1125; CX 1116; Goldsmith Tr. 2079).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

904. [REDACTED]

Schein's Response:

The asserted fact is not supported by the evidence. Complaint Counsel introduced only a *single instance* of a Smile Source member who did not receive the Smile Source discounts immediately upon signing up. (CX 2571-002; SF 1135). [REDACTED]

[REDACTED] (SF 1135). Moreover, the evidence demonstrates that Schein maintained a consistent discount for Smile Source members from 2010 until Smile Source terminated the relationship in January 2012. (SF 1130). Indeed, as part of the transfer, HSD assigned FSCs to each Smile Source member, but “kept ... the same sales plan” and continued to honor the formulary pricing that Special Markets had previously negotiated. (SF 232; CX 2454; RX 2714).

Schein further notes that “feelings” are not a substitute for the hard data showing that pricing was maintained without change.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

905. [REDACTED]
[REDACTED].

Schein's Response:

The asserted fact is not reliable, was not admitted for the truth, and should be disregarded.¹² [REDACTED]
[REDACTED]
[REDACTED]

(Goldsmith, Tr. 2110, 2114-17). Nor did they produce any documents to corroborate [REDACTED]

[REDACTED] (Goldsmith, Tr.

2116-17). [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] (Goldsmith, Tr. 2116-17). [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] (Goldsmith, Tr. 1979-81).

Patterson's Response:

No specific response.

¹² Complaint Counsel should be sanctioned for proposing a fact based on testimony that the Court *expressly* ruled was inadmissible for the truth of the matter asserted, without disclosing the fact that the Court had so ruled. (Goldsmith, Tr. 1981 (“Judge Chappell: “The way I hear this, he heard things. He acted on it. *This is not for the truth of the matter.* I’ll allow it on that basis.”) (emphasis added)).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

906.

Schein's Response:

The asserted fact is essentially the same as CCFF 903 and is inadmissible for the truth for the same reasons as stated in SRF 903. Schein incorporates its response to CCFF 903 here. (SRF 903) The asserted fact should not be considered because

(Goldsmith, Tr. 1979-81).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

907.

Schein's Response:

The asserted fact is not supported by the weight of the evidence.

First, the record contains only one instance in which Smile Source raised a pricing discrepancy. [REDACTED]

[REDACTED]

[REDACTED] (CX 2571; Goldsmith, Tr. 2118).

Second, there was no price creep. The data shows that Schein's discounts to Smile Source remained steady from 2010 to 2012. (SF 1130). As noted, Dr. Goldsmith's testimony about [REDACTED] was not admitted for the truth. (Goldsmith, Tr. 1979-81).

Third, Dr. Goldsmith did not testify that he brought the price creep issue to Schein's attention on two or three occasion. He testified that was [REDACTED] how many times he brought the issue to Henry Schein's attention, but guessed it was [REDACTED] [REDACTED] (Goldsmith, Tr. 1988). Such guesses are not reliable evidence in light of Mr. Goldsmith's admitted lack of recollection.

Fourth, there are no contemporaneous internal Smile Source documents, internal Schein documents, or inter-firm communications relating to or memorializing either the alleged price creep or any effort by Smile Source to bring the (imagined) price creep issue to Schein's attention.

Fifth, with respect to any discrepancies in pricing (of which there is only a single instance in the record), [REDACTED]

[REDACTED] (Goldsmith, Tr. 2118; *see also* Goldsmith, Tr. 2122 [REDACTED]

[REDACTED]

[REDACTED]; CX 8039
(Goldsmith, Dep. at 173)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

908. [REDACTED]
[REDACTED]

Schein's Response:

Dr. Goldsmith's belief is not a relevant fact, and the underlying assertions implied by the proposed finding are false.

As discussed above, [REDACTED]

[REDACTED] (Goldsmith, Tr. 2118;
see also Goldsmith, Tr. 2122 [REDACTED]

[REDACTED]

[REDACTED]; CX 8039
(Goldsmith, Dep. at 173)).

Moreover, there was no price creep. The data shows that Schein's discounts to Smile Source remained steady from 2010 to 2012. (SF 1130). And as noted, Dr. Goldsmith's testimony about [REDACTED] was not admitted for the truth. (Goldsmith, Tr. 1979-81). [REDACTED]

[REDACTED]

[REDACTED] (CX 2571; Goldsmith, Tr. 2118).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

909. Emails from 2011 confirmed Dr. Goldsmith's testimony on price creep. (CCFF ¶¶ 910-912).

Schein's Response:

Complaint Counsel does not cite any record evidence to support this finding. Complaint Counsel only cites other proposed factual findings, which, as discussed below, do not support this broad conclusion.

Substantively, Complaint Counsel only cites to one email where Smile Source reached out to Schein about a member purportedly not receiving the negotiated pricing. (CX 2571-002). However, the document merely reflects that a new Smile Source member in Hawaii had not been properly set up in Schein's pricing systems. (CX 2571-002).

Indeed, [REDACTED]

[REDACTED]

[REDACTED]

A single instance does not support an assertion of "price creep." As the data shows, Schein's discounts to Smile Source remained steady from 2010 to 2012. (SF 1130). Moreover, the documentary evidence shows that, as part of the transfer to HSD, HSD

continued providing the same discounts to Smile Source members that Special Markets had provided. (CX 2454 (“[W]e have just received a major account Smile Source from our special markets team.... They have special pricing based on the Special market formulary pricing.”); RX 2714-001 (“Since Smile Source has been moved over to [HSD,] these accounts need to be moved over to [HSD] and kept on the same Sales Plan.”)). Testimony at trial also confirms that HSD continued to offer Smile Source the same pricing that was extended by Special Markets. (Sullivan, Tr. 4181).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

910. On November 7, 2011, Nickerson of Smile Source wrote to Brady and Chatham of Schein: “We did a spot check on one of our newest additions to the Smile Source. Dr. Jonathon Okabe and compared his pricing to our Special Market pricing from Dr. James Choy and found out that he is not receiving our negotiated pricing.” (CX2571 at 002).

Schein’s Response:

No response, other than to note this was the single price discrepancy identified in the record, which related to a problem with processing the new member and which Schein rectified.

Patterson’s Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

911. On November 7, 2011, Brady responded to Nickerson that he would "look into this today" but by December 20, 2011, the issue had not been resolved. (CX2571 at 002). On December 20, 2011, Nickerson of Smile Source wrote to Brady of Schein: "We have still not heard back on the credit for Dr. Jonathon Okabe in Hawaii?? I had promised him that would be taken care of and he has heard nothing. He just spent 15 minutes speaking very harshly about this situation and we need to make sure that it gets resolved and credited by year end." (CX2571 at 002).

Schein's Response:

The asserted fact is incomplete. After Smile Source reached out to Mr. Brady again on December 20, 2011, he responded, "so sorry for delay in getting back to you!! End of year is just nuts, but this is now my #1 priority!" (CX 2571-001). Mr. Brady then reported that after looking at Dr. Okabe's account, the difference in pricing was only \$100-150, but that as a sign of goodwill he would apply a \$500 credit to Dr. Okabe's account. (CX 2571-001).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

912. On January 25, 2012, Schermerhorn, a field sales consultant, wrote to Meadows and Aaron (a regional manager who reported to Meadows) regarding a conversation he had with a customer: "He was unaware of most of the details for the decision to terminate our relationship with Smile Source however he did hear that some of the expectations of Smile Source from us were not being met." (CX2349 at 002; Meadows, Tr. at 2449-2450).

Schein's Response:

The proposed finding seeks to admit triple hearsay for the truth. The assertion is not reliable on its face, as it indicates the customer “was unaware of most of the details.” (CX 2349-002). Indeed, the customer was mistaken that Smile Source’s termination of Schein was Schein’s decision. Dr. Goldsmith clearly testified, [REDACTED] (Goldsmith, Tr. 2037). Moreover, there is no evidence that the FSC, Mr. Schermerhorn, had personal knowledge of any relevant fact.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

913. [REDACTED]
[REDACTED].

Schein's Response:

False. *First*, Schein objects to the asserted fact to the extent it is being used to establish the truth of the matter asserted, *i.e.*, that Schein increased prices to Smile Source. The data shows that Schein’s discounts to Smile Source remained steady from 2010 to 2012. (SF 1130). And as noted, Dr. Goldsmith’s testimony about [REDACTED] was not admitted for the truth. (Goldsmith, Tr. 1979-81). The evidence demonstrates that HSD “kept ... the same Sales Plan” and continued to honor the formulary pricing that Special Markets had previously negotiated with Smile Source members, and that the discount to

Smile Source remained consistent from 2010-2012. (RX 2714-001; SF 1130). On that score, Schein also here incorporates its responses to CCFF 903-907.

Second, the evidence demonstrates that Dr. Goldsmith had already begun to look for a replacement distributor before even speaking with Schein. On September 26, 2011, Dr. Goldsmith reached out to Benco about a potential partnership. (SF 1125). However, at the time of Dr. Goldsmith's September 26, 2011 email to Benco, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(Goldsmith, Tr. 2114).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

914. The relationship between Schein and Smile Source came to an end at the beginning of
2012. [REDACTED] Steck, Tr. 3688; Sullivan, Tr. 4156).

Schein's Response:

Smile Source fired Schein in January 2012. (CX 0199).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

915. [REDACTED]

Schein's Response:

False.

The asserted fact is misleading, incomplete, and is contradicted by Dr. Goldsmith's contemporaneous statements made at the time Smile Source decided to fire Schein. Soon after Smile Source moved to Burkhart, Dr. Goldsmith wrote to Mr. Sullivan, noting [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX 2090-002). Mr. Nickerson of Smile Source reiterated this, writing, "Smile Source was "appreciative of everything that Henry [Schein] has done," and that the decision to go with Burkhart was because it was "a better fit for us at this time due to our size." (RX 2619-001).

Indeed, [REDACTED]

[REDACTED] (Goldsmith, Tr. 2082, 2093-95, 2104-05; RX 2090-001-02). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
(Goldsmith, Tr. 1990-91, 2094-95). [REDACTED]

[REDACTED] (Goldsmith, Tr. 1990-91). [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (Goldsmith, Tr. 2003-04).

It was because Smile Source felt like Burkhart was a better fit at the time that Smile Source “fire[d]” Schein. (CX 0199-003).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

916. Schein documents support Dr. Goldsmith’s belief that the Schein-Smile Source relationship ended because of Schein’s behavior toward Smile Source. (CX0238 at 001 (“HSD did not give Smile Source the love that SM provided, so they recently dumped Schein.”); CX0238 at 001 (“Tim Sullivan is happy that we are less one more BG.”); CX2624 at 001 (“[W]e invited [Smile Source] to find a new distributor.”); CX2107 at 002 (“We ended the Smile Source relationship when they became more of a GPO then [*sic*] a ‘management company.’”); CX2349 at 001 (“[I]t was more our choice I believe to stop doing business with [Smile Source.] It’s closer to a GPO.”)).

Schein’s Response:

False.

Complaint Counsel’s asserted fact is unreliable because it cites to after-the-fact documents written by individuals without personal knowledge of the Smile Source relationship at the time of the termination. Thus, the cited emails are not entitled to any weight. (SF 1145).

For example, in CX 0238 Mr. Foley speculated that Smile Source “dumped Schein” because HSD did “not give Smile Source the love that [Special Markets] provided.” (CX 0238). And in CX 2107, he further speculated as to the reasons behind the break in the relationship, two years after the fact. Mr. Foley, however, had no involvement with Smile Source in 2012 when Smile Source “dumped” Schein. (Foley, Tr. 4590 (“after Smile Source was out of Special Markets and in HSD, it was no longer of my concern.”), 4672 (“so did you work with Smile Source as of the date of this email, November 2, 2011? A. No.”), 4706 (“My responsibility with Smile Source ended in 2010.”)).

Likewise, CX 2349 is just an email from Mr. Meadows speculating about whose “choice” the termination was. Mr. Meadows testified that he had no personal knowledge of Smile Source at the time. (Meadows, Tr. 2453). And CX 2624 is an email from a Texas Regional Manager who had no role in the Smile Source relationship, sent a year after Smile Source fired Schein.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

917. On February 20, 2012, Foley wrote, “HSD did not give Smile Source the love that SM provided, so they recently dumped Schein and went to Burkhart.” (CX0238 at 001).

Schein’s Response:

The asserted fact is essentially the same as CCFF 916. Schein incorporates its response to that proposed finding here. As noted above, Mr. Foley was not involved in the

Smile Source relationship after November 2011 and did not have any personal knowledge of the Smile Source relationship in early 2012. (SF 1145). His February 20, 2012 email, therefore, cannot be admitted for the truth of the matter asserted.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

918. On February 20, 2012, Foley wrote regarding the end of the Schein/Smile Source relationship: "Tim Sullivan is happy that we are less one more BG." (CX0238 at 001). Foley was referring to buying group when he wrote "BG." (Foley, Tr. 4554).

Schein's Response:

The asserted fact is essentially the same as CCFF 916 and 917. Schein incorporates its responses to those proposed findings here. As noted above, Mr. Foley was not involved in the Smile Source relationship after November 2011, and did not have any personal knowledge of the Smile Source relationship in early 2012. (SF 1145).

Schein also incorporates its response to CCFF 758, which excerpts the same quote from Mr. Foley's email. (SRF 758). At trial, Mr. Foley confirmed that Mr. Sullivan never communicated to him in any fashion that he was happy that Smile Source fired Schein. (Foley, Tr. 4728). Indeed, Mr. Sullivan never responded to Smile Source with anything other than enthusiasm. Even after Smile Source fired Schein in 2012, Mr. Sullivan wrote,

[REDACTED]
[REDACTED] (SF 1354; RX 2090-001). He expressed the same sentiments each time that Smile Source approached Schein thereafter: "I would enjoy catching up with you" (Oct. 2013);

“Yes, we *absolutely* would like to discuss further” (Nov. 2013). (SF 1465; CX 2580; RX 2328-001 (emphasis added)).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

919. On February 27, 2013, Showgren wrote to Alguire, a field sales consultant regarding Smile Source: “Too long of a story to email. Basically we invited them to find a new distributor.” (CX2624 at 001).

Schein’s Response:

The asserted fact is not reliable for the truth of the matter asserted, as Complaint Counsel has laid no foundation that Mr. Showgren had any personal knowledge of, or involvement with, Smile Source’s decision to fire Schein in favor of Burkhart in 2012. As a result, such testimony should not be considered.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

920. On July 11, 2014, Foley wrote: “We ended the Smile Source relationship when they became more of a GPO then [*sic*] a ‘management company.’” (CX2107 at 002).

Schein's Response:

The asserted fact is essentially the same as CCFF 916. Schein incorporates its response to that proposed finding here. As noted above, Mr. Foley was not involved in the Smile Source relationship after November 2011 and did not have any personal knowledge of the Smile Source relationship in early 2012. (SF 1145). His July 11, 2014 email, therefore, cannot be admitted for the truth of the matter asserted.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

921. On January 26, 2012, Meadows wrote to Porro, the director of sales: "John Nathan was working closely on this and it was more our choice I believe to stop doing business with the group. It's closer to a GPO." (CX2349 at 001; Meadows, Tr. 2450-2452). Meadows' email was questioning whether Schein would want to win back the Smile Source group. (Meadows, Tr. 2452). When Meadows wrote, "It's closer to a GPO," "It's" referred to Smile Source. (Meadows, Tr. 2453).

Schein's Response:

The asserted fact is essentially the same as CCFF 916. Schein incorporates its response to that proposed finding here. (SRF 916). As noted above, Mr. Meadows testified that he had no personal knowledge of Smile Source at the time of this document, and so his January 26, 2012 email cannot be admitted for the truth of the matter asserted. (SF 1145; Meadows, Tr. 2453). Indeed, his email indicates he was simply relaying what he "believe[d]" at the time.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

922. Meadows would not have put something in an e-mail to Porro that he did not believe to be true. (Meadows, Tr. 2453).

Schein's Response:

Irrelevant. Mr. Meadow's email on its face merely relayed his "belie[f]," which, as he testified, was not based on any personal knowledge or involvement with Smile Source. (Meadows, Tr. 2453).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

923. Sullivan was happy that Schein's relationship with Smile Source ended. (CCFF ¶¶ 918, 924; *see also* CX0238 at 001 ("Tim Sullivan is happy that we are less one more BG.")).

Schein's Response:

False. Complaint Counsel cites only unreliable hearsay in support of this proposed finding. At trial, Mr. Foley confirmed that Mr. Sullivan never communicated to him in any fashion that he was happy that Smile Source fired Schein. (Foley, Tr. 4728). Moreover, Mr. Sullivan testified that he ***did not*** want Schein's relationship with Smile Source to end

in 2012. (Sullivan, Tr. 4157 (“Q. You didn’t want the relationship to end. A. No. That’s why we bid on it.”)). Mr. Sullivan’s contemporaneous emails support his testimony. His first note to Smile Source after Smile Source moved to Burkhart indicated, [REDACTED]

[REDACTED]
(RX 2090-001).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

924. On February 2, 2012, Sullivan wrote that he was more concerned with “what we can do to KILL the buying group model!” than the lost revenues from the Smile Source account. (CX0199 at 001 (emphasis in original); Sullivan, Tr. 3937; see also CCFF ¶¶ 728-732

Schein’s Response:

The asserted fact is essentially the same as CCFF 729-732. Schein incorporates its responses to those proposed findings here. In a nutshell, Mr. Sullivan’s email reflects an executive trying to motivate his team to compete to retain business that was at risk due to Smile Source’s decision to switch to Burkhart. As Mr. Sullivan testified, “when Smile Source terminated us ... I definitely wanted to kill – you know, go after ... Smile Source’s model, and the customers that they were now attempting to switch to someone else.” (Sullivan, Tr. 3932-33, 3935-37 (“We wanted to keep the business.”), 4144-46). It did not reflect any special animus towards buying groups generally or Smile Source specifically. In fact, just a week after this email, Mr. Sullivan wrote to Smile Source, [REDACTED]

[REDACTED] (RX 2090-001).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

d) Schein Rejected Buying Groups During the Conspiracy Period.

925. Schein did not offer Florida Dental Association a discount on supplies for its buying group. (CX0310 (Steck, IHT at 132); CX0201 at 001).

Schein's Response:

False. The evidence shows that Schein competed for the business of the FDA's buying group and offered it discounts, but that the FDA chose a different supplier instead. (SF 750). In June 2012, the FDA approached Schein about partnering with its buying group. (SF 751). Schein was interested, and had several discussions with the FDA about its new program. (SF 752). While Schein was interested, it had concerns about the FDA's inability "to commit volume for their members or give [Schein] any kind of minimum purchase levels," and was skeptical that FDA members working with other distributors would switch to Schein. (SF 753). Despite these concerns, Schein prepared a "value-added" offer that included seminars for members and increased discounts to members who made purchase commitments. (SF 754). As Mr. Steck explained, "we offered that if a customer signed up on a plan we would normally offer a \$25,000 customer that they could get that same plan with a \$15,000 commitment. So we gave them a reduced commitment

to get the pricing, but it still required a commitment.” (CX 0310 (Steck, IHT at 133-34)). However, the FDA declined Schein’s offer and decided to work with Darby as its “supplier partner” instead. (SF 755).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

926. Steck testified that Florida Dental Association sought a discount for its members and Schein “refused because it [was] not within the parameters that we dealt with.” (CX0310 (Steck, IHT at 132)).

Schein’s Response:

The asserted fact is false, misleading, and mischaracterizes the evidence. Complaint Counsel fails to include all of Mr. Steck’s testimony on the subject where he explains that Schein was not willing to offer large discounts across the board because the FDA could not guarantee compliance, but that Schein was still open to working with the FDA on another program. As Mr. Steck testified, the FDA “initially came in and asked us for a large discount across the board for all FDA members on everything they buy regardless of whether they committed volume or anything and we refused because it is not within the parameters that we dealt with. ***But we said we would be willing to work with them on some other things.***” (CX 0310 (Steck, IHT at 132) (emphasis added)). In fact, Schein presented a “value-added” offer to the FDA that included seminars for members and increased discounts to members who made purchase commitments. (SF 754; CX 0310 (Steck, IHT at 133-34)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

927. Steck wrote regarding Florida Dental Association in late-2011, "This is the classic 'buying group' approach that we aren't buying into." (CX0201 at 001).

Schein's Response:

Schein does not dispute that Mr. Steck wrote this. Schein, notes, however, that this document was written at the beginning of the negotiations with the FDA (after only one call with them). As noted, while Schein had concerns on the FDA's ability to drive compliance and deliver incremental sales volume to Schein, Schein developed a proposal that was a "value-added" offer that included seminars for members and increased discounts to members who made purchase commitments. (SF 754; CX 0310 (Steck, IHT at 133-34)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

928. Schein declined to work with Kois Buyers Group in November 2014, stating that it would "pass" on working with the buying group. (CX4310 at 001; *see also* Kois Sr., Tr. 190, 196 (Schein, Patterson, and Benco rejected Kois Buyers Group)).

Schein's Response:

The asserted fact is incomplete and misleading. The evidence demonstrates that Schein engaged the Kois Buyers Group in active discussions, but Mr. Ahmed declined to provide Schein with additional information about its proposal. Before discussions could progress, Dr. Kois elected to contract with Burkhart. (SF 893-913).

Schein did not receive a proposal from the Kois Buyers Group until October 22, 2014 – after Patterson and Benco had already declined. (SF 872-75, 893). Mr. Sullivan immediately met with Kois to discuss its plans. (SF 895). Mr. Sullivan told Kois that he would find time to speak again in the next week or so, but Kois wanted to “schedule a webex this week as time is of the essence.” (SF 896). Mr. Sullivan accommodated. (SF 896). After speaking with Mr. Ahmed the following day, Mr. Sullivan noted that Schein was “very interested in learning more about this initiative as it certainly seems very unique to anything we’ve heard thus far.” (SF 897; RX 2602-006). Due to the unconventional aspects of Kois’s proposal, Mr. Sullivan “need[ed] a little time to do some homework” and promised to “follow up” the following week. (SF 897).

A few days later, Mr. Sullivan held an internal meeting where additional questions were raised, prompting him to ask Mr. Ahmed for a “face-to-face meeting” and “a little more time” considering that Schein was “invited to the discussion so late in the game.” (SF 899). As Mr. Sullivan testified, “I’m basically saying to him we’re not saying no. There are some things that ... actually sound like there’s some potential opportunity here.... [B]ut we need to analyze this, and I’m not going to rush into an agreement with them.” (SF 901).

Mr. Ahmed, however, rejected Schein’s request for time to conduct its pre-deal due diligence. He was willing to spend “serious time” with Schein only “after we get a basic

initial deal done that gives you an ‘out’ if we don’t deliver on the rest in a timely fashion.” (SF 902). As Mr. Sullivan testified, “That’s not how you enter a contract. That’s not how you enter a partnership.” (SF 908). So, Mr. Sullivan wrote back that he appreciated Mr. Ahmed’s “‘get r done’ approach, but it’s not a style I am comfortable working in. I can’t get married with a ‘no big deal,’ we can always divorce later’ mentality.” (SF 909). Still, Mr. Sullivan sought to continue the discussions: “If we can slow down and really understand your model better ..., then we believe it is worth rolling up [our] sleeves.” (SF 909). Despite believing that Schein’s interest remained “high,” Dr. Kois reached agreement-in-principle with Burkhardt on October 30, 2014 – before Schein had even informed Kois that it had to “pass on the offer.” (SF 912-13).

Schein’s behavior with Kois is consistent with its unilateral, deliberate approach to evaluating buying groups. Indeed, Schein evaluated the opportunity and engaged in active discussions with the group, but was not afforded adequate time or information to move forward with a proposal to Kois. Kois was not willing to “slow down” and attempt to reach a deal with Schein and instead decide to forge ahead with Burkhardt as its chosen supplier.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

929. On November 3, 2014, Chatham wrote to Ahmed, a representative of Kois Buyers Group and copied Sullivan and Steck: “We have conferenced as a team and at this point believe we need to take a pass on the offer.” (CX4310 at 001).

Schein's Response:

The asserted fact is the same as CCF 928. Schein incorporates its response to that finding here.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

930. Henry Schein declined to work with the New Mexico Dental Cooperative. (Mason, Tr. 2354-2355).

Schein's Response:

False. The testimony Complaint Counsel cites deals with Patterson, not Schein. The evidence instead indicates that Schein did, in fact, partner with the New Mexico chapter of the Utah Dental Co-Op through Schein's agreement with the Utah Dental Co-Op. (Mason, Tr. 2402-05).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

931. Schein declined to work with PMGS, a buying group, in July 2014. (Titus, Tr. 5228 (Schein made decision not to partner with PGMS); CX2219 at 002; CX2235 at 001 ("GPO prospect called PGMS . . . went to Tim and he shot it down."); Titus, Tr. 5216-5217 (PGMS was a buying group); *see also* CCF ¶¶ 801-805).

Schein's Response:

The asserted fact is essentially the same at CCFF 798 and Schein incorporates its response to CCFF 798 here. In a nutshell, Schein engaged in discussions with PGMS about a potential agreement. However, Mr. Cavaretta decided not to move forward with the group because Schein had concerns with the group's ability to drive compliance, especially since the founder of the group refused to purchase from Schein. (SF 1061-73).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

932. On July 16, 2014, Titus wrote, "Just delivered the news moments ago to Kathy Khalik. She was absolutely gracious, but clearly devastated. I explained if there was a time in the future they become an MSO that could demonstrate compliance, we would be pleased to revisit. I offered her the compromise Tim suggested to enroll the fully owned locations in a SM program." (CX2219 at 002).

Schein's Response:

The asserted fact is essentially the same as CCFF 798 and Schein incorporates its response to CCFF 798 here. Schein notes that it was Mr. Cavaretta, not Mr. Sullivan, who made the decisions not to partner with PGMS. (SF 1068-1073).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

933. PGMS was willing to enter into an exclusive contract with Schein. (Titus, Tr. 5226, 5311; CX2235 (Statement of Titus: “We had a GPO prospect called PGMS. Very intriguing, willing to be exclusive.”)).

Schein’s Response:

The asserted fact is essentially the same at CCFF 800 and Schein incorporates its response to that proposed finding here. In a nutshell, just because a buying group could guarantee exclusivity, that did not equate to a buying group being able to drive compliance. Exclusivity and compliance are not the same thing.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

934. On December 21, 2011, Foley declined to work with Unified Smiles informing Knysz of Schein’s new policy that it “no longer participate[d] in Buying Groups.” (CX2062 at 001; Foley, Tr. 4545-4546; *see also* CX2073 (Statement of Foley: “It’s a buying group that we do not participate with, as with all buying groups.”)).

Schein’s Response:

The asserted fact is essentially the same at CCFF 719 and 720, and Schein incorporates its responses to those proposed findings here.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

935. Academy of General Dentistry (“AGD”) is an organized group that educates dental professionals. (Cavaretta, Tr. 5646). In August 2011, AGD approached Schein regarding a buying group they were attempting to form. (CX0166 at 002; Cavaretta, Tr. 5646-5647).

Schein’s Response:

The asserted fact is not supported by the evidence. CX 0166 is an email from an FSC reporting on a dentist’s assertion that the AGD “approached Schein.” This is hearsay within hearsay within hearsay, and there is no indication that the unnamed doctor had personal knowledge. Nor is there any indication concerning when the supposed reach-out occurred, or what was said. In his response, Mr. Cavaretta makes clear that he “[has]n’t heard anything about this.” (CX 0166-002). While Complaint Counsel cites Mr. Cavaretta’s trial testimony (without quoting it), Mr. Cavaretta was simply asked to read the email and answer questions about who the FSC reported to. He was not asked whether he knew anything about any potential bid, or decision not to bid, for AGD. (Cavaretta, Tr. 5646-47).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

936. On August 25, 2011, Gadd, a Schein FSC wrote to Cavaretta, “AGD is trying to negotiate a deal for members of the AGD to get discounts (a buying group in other words) and I know they have approached Schein.” (CX0166 at 002; Cavaretta, Tr. 5647).

Schein's Response:

The asserted fact is not reliable. Complaint Counsel cites to no testimony establishing that AGD did in fact approach Schein. Complaint Counsel did not call Mr. Gadd to testify at trial, nor did Mr. Cavaretta offer any testimony that he had personal knowledge of AGD actually approaching Schein at this time.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

937. Cavaretta responded to Gadd: "As for the AGD buying group . . . I haven't heard anything about this but I doubt this will happen. Once the buying groups entire [*sic*] our market the dental model as we know it will change. I will ask John or Dave about our progress but I would assume at this point that nothing is going to happen." (CX0166 at 002Cavaretta, Tr. 5648).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

938. On September 14, 2014, Penrose wrote, "[W]e are not considering any 'buying group' program with AGD at this time." (CX2439 at 002).

Schein's Response:

The asserted fact is incomplete and misleading. Ms. Penrose stated that while “we are not considering any ‘buying group’ program with AGD at this time,” she continued on to say that “we have presented an option to work with AGD offering several of our Business Solutions products ... ***at a discount*** and drive this program at a local and national level.” (CX 2439-002 (emphasis added)). Consequently, the evidence does not demonstrate that Schein rejected working with AGD. In fact, the evidence actually demonstrates that Schein offered discounts to members of AGD, which were approved by Tim Sullivan and John Chatham. (CX 2439-002).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

939. Henry Schein declined to work with AGD during the conspiracy period. (CCFF 935-938).

Schein's Response:

Complaint Counsel cites no record evidence to support this finding. They only cite other proposed findings, which – as set forth in Schein's specific replies – also fail to support their characterization of the evidence.

Substantively, as explained in Schein's responses to CCFF 935-38, Complaint Counsel cites to no reliable evidence that Schein declined to work with AGD during the alleged conspiracy period.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

940. In early 2011, Schein bid on the Tralongo buying group. (Foley, Tr. 4568).

Schein's Response:

The evidence does not support the asserted fact. Mr. Foley did not testify precisely as to when Schein bid on Tralongo, but rather placed it sometime in 2011 or 2012. (Foley, Tr. 4568 ("we bid on [Tralongo] in early 2011"); Foley, Tr. 4712 ("Q. When did Schein Special Markets first engage in discussions with Tralongo? A. Around 2011-2012 I visited with them at their corporate office."); Foley, Tr. 4591 ("We bid on Tralongo early on it 2012.")). As such, the evidence is not clear as to whether the first time Schein bid on Tralongo was before or after the start of the alleged conspiracy.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

941. In 2014, Schein refused a request to bid on Tralongo's buying group component. (Foley, Tr. 4568-4569; CX2081 at 002; CX2697 at 001; CX2083 at 001).

Schein's Response:

Mr. Foley testified at trial that Schein's decision in 2014 not to move forward with a second bid for Tralongo's buying group had nothing to do with Tralongo being a buying group. (SF 1276). The evidence instead shows that Mr. Foley engaged in discussions with Tralongo in 2014. (SF 1273). After vetting the group, Special Markets declined to submit a new bid on Tralongo because Tralongo was not willing to offer Schein's software, equipment, or services to its members, in addition to supplies. (SF 1275). Special Markets felt that there was thus no "stickiness," and Tralongo was focused only on obtaining low pricing competitive with Darby's (its current supplier). (SF 1275). As such, Schein did not see any advantage to working with Tralongo at that time. (SF 1275).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

942. On November 10, 2014, Foley wrote to Muller, "I also got an email from Tralongo, another growing BG that we said no to." (CX2081 at 002).

Schein's Response:

No response, other than to note that Schein engaged in discussions with Tralongo in 2014, as described in Schein's response to CCFF 941.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

943. Foley instructed his sales team not to meet with the Tralongo buying group in 2013 or 2014. (Foley, Tr. 4593; *see also* CX2083 at 001; CX2081 at 002; CX2697 at 001).

Schein's Response:

The evidence is not clear as to whether it was in 2013 or 2014 when Mr. Foley decided not to bid for Tralongo. (Foley, Tr. 4593).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

944. On December 18, 2014, Foley wrote to Daniel Hobson regarding Tralongo, "This a buying group so we declined to bid (Rhonda declined at my direction)." (CX2083 at 001).

Schein's Response:

The asserted fact is misleading. This email just refers to the same discussion cited in CCFF 943. As Mr. Foley confirmed at trial, Schein's decision in 2013 or 2014 not to move forward with a second bid for Tralongo's buying group had nothing to do with Tralongo being a buying group. (SF 1276). Rather, after vetting the group, Special Markets declined to submit a new bid on Tralongo because Tralongo was not willing to offer Schein's software, equipment, or services to its members, in addition to supplies. (SF 1275). Special Markets felt that there was thus no "stickiness," and Tralongo was focused

only on obtaining low pricing competitive with Darby's (its current supplier). (SF 1275).
As such, Schein did not see any advantage to working with Tralongo at that time. (SF 1275).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

945. On December 15, 2014, Foley wrote to Schein employees regarding Tralongo, "It's a buying group so we walked away from them—did not bid on the business." (CX2697 at 001).

Schein's Response:

The asserted fact is essentially the same as CCFF 941-944 and Schein incorporates its answers to those proposed findings here. In a nutshell, Special Markets declined to do business with Tralongo *not* because it was a buying group, but rather because the group did not have any "stickiness" and was only focused on obtaining low pricing competitive with Darby's – as evidenced by the fact that Tralongo was not willing to offer Schein's software, equipment or services to its members. (SF 1275).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

946. On October 27, 2015, Scott Carringer, a Regional Manager located in the Atlanta area, emailed Foley regarding Tralongo. (CX2094 at 003; Foley, Tr. 4594). Carringer wrote, “Randy we will wait for your instructions as to what to do.” (CX2094 at 003).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

947. On October 28, 2015, Foley wrote to Schein employees, “Schein, PDCO and Benco all refused to bid on their business when they entered the GPO/Buying Group world” (CX2094 at 001). Foley testified that this email is regarding Tralongo. (Foley, Tr. 4594-4595).

Schein’s Response:

The asserted fact is misleading. There is no evidence that Mr. Foley or anyone at Schein ever discussed Tralongo with anyone at Patterson or Benco. (SF 1278). Mr. Foley testified that he “had no direct knowledge” of whether PDCO or Benco bid on Tralongo. (SF 1278). Rather, he was just reporting market intelligence based on the fact that he had “never run into them at any buying group opportunities.” (SF 1278).

Further, as described in Schein’s responses to CCFF 940 and 941, Schein bid on Tralongo in either 2011 or 2012 and subsequently engaged in discussions with Tralongo in 2014, and ultimately declined to submit a bid in 2014 because Tralongo was not agreeable to offering Schein’s software, equipment, or services to its members. (SF 1269-77).

Patterson’s Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

948. In December 2011, Pearl Network at NYU expressed interest to Schein in "creating a dental GPO with Schein as the anchor." (CX2456 at 005).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

949. Steve Kess elevated the issue of working with Pearl Network's potential buying group to Sullivan and Steck on December 7, 2011. (CX2456 at 001 ("By cc of this email and chain I have shared it with HSD Leadership.")).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

950. Sullivan responded to the idea of working with Pearl Network ‘s potential buying group: “I am still of position that we do NOT want to lead in getting this initiative started in dental. I think that it is a very slippery slope.” (CX2456 at 001; Sullivan, Tr. 3943-3944).

Schein’s Response:

The asserted fact is incomplete and essentially repeats CCFF 709. Schein incorporates its response to CCFF 709 here. Complaint Counsel fails to include the next part of the email where Mr. Sullivan explains that buying groups generally fail to deliver incremental volume, result in cannibalization, and create conflicts with non-members. As Mr. Sullivan stated, “At the end of the day, we provide package discount ‘deals’ to those that control buying. Simply being a ‘member’ has historically provided little value or incentive to drive change in purchasing loyalty at the local [general practitioner] level, yet causes all sorts of issues for those members and local area non-members who then expect the same.” (CX 2456-001).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

951. Schein declined to work with Pearl Network’s buying group. (CCFF ¶¶ 948-950).

Schein’s Response:

The asserted fact is misleading. There is no evidence that the Pearl Network presented a concrete proposal to Schein. CX 2456 is simply an inquiry by a Schein Medical Regional Manager whose father was friends with someone affiliated with Pearl. Thus, while Schein did not affirmatively try to pursue a deal, there is no evidence that it

“declined” an opportunity that Pearl presented. In any event, the evidence shows that Schein’s decision was based on unilateral reasons. As Henry Schein Inc.’s Steve Kess, Vice President of Global Professional Relations, explained, given “[t]he brand position of HSD and SM ... [w]ith almost 40% market share,” contracting with a “national GPO” “could be a disaster to our pricing and [gross profit] structure.” (CX 2456-002). Therefore, Schein’s decision not to pursue business with the Pearl Network was in its unilateral self-interest and had nothing to do with an alleged agreement with Benco and Patterson. (SF 1277-78).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

952. On May 22, 2013, Schein employee Paul Berkey asked whether his colleagues had heard of Synergy Dental Partners, a “dental gpo . . . based out of Charlotte, NC.” (CX0252 at 001). Foley responded, “They approached us about a year ago and we said no.” (CX0252 at 001).

Schein’s Response:

No response, other than to note that Synergy Dental actually approached Schein in March 2010, well before the start of the alleged conspiracy. (CX 2451).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

953. On September 14, 2014, Foley wrote to Muller and Peter Jugoon regarding Synergy Dental Partners, “I believe our local North Carolina team was entertaining the option for Schein to be a distributor for this group, but later decided against it. As with other buying groups we continue to say no (at least try to).” (CX2079 at 001; Foley, Tr. 4650-4651).

Schein’s Response:

The email is an inquiry from Schein Canada, simply asking if Special Markets U.S. knew anything about Synergy Dental. Mr. Foley simply responded that Schein had previously said no to that group, consistent with Schein’s 2010 Guidance. (Foley, Tr. 4651-52). As noted above, Schein declined to work with Synergy Dental in March 2010, before the start of the alleged conspiracy. (CX 2451). Moreover, as Mr. Foley testified, his comment that “we continue to say no [or] (at least try to)” was directed at groups like Synergy that could not demonstrate compliance, would result in “pure cannibalization,” and therefore were not a good fit for Schein. (Foley, Tr. 4650-51).

At trial, Mr. Foley confirmed that he was not trying to communicate any alleged policy not to business with buying groups to Mr. Jugoon and Mr. Muller. (Foley, Tr. 4652). In fact, Mr. Foley subsequently put Mr. Jugoon in contact with a different buying group, OrthoSynetics, so that Mr. Jugoon could work to expand Schein’s relationship with the buying group into Canada. (Foley, Tr. 4652-53).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

954. Schein declined to work with Synergy Dental Partners during the conspiracy period. (CX0252 at 001; CX2079 at 001).

Schein's Response:

The evidence does not support the asserted fact.

The evidence shows that Schein declined to work with Synergy Dental in March 2010, before the start of the alleged conspiracy. (CX 2451).

All the later documents relating to Synergy Dental are simply *internal* inquiries asking about whether someone has heard of this group. None of these documents suggest that Synergy approached Schein during the alleged conspiracy period seeking a supply relationship. (CX 0185; CX 0252; CX 2079). CX 0185 is just an internal email dated July 2011 discussing an article about Synergy Dental. CX 2052 is a May 2013 internal email from Special Markets' Director of Merchandise (who deals with manufacturers) asking if anyone had heard of the Synergy. CX 2079 is an internal inquiry from Special Markets Canada simply asking if anyone knows anything about them.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

C. Benco Confronted Schein When It Suspected Schein of Discounting to Buying Groups.

1. Unified Smiles (2012)

955. On January 11, 2012, Benco learned from a customer that Schein might be offering discounts to the buying group Unified Smiles. (CCFF 956-961; CX1144 at 001; Ryan, Tr. 1061-1062, 1246; *see also* Cohen, Tr. 743-744; CX1052 at 001).

Schein's Response:

Schein does not dispute that an industry participant (and perhaps customer), Dr. Aksu told his Territory Representative, Michael Paquette, that he “thought that Schein would be” participating in a new “buying consortium” called Unified Smiles. Schein notes, however, that this information was incorrect. Three weeks earlier, Mr. Foley had previously explained to Unified Smiles that Schein could not offer it the DSO pricing it was seeking. (SF 1287-97; CX 2062; Foley, Tr. 4543-46, 4684-89).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the cited exhibit contains the subject line “Unified Smiles,” but otherwise contains no information regarding the group or the relationship between Unified Smilies and the Dr. Aksu, who is mentioned in the cited exhibit by Benco's territory representative. (CX1144).

Second, Pat Ryan promptly responds to Paquette's message, writing: “We've already spoken to them and turned them down.” (CX1144). So prior to January 11, 2012 – the date of the cited exhibit – Benco spoke to Unified Smiles and turned them down per Benco's policy.

Third, Pat Ryan has never had any communications with anyone at Schein or Patterson regarding an entity called Unified Smiles. (Ryan, Tr. 1172).

Fourth, Pat Ryan evaluated Unified Smiles' ownership structure, applied Benco's policy, and informed Unified Smiles that Benco would not do business with Unified Smiles as a single customer. (Ryan, Tr. 1172-73).

Fifth, Pat Ryan independently made Benco's decision on Unified Smiles by applying Benco's policy and reaching a decision that was in Benco's unilateral economic interest. Any involvement that Schein may, or may not have had, with Unified Smiles played absolutely no role in Ryan's decision. (Ryan, Tr. 1172-73).

956. On January 11, 2012, Ryan received an email from Paquette, a Benco territory representative, regarding the buying group, Unified Smiles. (CX1144 at 001).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the cited exhibit contains the subject line "Unified Smiles," but otherwise contains no information regarding the group or the relationship between Unified Smiles and the Dr. Aksu, who is mentioned in the cited exhibit by Benco's territory representative. (CX1144).

Second, Pat Ryan promptly responds to Paquette's message, writing: "We've already spoken to them and turned them down." (CX1144). So prior to January 11, 2012

– the date of the cited exhibit – Benco spoke to Unified Smiles and turned them down per Benco’s policy.

Third, Pat Ryan has never had any communications with anyone at Schein or Patterson regarding an entity called Unified Smiles. (Ryan, Tr. 1172).

Fourth, Pat Ryan evaluated Unified Smiles’ ownership structure, applied Benco’s policy, and informed Unified Smiles that Benco would not do business with Unified Smiles as a single customer. (Ryan, Tr. 1172-73).

Fifth, Pat Ryan independently made Benco’s decision on Unified Smiles by applying Benco’s policy and reaching a decision that was in Benco’s unilateral economic interest. Any involvement that Schein may, or may not have had, with Unified Smiles played absolutely no role in Ryan’s decision. (Ryan, Tr. 1172-73).

957. Paquette asked whether Benco would participate in the buying group and indicated that a doctor thought Schein “would be” participating in Unified Smiles. (CX1144 at 001; Ryan, Tr. 1061-1062). Ryan understood Paquette to be saying that a doctor thought that Schein would be participating in the buying group, Unified Smiles. (Ryan, Tr. 1061-1062, 1246-1247).

Schein’s Response:

Schein does not dispute the text of the email. Schein notes, however, that three weeks earlier, Mr. Foley had previously explained to Unified Smiles that Schein could not offer Unified Smiles the DSO pricing it was seeking. (SF 1287-97; CX 2062; Foley, Tr. 4543-46, 4684-89; SRF 719).

Patterson’s Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit and testimony.

First, the cited exhibit contains the subject line "Unified Smiles," but otherwise contains no information regarding the group or the relationship between Unified Smilies and the Dr. Aksu, who is mentioned in the cited exhibit by Benco's territory representative. (CX1144).

Second, Pat Ryan promptly responds to Paquette's message, writing: "We've already spoken to them and turned them down." (CX1144). So prior to January 11, 2012 – the date of the cited exhibit – Benco spoke to Unified Smiles and turned them down per Benco's policy.

Third, Pat Ryan has never had any communications with anyone at Schein or Patterson regarding an entity called Unified Smiles. (Ryan, Tr. 1172).

Fourth, Pat Ryan evaluated Unified Smiles' ownership structure, applied Benco's policy, and informed Unified Smiles that Benco would not do business with Unified Smiles as a single customer. (Ryan, Tr. 1172-73).

Fifth, Pat Ryan independently made Benco's decision on Unified Smiles by applying Benco's policy and reaching a decision that was in Benco's unilateral economic interest. Any involvement that Schein may, or may not have had, with Unified Smiles played absolutely no role in Ryan's decision. (Ryan, Tr. 1172-73).

958. On January 11, 2012, minutes after receiving the information that Schein would be participating in the buying group, Unified Smiles (in CX1144), Ryan forwarded the email to his boss, Cohen, and wrote, "For Timmy conversation." (CX1052 at 001; Ryan, Tr. 1061-1063; Cohen, Tr. 503).

Schein's Response:

Schein does not dispute that Mr. Ryan forwarded Mr. Paquette's email 21 minutes after receiving it and that he wrote, "For Timmy Conversation." Schein notes, however, that Benco did not receive "information that Schein would be participating in the buying group, Unified Smiles," but rather an indication that Dr. Aksu "thought that Schein would be" participating in a new "buying consortium" called Unified Smiles. (CX 1052). Schein also notes that Dr. Aksu was incorrect. Three weeks earlier, Mr. Foley had previously explained to Unified Smiles that Schein could not offer it the DSO pricing it was seeking. (SF 1287-97; CX 2062; Foley, Tr. 4543-46, 4684-89).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, Complaint Counsel overstates the evidence in the proposed finding. It contains no credible market intelligence at all that Schein conclusively "would be participating" in Unified Smiles. (CX1144). The cited exhibit only contains a Benco territory representative mentioning a "thought" of a dentist. (CX1144).

Second, the cited testimony similarly does not support the proposed finding. Chuck Cohen's actual testimony was:

Q. And so here Mr. Paquette is mentioning Schein there; right?

A. Yes.

(Cohen, Tr. 503).

Third, Chuck Cohen has never had any communications with Tim Sullivan or anyone else at Schein regarding an entity called Unified Smiles. (Cohen, Tr. 738).

959. Ryan testified that “Timmy” in CX1052 referred to Tim Sullivan of Henry Schein. (Ryan, Tr. 1063).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Chuck Cohen has never had any communications with Tim Sullivan or anyone else at Schein regarding an entity called Unified Smiles. (Cohen, Tr. 738).

960. Cohen testified that “Timmy” in CX1052 referred to Tim Sullivan of Henry Schein. (Cohen, Tr. 504).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Chuck Cohen has never had any communications with Tim Sullivan or anyone else at Schein regarding an entity called Unified Smiles. (Cohen, Tr. 738).

961. Based on Ryan's email (CX1052), Cohen understood that Unified Smiles was a buying group. (Cohen, Tr. 743-744).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Chuck Cohen testified only that "from the e-mail that's here, it seems to indicate that Unified Smiles was a new buying group." (Cohen, Tr. 743-44). Prior to Ryan's e-mail (CX1052), Cohen had never heard of Unified Smiles. (Cohen, Tr. 743-44).

962. In response to Ryan's email (CX1052), Cohen did not inform Ryan that he would not talk to his competitor, Sullivan, regarding a potential customer, Unified Smiles. (Cohen, Tr. 503; Ryan, Tr. 1063).

Schein's Response:

Aside from Mr. Cohen's reply to Mr. Ryan's email two days later, on January 11, 2012, in which Mr. Cohen simply says, "Talking this AM...", there is no evidence that Mr. Cohen communicated with Mr. Ryan or told him what he would or would not talk about with Mr. Sullivan.

Schein also notes that Complaint Counsel's characterization of Unified Smiles as a "potential customer" is inaccurate, as by this point, both Schein and Benco had separately and independently turned Unified Smiles down. (SF 1429; CX 1044; CX 2062; Foley, Tr. 4643-46).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, the proposed finding contains a double negative, making it incomprehensible.

Second, Chuck Cohen has never had any communications with Tim Sullivan or anyone else at Schein regarding an entity called Unified Smiles. (Cohen, Tr. 738).

963. At trial, when asked about his January 11, 2012 email (CX1052), Ryan did not provide any testimony explaining why he specifically sent information about Schein discounting to a buying group to Cohen for a conversation with Sullivan. (Ryan, Tr. 1173-1176).

Schein's Response:

The asserted fact is misleading. Mr. Ryan was not asked why he forwarded Mr. Paquette's email to Mr. Cohen, or why he wrote "For Timmy Conversation." (Ryan, Tr. 1173-76). In fact, Complaint Counsel never asked that question during its direct examination of Mr. Ryan. (Ryan, Tr. 1062-64). As such, any inferences about Mr. Ryan's motivation are pure speculation.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, the proposed finding misstates Pat Ryan's testimony at trial. Specifically, Pat Ryan testified and explained the cited exhibit for almost 4-full pages of testimony at trial. (Ryan, Tr. 1173-76).

Second, prior to January 11, 2012 – the date of the cited exhibit – Benco had already spoken to Unified Smiles and turned them down per Benco's policy. (CX1144 ("We've already spoken to them and turned them down.")).

Third, Pat Ryan has never had any communications with anyone at Schein or Patterson regarding an entity called Unified Smiles. (Ryan, Tr. 1172). Pat Ryan evaluated Unified Smiles' ownership structure, applied Benco's policy, and informed Unified Smiles that Benco would not do business with Unified Smiles as a single customer. (Ryan, Tr. 1172-73). Pat Ryan independently made Benco's decision on Unified Smiles by applying Benco's policy and reaching a decision that was in Benco's unilateral economic interest. Any involvement that Schein may, or may not have had, with Unified Smiles played absolutely no role in Ryan's decision. (Ryan, Tr. 1172-73).

Fourth, 576. Though Schein and Benco had already each independently declined to do business with Unified Smiles, Complaint Counsel contends Mr. Ryan's suggested conversation regarding Unified Smiles took place on January 13, 2012. (FTC Opening, Slide 16; Opening Tr. 43; CC Pretrial Br. at 14). The evidence does not support that contention. (BFF ¶¶ 577-94).

964. Instead, after receiving Ryan's email (CX1052) on January 11, 2012, Cohen texted Sullivan that same day to schedule a time to speak on the phone. (CX2347 at 001-003 (January 12, 2012 text messages between Cohen and Sullivan); Cohen, Tr. 507-508).

Schein's Response:

The asserted fact is not true.

Mr. Cohen sent a text message to arrange a call with Mr. Sullivan *more than* 24 hours after receiving Mr. Ryan's January 11, 2012 email. (*Compare* CX 1052 (email dated January 11, 2012 at 5:12 PM) *with* CX 2347 (January 12, 2012 text at 7:14 PM from Mr. Cohen to Mr. Sullivan asking Mr. Sullivan if he "was around to talk for a few minutes tomorrow?")).

The evidence does not establish that the text was prompted by the email. Complaint Counsel did not ask Mr. Cohen why he set up the call or what the call was about. (Cohen, Tr. 739). And Mr. Cohen affirmatively testified that he set up the call to discuss an employment issue, relating to the hiring of the Rotert group. (Cohen, Tr. 741-42, 747-49).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Complaint Counsel is conflating two events that are not related to each other. Chuck Cohen's call with Tim Sullivan on January 13, 2012, and his January 12, 2012 text message scheduling the call, was a wholly different topic than Complaint Counsel contends. (BFF ¶¶ 576-94).

965. On January 12, 2012, Cohen texted Sullivan to schedule a time to talk on the phone; Cohen wrote, “You around to talk for a few minutes tomorrow?” (CX2347 at 001).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Complaint Counsel is conflating two events that are not related to each other. Chuck Cohen’s call with Tim Sullivan on January 13, 2012, and his January 12, 2012 text message scheduling the call, was a wholly different topic than Complaint Counsel contends. (BFF ¶¶ 576-94).

966. Sullivan responded and Cohen and Sullivan scheduled a call for “8:00 am central” on January 13, 2012. (Cohen, Tr. 507-508; CX2347 at 001-003).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Complaint Counsel is conflating two events that are not related to each other. Chuck Cohen’s call with Tim Sullivan on January 13, 2012, and his January 12, 2012 text

message scheduling the call, was a wholly different topic than Complaint Counsel contends. (BFF ¶¶ 576-94).

967. On January 13, 2012, Cohen responded to Ryan's email (CX1052) and informed him that he was, "Talking this AM..." with Sullivan (Cohen Tr. 503; CX1052 at 001; *see also* CX8015 (Cohen, Dep. at 216); CX8037 (Ryan, Dep. at 110)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Complaint Counsel is conflating two events that are not related to each other. Chuck Cohen's call with Tim Sullivan on January 13, 2012, and his January 12, 2012 text message scheduling the call, was a wholly different topic than Complaint Counsel contends. (BFF ¶¶ 576-94).

968. On January 13, 2012, Cohen and Sullivan spoke on the phone for 11 minutes and 34 seconds. (Cohen, Tr. 511; CX6027 at 019 (Row 170)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Though Schein and Benco had already each independently declined to do business with Unified Smiles, Complaint Counsel contends Mr. Ryan's suggested conversation regarding Unified Smiles took place on January 13, 2012. (FTC Opening, Slide 16; Opening Tr. 43; CC Pretrial Br. at 14). The evidence does not support that contention. (BFF ¶¶ 577-94).

969. Cohen and Sullivan spoke on the telephone on January 13, 2012 regarding Unified Smiles. (CCFF ¶¶ 958-968, 970-972).

Schein's Response:

The asserted fact is not supported by the weight of the evidence.

There is no record concerning what was discussed on the January 13, 2012 phone call.

Mr. Sullivan testified that he did not know anything about Unified Smiles, was not involved with Unified Smiles, and did not discuss Unified Smiles with Mr. Cohen. (Sullivan, Tr. 4217-20; Foley, Tr. 4692-94). There are no internal Schein emails or documents suggesting that Mr. Sullivan had spoken with Mr. Cohen about Unified Smiles, or that he had undertaken any inquiry to find out about Unified Smiles following his call with Mr. Cohen.

Mr. Cohen testified that while he did not have a specific recollection of the call, he did not believe he discussed Unified Smiles with Mr. Cohen. (Cohen, Tr. 747 ("I don't believe that I would have ever talked to Tim about Unified Smiles.")). Mr. Cohen further

testified that, based on his review of the telephone records, including his calls to his employment counsel immediately before and after the call with Mr. Sullivan, his recollection was refreshed and that the call was about an employment issue relating to the Rotert group. (Cohen, Tr. 741-42, 746-47).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony. The proposed finding is false and is not supported by the evidence.

Though Schein and Benco had already each independently declined to do business with Unified Smiles, Complaint Counsel contends Mr. Ryan's suggested conversation regarding Unified Smiles took place on January 13, 2012. (FTC Opening, Slide 16; Opening Tr. 43; CC Pretrial Br. at 14). The evidence does not support that contention.

In late October, 2011, Benco recruited four or five Schein employees from the Fresno, California area. (CX4412; Sullivan, Tr. 4272). Pat Ryan was involved in the recruitment of the Fresno, California group from Schein, as he was responsible for the California market at that time. (Ryan, Tr. 1173-75). Benco's hiring of the Fresno, California group was especially problematic for Schein because it was effectively a "group hiring event" and there were other "idiosyncrasies of California employment law." (Sullivan, Tr. 4270). The leader of the group in Fresno that Benco hired was Bill Rotert. (Cohen, Tr. 742).

There were several issues surrounding Benco's hiring of the Rotert Group from Schein. Moreover, the issues raised by the Rotert Group's hiring led to a global

renegotiation of the Competitive Hiring Agreement. (Cohen, Tr. 742-43; Ryan, Tr. 1174-75). These issues caused Mr. Sullivan and Mr. Cohen to have several discussions over several months about these issues. (Sullivan, Tr. 4270-4271).

Benco's Pat Ryan was involved and aware of these discussions between Mr. Cohen and Mr. Sullivan concerning these issues. (Ryan, Tr. 1175-1176). When Mr. Ryan received the January 11, 2012 e-mail from the field providing the Unified Smiles launch letter, he was aware that Mr. Cohen and Mr. Sullivan would be having a conversation concerning the Fresno recruits in the coming days. (Ryan, Tr. 1176).

On January 13, 2012, Mr. Cohen called Mr. Sullivan and the two spoke for 11 minutes and 34 seconds. (CX1118; Cohen, Tr. 741). Mr. Cohen's review of employment records refreshed his recollection concerning the substance of the January 13, 2012 phone call. (CX1118; Cohen, Tr. 741). Mr. Cohen "can say with confidence that Tim and I were discussing some employee issues that started in – with the movement of reps – some reps in California and resulted in a renegotiation of the Competitive Hiring Agreement. (Cohen, Tr. 741-42).

The context around the January 13, 2012 phone call supports Mr. Cohen's testimony. (CX1118; Cohen, Tr. 746-50). The morning before the call, at 7:39am, Mr. Cohen spoke with his attorney, Joe Dougherty, who was handling the employment matters for Benco. (CX1118; Cohen, Tr. 749). Immediately after the call with Mr. Sullivan, Mr. Cohen again spoke to Mr. Dougherty. (CX1118; Cohen, Tr. 749).

Mr. Sullivan does not recall the details of the January 13, 2012 call, but he is certain Unified Smiles was not discussed. (Sullivan, Tr. 4218-19). Based on the text messages

around the time of the call, Mr. Sullivan believes they discussed Kent Hayes (a Fresno recruit) and employment related issues. (Sullivan, Tr. 4218-4219).

The evidence at trial and context around the January 13, 2012 phone call conclusively demonstrate that the phone call concerned hiring issues, and there is no support for Complaint Counsel's suggestion that the conversation reflects the existence of an agreement regarding Unified Smiles or any other buying group.

970. Cohen does not have an independent recollection of what was discussed on the January 13, 2012 call with Tim Sullivan. (Cohen, Tr. 973-975).

Schein's Response:

The asserted fact is misleading. Mr. Cohen testified that his recollection was refreshed, and this Court admitted his testimony over the express objection of Complaint Counsel. (Cohen, Tr. 740-41 ("JUDGE CHAPPELL: Do you recall the phone call on that date. THE WITNESS: Not specifically, but I do recall it in preparing for this trial and the testimony and looking at my phone records -- JUDGE CHAPPELL: [Objection] Overruled.... You can answer.")).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Chuck Cohen's review of employment records refreshed his recollection concerning the substance of the January 13, 2012 phone call. (CX1118; Cohen, Tr. 741). Mr. Cohen "can say with confidence that Tim and I were discussing some employee issues

that started in – with the movement of reps – some reps in California and resulted in a renegotiation of the Competitive Hiring Agreement. (Cohen, Tr. 741-42).

The context around the January 13, 2012 phone call supports Mr. Cohen's testimony. (CX1118; Cohen, Tr. 746-50). The morning before the call, at 7:39am, Mr. Cohen spoke with his attorney, Joe Dougherty, who was handling the employment matters for Benco. (CX1118; Cohen, Tr. 749). Immediately after the call with Mr. Sullivan, Mr. Cohen again spoke to Mr. Dougherty. (CX1118; Cohen, Tr. 749).

Mr. Sullivan does not recall the details of the January 13, 2012 call, but he is certain Unified Smiles was not discussed. (Sullivan, Tr. 4218-19). Based on the text messages around the time of the call, Mr. Sullivan believes they discussed Kent Hayes (a Fresno recruit) and employment related issues. (Sullivan, Tr. 4218-4219).

The evidence at trial and context around the January 13, 2012 phone call conclusively demonstrate that the phone call concerned hiring issues, and there is no support for Complaint Counsel's suggestion that the conversation reflects the existence of an agreement regarding Unified Smiles or any other buying group.

971. Cohen admitted he "had buying groups on his mind" on January 13, 2012 at 8:39 a.m., less than thirty minutes before his call with Sullivan. (Cohen, Tr. 516).

Schein's Response:

The asserted fact is misleading.

As discussed in response to CCFF 972, the evidence shows that the *reason* Mr. Cohen had "buying groups on his mind" was because he had reviewed and responded to an entirely unrelated internal email about an entirely different buying group on the morning of January 13, 2012. Mr. Cohen affirmatively testified that this email was *unrelated* to his

call with Mr. Sullivan. (Cohen, Tr. 837 (Q. “Ms. Kahn had suggested this e-mail was related to your call with Tim Sullivan later that day.... Was it? A. No.”); *see also* Cohen, Tr. 878). The suggestion that the email and call were somehow related, or that the email supports any inference about the content of the separate call with Mr. Sullivan, is pure speculation.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, in the cited testimony, Chuck Cohen was discussing CX1051 – his response to January 4, 2012 e-mail regarding Benco’s Large Group criteria. (CX1051; Cohen, Tr. 512-16). The e-mail to which Cohen was responding was sent a week prior to the initial January 11, 2012 e-mail regarding Unified Smiles. (CX1051; CX1144). Therefore, it had no connection to Unified Smiles.

Second, Cohen made it clear at trial that as Managing Director of Benco, he works on many tasks during a given day and sends a large volume of e-mails. (Cohen, Tr. 837). Therefore, Complaint Counsel’s strained attempt to connect Cohen’s e-mail response to Unified Smiles is not supported by the evidence, and is simply not credible.

972. Thirty minutes before his call with Sullivan, Cohen emailed Benco employees reinforcing Benco’s no buying group policy. (Cohen, Tr. 514; CX1051). Specifically, on January 13, 2012 at 8:39 a.m., Cohen emailed Ryan and asked him to tell Benco’s VP of Sales, Mike McElaney, to review Benco’s no buying group policy with Benco’s sales management team. (Cohen, Tr. 515 (“Q. So there in that second sentence in your e-mail on January 13, 2012, less than 30 minutes before your call with Tim Sullivan, you were telling . . . Patrick Ryan [to] tell the VP of sales to

review Benco's no-buying group policy with the team? A. With the management team, the sales management team. Yes."); CX1051 at 001).

Schein's Response:

The asserted fact is misleading, and ignores important context that undermines the inference that Complaint Counsel seeks to draw.

On January 3, 2012, a buying group called Nexus had approached Benco looking to establish a supply relationship. (CX 0006; Cohen, Tr. 878-82). Mr. Ryan had responded that there were "2 scenarios where we could work together," but that Nexus appeared to meet Benco's "definition of a buying group," and that "[w]e simply can't open that door." (CX 0006-002). Nexus responded, saying that they believed they could fit within the "second option." (CX 0006-001). Mr. Ryan forward Nexus's response to Mr. Cohen that same day, writing, "I gotta do something with this." (CX 0006-002). The following day, Mr. Ryan forwarded a document called LG Policy, or "Large Group" Policy, which was Benco's first attempt to reduce its no-buying-group policy to writing for purposes of communicating it to Benco's regional sales team. (CX 1051; Cohen, Tr. 875-78 ("the first paragraph of my email ... references a meeting with the RM team [which occurs] in January of every year, and it looks to me like ... I was suggesting we get this straightened out and posted and ready for discussion in time for the ... meeting."))).

The exchange between Mr. Cohen and Mr. Ryan about Nexus, and Mr. Ryan's email sending Mr. Cohen a draft LG Policy, was seven days *before* Benco had heard about Unified Smiles, eight days before Mr. Cohen sought to schedule a call with Mr. Sullivan, and nine days before the call took place. While Mr. Cohen did not respond to Mr. Ryan's draft policy until the morning of January 13, 2012, it is clear that CX 1051 was unrelated to either Unified Smiles or the call with Mr. Sullivan. As Mr. Cohen testified:

Q. Now, complaint counsel pointed out that you had revised this draft or you had prepared this e-mail at 8:39 a.m., before your call with Mr. Sullivan on the 13th of January. Do you recall that?

A. Yes.

Q. Was there any connection between your revision of the LG policy and your call with Mr. Sullivan?

A. No.

Q. Did you share this policy with Mr. Sullivan on that call?

A. I did not.

Q. Did you ever send this policy to Mr. Sullivan?

A. I did not.

(Cohen, Tr. 877-78).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, in the cited testimony, Chuck Cohen was discussing CX1051 – his response to January 4, 2012 e-mail regarding Benco's Large Group criteria. (CX1051; Cohen, Tr. 512-16). The e-mail to which Cohen was responding was sent a week prior to the initial January 11, 2012 e-mail regarding Unified Smiles. (CX1051; CX1144). Therefore, it had no connection to Unified Smiles.

Second, Cohen made it clear at trial that as Managing Director of Benco, he works on many tasks during a given day and sends a large volume of e-mails. (Cohen, Tr. 837).

Therefore, Complaint Counsel's strained attempt to connect Cohen's e-mail response to Unified Smiles is not supported by the evidence, and is simply not credible.

Third, the cited exhibit did not "reinforce Benco's no buying group policy," as the proposed finding suggests. (CX1051). Its subject matter was Benco's Large Group criteria. (CX1051).

973. Neither Schein nor Benco bid on Unified Smiles. (Cohen, Tr. 744 (Benco did not respond to Unified Smiles); Foley, Tr. 4552, 4549 (Schein did not bid on Unified Smiles); *see also* CX2062 at 001; CX1144 at 001).

Schein's Response:

The asserted fact is misleading.

Neither Schein nor Benco contracted with Unified Smiles. But the decisions were made separately and independently, and before the January 13, 2012 telephone call Complaint Counsel claims related to Unified Smiles. For a fuller discussion of Unified Smiles, see SF 1286-308 and SRF 719.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the cited exhibit is an internal Benco e-mail chain that contains no communications between Benco and Unified Smiles at all. (CX1144).

Second – and logically consistent with the first point above – the cited exhibit neither contains any request by Unified Smiles that Benco place a "bid," nor any request that Benco get involved with Unified Smiles in any way. (CX1119).

Third, to the extent that Pat Ryan may have told Unified Smiles that Benco did not recognize buying groups, that statement would have been wholly consistent with Benco's policy and Benco's own unilateral economic interest. (BFF ¶¶ 166-189).

The proposed finding should be rejected by the court as unsupported by evidence.

974. Cohen kept Ryan informed of most of his communications with Sullivan. (Cohen, Tr. 976-977). Cohen testified, "Pat Ryan was the one internal person who pretty much knew everything about my conversations with Tim Sullivan." (Cohen, Tr. 745).

Schein's Response:

Schein has no knowledge of the communications between Mr. Ryan and Mr. Cohen. Schein notes, however, that the asserted fact is vague, has limited probative value, and is insufficient to establish that Mr. Ryan has foundation to testify about conversations that did not involve him. Indeed, as Mr. Ryan testified regarding CX 0018, "What happened after that I don't know." (Ryan, Tr. 1067).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Complaint Counsel in the proposed finding misstates Chuck Cohen's testimony. The proposed finding, by quoting only a small phrase of Cohen's testimony while ignoring the context for the testimony, unfairly seeks to make Cohen's testimony appear broader than it actual was. In doing, Complaint Counsel is attempting to change the meaning of Cohen's testimony.

Chuck Cohen's actual testimony at trial was:

Q. Do you know why Pat Ryan forwarded this e-mail to you with this note?

A. I mean, again, I'm looking backwards on this, and knowing that Pat Ryan was involved in the hiring of people on the West Coast and also in our strategic markets operation, I think he knew that I was going to be talking to Tim soon. I mean, he was aware of -- Pat Ryan was the one internal person who pretty much knew everything about my conversations with Tim Sullivan.

(Cohen, Tr. 745).

Complaint Counsel then later asked Cohen about his initial testimony and his testimony there was consistent:

Q. Mr. Cohen, you mentioned that Patrick Ryan knows about all of your conversations with Tim Sullivan. Did I get that right?

A. Not -- I don't know that I said all of them, but he knows about most of them. And he was intimately involved in our recruiting activities between Schein and Patterson, especially during that period of time.

Q. So you would keep Patrick Ryan informed of you communications with Tim Sullivan?

A. Sometimes. When I feel it's appropriate.

(Cohen, Tr. 976-77).

In both instances, Cohen was clearly testifying about Pat Ryan's knowledge of Cohen's communications with Tim Sullivan regarding employee hiring issues. Therefore, the proposed finding and its overstatement of Cohen's testimony should be rejected.

975. Cohen admitted at trial that Ryan "was the one [Benco] person who pretty much knew everything about my conversations with Tim Sullivan." (Cohen, Tr. 745; *see, e.g.*, Ryan, Tr. 1055).

Schein's Response:

Schein has no knowledge of the communications between Mr. Ryan and Mr. Sullivan. Schein notes, however, that the asserted fact is vague, has limited probative

value, and is insufficient to establish that Mr. Ryan has foundation to testify about conversations that did not involve him.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Complaint Counsel in the proposed finding misstates Chuck Cohen's testimony. The proposed finding, by quoting only a small phrase of Cohen's testimony while ignoring the context for the testimony, unfairly seeks to make Cohen's testimony appear broader than it actual was. In doing, Complaint Counsel is attempting to change the meaning of Cohen's testimony.

Chuck Cohen's actual testimony at trial was:

Q. Do you know why Pat Ryan forwarded this e-mail to you with this note?

A. I mean, again, I'm looking backwards on this, and knowing that Pat Ryan was involved in the hiring of people on the West Coast and also in our strategic markets operation, I think he knew that I was going to be talking to Tim soon. I mean, he was aware of -- Pat Ryan was the one internal person who pretty much knew everything about my conversations with Tim Sullivan.

(Cohen, Tr. 745).

Complaint Counsel then later asked Cohen about his initial testimony and his testimony there was consistent:

Q. Mr. Cohen, you mentioned that Patrick Ryan knows about all of your conversations with Tim Sullivan. Did I get that right?

A. Not -- I don't know that I said all of them, but he knows about most of them. And he was intimately involved in our recruiting activities between Schein and Patterson, especially during that period of time.

Q. So you would keep Patrick Ryan informed of you communications with Tim Sullivan?

A. Sometimes. When I feel it's appropriate.

(Cohen, Tr. 976-77).

In both instances, Cohen was clearly testifying about Pat Ryan's knowledge of Cohen's communications with Tim Sullivan regarding employee hiring issues. Therefore, the proposed finding and its overstatement of Cohen's testimony should be rejected.

976. Ryan was aware of Cohen and Sullivan's agreement limiting the number of hires between Benco and Schein. (Ryan, Tr. 1054-1059; CX1420 (Statement of Ryan: "I just heard from Chuck at the DTA regarding his conversation with Tim Sullivan about changes Tim wanted to the Global. Chuck agreed to, effective immediately....3 hires from his per Schein ZONE (map to be provided) every 6 MONTHS.") (emphasis in original)).

Schein's Response:

The asserted fact is irrelevant. The asserted fact constitutes evidence of "other acts" and cannot be introduced to show actions in conformity therewith. Fed. R. Evid. 404. The agreement at issue was entered into as a settlement of ongoing litigation, and was designed to resolve that dispute as well as other related disputes concerning tortious interference, breach of non-compete agreements, misappropriation of trade secrets, and corporate raiding. The agreement facilitated hiring, and thus, was procompetitive. Complaint Counsel has not challenged the legality of the agreement, or established that communications concerning that agreement had anything to do with buying groups. As such, the asserted fact is inadmissible to show a propensity to conspire about buying groups.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, Pat Ryan became aware of the existence of the Competitive Hiring Agreement shortly after its formation. In opening new markets for Benco, and leading Benco's hiring of Schein sales employees, Ryan became familiar with the terms of the Competitive Hiring Agreement and its application to Benco's national expansion. (Ryan, Tr. 1148-54).

Second, the proposed finding mischaracterizes the Competitive Hiring Agreement. (BFF ¶¶ 71-89). The predictability and certainty provided by the Competitive Hiring Agreement, allowed Benco to compete better against Schein, Patterson and other dental distributors. As the primary enabler of Benco's rapid national expansion, the Competitive Hiring Agreement allowed Benco to offer customers greater choice and price competition in new markets against Schein, Patterson and other distributors already entrenched in those markets. (RX1127-478). The Competitive Hiring Agreement never prevented Benco from hiring any Henry Schein sales reps that it wanted to hire. (Ryan, Tr. 1154).

977. In furtherance of the hiring agreement between Cohen and Sullivan, Ryan had a practice of forwarding hiring issues to Cohen to communicate with Sullivan. (Ryan, Tr. 1059 ("I had asked [Cohen] to try to modify the deal [with Tim Sullivan]."); CX1420 (Statement of Ryan: "I have asked [Cohen] to go back to Tim and try to eliminate service techs from this, or at the very worst, make it 3 sales, 3 service per zone per 6 months.")).

Schein's Response:

Schein lacks knowledge about Mr. Ryan's practices, but notes that the cited evidence does not establish a general "practice."

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, there is no evidence – either cited in the proposed finding or in the case more generally – that supports Complaint Counsel's purely fictional statement that “Ryan had a practice of forwarding hiring issues to Cohen to communicate with Sullivan.” (Ryan, Tr. 1059; CX1420).

Second, the cited testimony does not even involve a single instance of Ryan “forwarding hiring issues to Cohen to communicate with Sullivan.” (Ryan, Tr. 1058-60). Rather, it shows Pat Ryan suggesting to Chuck Cohen a modification of the Competitive Hiring Agreement. (Ryan, Tr. 1058-60). Cohen did not even accept Ryan's suggestion; he rejected it and never even discussed it with Tim Sullivan. (Ryan, Tr. 1060 (“Q. And what came about that proposal? A. Nothing that I'm aware of.”)).

2. Smile Source (2012)

978. On July 25, 2012, Cohen again reached out to Sullivan when he learned from another buying group, Smile Source, that Schein might be selling to a buying group. (CCFF 979-980; CX0018 at 001).

Schein's Response:

False. There is no evidence that “[o]n July 25, 2012, Cohen again reached out to Sullivan” about Smile Source, about any buying group, or about anything. Both Mr. Sullivan and Mr. Cohen testified that no such communication occurred. (Cohen, Tr. 887-88; Sullivan, Tr. 4252-53). Nor does Complaint Counsel cite any evidence that purports

to memorialize such communication. Indeed, the communications log prepared by Complaint Counsel does not reflect any text or telephone communication between Mr. Sullivan and Mr. Cohen from July 25, 2012 to January 2, 2013. (CX 6027-025-26). Complaint Counsel's citation in its Post-Trial Brief to this as evidence of Benco "confronting Schein when it received market intelligence that indicated that Schein was deviating from their agreement" "not to discount to buying groups" is therefore inaccurate and misleading. (*See* CC Br. 29-30). For a fuller description of the facts surrounding the July 25, 2012 internal Benco email, see SF 1447-54.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding. None of the individual findings cited in this proposed finding contain evidence that "Cohen again reached out to Sullivan," as the proposed finding speculates.

First, there is no evidence – either cited in the proposed finding or in the case more generally – that supports Complaint Counsel's purely fictional statement in the proposed finding. (CX0018). The cited exhibit certainly does show Cohen reaching out to Sullivan – as it is merely an e-mail between Cohen and Pat Ryan. (CX0018).

Second, Chuck Cohen has consistently testified that he never contacted Tim Sullivan about Smile Source and there is no evidence that Cohen actually sent a note to, or otherwise communicated with, Sullivan about Smile Source or any buying group in or around July 25, 2012. (Cohen, Tr. 520, 885-86).

Third, Sullivan also denied receiving any note from Mr. Cohen about Smile Source or buying groups generally. (Sullivan, Tr. 4252-53). Pat Ryan also testified that he was unaware of any such communication occurring. (Ryan, Tr. 1248-49).

Fourth, there are no after-the-fact internal documents purporting to memorialize any alleged communication between Cohen and Sullivan about Smile Source. Complaint Counsel failed to introduce evidence of any response by Sullivan to the supposed note. In fact, when Sullivan next interacted with Smile Source, he wrote, “I would enjoy catching up with you [and] look forward to learning more.” (CX 2580).

Fifth, the communications log prepared by Complaint Counsel does not reflect any text or telephone communication between Sullivan and Cohen between July 25, 2012 and January 2, 2013. (CX 6027-025-26). Complaint Counsel also failed to introduce any evidence of any change in conduct by either Schein or Benco that could reasonably be tied to any such communication in July 2012.

Accordingly, the evidence does not support the allegation that Benco communicated with Schein in or around July 25, 2012 about Smile Source or buying groups, that Benco attempted to “enforce” any pre-existing agreement with Schein, or that Schein reached or re-affirmed any such agreement.

979. On July 25, 2012, Ryan was forwarded an email from Dr. Goldsmith of Smile Source. (CX0018 at 001-002).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

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

Second, the cited exhibit was the second time that Smile Source approached Benco, after having already done so in 2011. (BFF ¶¶ 390-404). Even after having communicated directly with Pat Ryan less than 10 months earlier, Dr. Goldsmith nonetheless sent his July 25, 2012 e-mail to a general Benco e-mail box ("Institutions") rather than directly to Ryan. (CX0018; Goldsmith, Tr. 2181). Dr. Goldsmith sent a cold solicitation to Benco's "Institutions" e-mail account, even though he remembered Ryan's prior response. (Goldsmith, Tr. 2181). Even though Dr. Goldsmith avoided sending his second inquiry directly to Pat Ryan, his e-mail was eventually forwarded to Ryan. (CX0018).

980. On July 25, 2012, Dr. Goldsmith wrote that he wanted to "explore a relationship" with Benco and informed Benco that "[i]n the past we [Smile Source] were in Special Markets division of Henry Schein and worked directly with Tim Sullivan." (CX0018 at 002; Ryan, Tr. 1064-1065).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the proposed finding quotes only a selective portion of Dr. Goldsmith's e-mail. (CX0018). Dr. Goldsmith also writes: "One of our members in Maryland has selected you as the distributor for our east coast operations." (CX0018). Dr. Goldsmith admitted at trial that the member in Maryland was a Dr. Byrne, who was already a Benco customer. (Goldsmith, Tr. 2182-83). Dr. Byrne was a current Benco customer, who wanted to buy equipment from Benco, and wanted to use Smile Source to get a discount on the equipment he was already buying from Benco. (Goldsmith, Tr. 2182-83). Obviously, Benco did not need to work with Smile Source to sell equipment it was already selling to Dr. Byrne.

Second, as he did in response to Smile Source's prior inquiry, Pat Ryan politely told Smile Source – consistent with Benco's policy – that Benco does not do business with buying groups like Smile Source. (CX1220).

981. In response, Ryan informed Dr. Goldsmith that Benco would not work with Smile Source because it was a group purchasing organization. (CX0018 at 001).

Schein's Response:

Schein does not dispute that on July 25, 2012, a few hours after receiving Dr. Goldsmith's email, Mr. Ryan responded to Dr. Goldsmith informing him that Benco does not "recognize GPOs as a single customer." (CX 0018).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, Dr. Goldsmith e-mail included the following: “One of our members in Maryland has selected you as the distributor for our east coast operations.” (CX0018). Dr. Goldsmith admitted at trial that the member in Maryland was a Dr. Byrne, who was already a Benco customer. (Goldsmith, Tr. 2182-83). Dr. Byrne was a current Benco customer, who wanted to buy equipment from Benco, and wanted to use Smile Source to get a discount on the equipment he was already buying from Benco. (Goldsmith, Tr. 2182-83). Obviously, Benco did not need to work with Smile Source to sell equipment it was already selling to Dr. Byrne.

Second, as he did in response to Smile Source’s prior inquiry, Pat Ryan politely told Smile Source – consistent with Benco’s policy – that Benco does not do business with buying groups like Smile Source. (CX1220).

982. Minutes after receiving Dr. Goldsmith’s July 25, 2012 email, Ryan forwarded Dr. Goldsmith’s email to his boss, Cohen, writing, “Better tell your buddy Tim to knock this shit off.” (CX0018 at 001; Ryan, Tr. 1065).

Schein’s Response:

Schein does not dispute that Mr. Ryan forwarded Dr. Goldsmith’s email to Mr. Cohen and wrote the quoted language, but notes that he sent the email to Mr. Cohen 134 minutes after he received it and only after he told Dr. Goldsmith that Benco does not “recognize GPOs as a single customer.” (CX 0018-001).

To the extent Complaint Counsel relies on Mr. Ryan’s email to infer that Mr. Cohen communicated with Mr. Sullivan about Smile Source, there is no evidence supporting such an inference: no email, no text message, no phone call. (*See* SRF 978; SF 1447-54).

Patterson’s Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

After responding to Dr. Goldsmith's e-mail, Ryan forwarded his response to Chuck Cohen with a note "Better tell your buddy Tim to knock this shit off." (CX0018). Although Cohen responded requesting that Ryan forward the e-mail chain to him without Ryan's off-color comment so that he could send it to Tim, there is no evidence that Ryan ever re-forwarded the e-mail to Cohen. Instead, Ryan responded to Cohen by e-mailing back that Dr. Goldsmith described Smile Source as a 'franchise', and not a GPO. (CX1147). That was the end of Ryan's e-mail exchange with Cohen concerning Smile Source. (Ryan, Tr. 1193-1194).

983. Ryan testified that he was "frustrated" that Schein would be working with Smile Source. (Ryan, Tr. 1066, 1192).

Schein's Response:

The asserted fact mischaracterizes Mr. Ryan's testimony. Mr. Ryan testified that his comment in his email to "Better tell your buddy Tim to knock this ... off" was just a "flippant" or "frustrated" remark. (Ryan, Tr. 1065-66, 1191-92). He did not say he was *frustrated* that Schein was working with Smile Source. He testified instead that his remark just reflected that the fact that he "personally ha[s] a very strong opinion of GPOs[.]" (Ryan, Tr. 1066, 1192). Consequently, there is no basis for any inference that any "frustration" was due to Schein deviating from any alleged conspiracy. Moreover, Mr. Ryan made clear that he did not know one way or the other whether Schein was working with Smile Source at the time of the email. (Ryan, Tr. 1191).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

It is simply not true that "Ryan testified that he was 'frustrated' that Schein would be working with Smile Source. The proposed finding contains only Complaint Counsel's fictional paraphrasing of testimony that did not actually happen. Ryan's actual testimony in response to Complaint Counsel's question was:

Q. And "this shit" refers to Schein working with buying groups?

A. That's a very flippant answer that I made to Chuck. It's just a generally frustrated statement.

(Ryan, Tr. 1065-66).

984. At trial, Ryan testified that his July 25, 2012 email (CX0018) to Cohen referred to Sullivan as "Tim" and "knock it off" meant to stop doing something. (Ryan, Tr. 1065-1066; CX0018 at 001).

Schein's Response:

Complaint Counsel's proposed finding is an incomplete and misleading representation of Mr. Ryan's testimony. Mr. Ryan's testified that his email was just "a flippant answer" and that there was "no way we're going to tell anybody what to do." (Ryan, Tr. 1065-66; CX 0018). Regardless, there is no evidence that any such communication occurred. (See SRF 978; SF 1447-54).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The proposed finding again mischaracterizes Pat Ryan's testimony. Ryan's actual testimony in response to Complaint Counsel's question was:

Q. And the part of your sentence "knock this off," that meant to stop working with Smile Source; is that right?

A. Again, it's a flippant answer. There's – there's no way we're going to tell anybody what to do.

(Ryan, Tr. 1066).

985. Ryan also admitted that "this shit" in his July 25, 2012 email (CX0018) to Cohen referred to Schein working with Smile Source. (Ryan, Tr. 1065-1066; CX0018). Ryan testified that he wrote "this shit" because "I personally have a very strong opinion of GPOs." (Ryan, Tr. 1065-1066).

Schein's Response:

No response, other than to note that Mr. Ryan had misread the underlying email; that he did not know one way or the other whether Schein was working with Smile Source at the time of his email; and, in fact, Smile Source had terminated its relationship with Schein and switched to Burkhart in January 2012. (CX 0018; Ryan, Tr. 1191; *see also* SF 1107-11, 1450 & n.13).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The proposed finding again mischaracterizes Pat Ryan's testimony. Ryan's actual testimony in response to Complaint Counsel's question was:

Q. What does "this shit" refer to?

A. Again, I personally have a very strong opinion of GPOs, and I flippantly told Chuck what it says.

(Ryan, Tr. 1066).

986. Cohen understood that Ryan was telling him to tell Sullivan to stop recognizing Smile Source as a customer. (Cohen, Tr. 518-519).

Schein's Response:

Mr. Cohen testified that that was not what the email says and that he could not say what he understood five years earlier, but that he *assumed* Ms. Kahn was correct. (Cohen, Tr. 519 ("Q. And the stop doing something was to stop recognizing Smile Source as a customer; right? A. ... I *assume* so, but that's *not what it says*.... Q. But that's what you understood? A. I can't say what I understood five years ago, but ... that seems to be the implication....") (emphasis added)).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The proposed finding mischaracterizes Chuck Cohen's testimony. Cohen never testified that he understood the assertion that Complaint Counsel makes in the proposed finding. At trial, Complaint Counsel asked this question five times and Cohen consistently did not testify to what is contained in the proposed finding. Cohen responded with: "Say

the questions again?"; "That's what it says."; "I think it says"; "that's not what it says"; and "I can't say." (Cohen, Tr. 519). None of Cohen's five responses constitute factual support for the assertion in the proposed finding.

987. Ryan's email to Cohen (CX0018) was the second time Ryan forwarded information regarding buying groups to Cohen for communication to Sullivan. (Cohen, Tr. 518).

Schein's Response:

Schein does not dispute that Mr. Cohen testified that CX 0018 was the second time he had seen Mr. Ryan forward information in an internal Benco email to Mr. Cohen for communication with Mr. Sullivan. Schein notes, however, that there is no evidence that Mr. Cohen communicated with Mr. Sullivan in either instance. (See SRF 955-72, 978).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Chuck Cohen only acknowledged that it was the second time Pat Ryan forwarded him such information. Cohen consistently denied that he ever actually communicated with Tim Sullivan about the information. (Cohen, Tr. 520, 885-86).

988. Cohen did not inform Ryan that he would not contact Sullivan regarding a potential customer. (Ryan, Tr. 1067).

Schein's Response:

Mr. Cohen's reply to Mr. Ryan is set forth in CX 0018.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, the proposed finding contains a double negative, making it incomprehensible.

Second, the cited testimony does not support whatever assertion the proposed finding is trying to make. Pat Ryan did not testified to the information in the proposed finding. (Ryan, Tr. 1067).

Third, Chuck Cohen does not work for Pat Ryan and does not have to inform him of anything. (Ryan, Tr. 1263).

Fourth, Chuck Cohen has consistently testified that he never contacted Tim Sullivan about Smile Source and there is no evidence that Cohen actually sent a note to, or otherwise communicated with, Sullivan about Smile Source or any buying group in or around July 25, 2012. (Cohen, Tr. 520, 885-86).

Accordingly, the evidence does not support the allegation that Benco communicated with Schein in or around July 25, 2012 about Smile Source or buying groups, that Benco attempted to "enforce" any pre-existing agreement with Schein, or that Schein reached or re-affirmed any such agreement.

989. Cohen did not tell Ryan that he thought it was a bad idea to contact Tim Sullivan of Schein. (Cohen, Tr. 519-520).

Schein's Response:

Mr. Cohen's reply to Mr. Ryan is set forth in CX 0018.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, the proposed finding contains a double negative, making it incomprehensible.

Second, the cited testimony does not support whatever assertion the proposed finding is trying to make. Pat Ryan did not testified to the information in the proposed finding. (Ryan, Tr. 1067).

Third, Chuck Cohen does not work for Pat Ryan and does not have to inform him of anything. (Ryan, Tr. 1263).

Fourth, Chuck Cohen has consistently testified that he never contacted Tim Sullivan about Smile Source and there is no evidence that Cohen actually sent a note to, or otherwise communicated with, Sullivan about Smile Source or any buying group in or around July 25, 2012. (Cohen, Tr. 520, 885-86).

Accordingly, the evidence does not support the allegation that Benco communicated with Schein in or around July 25, 2012 about Smile Source or buying groups, that Benco attempted to "enforce" any pre-existing agreement with Schein, or that Schein reached or re-affirmed any such agreement.

990. Cohen responded to Ryan's July 25, 2012 email (CZ0018):

Please resend his e-mail without your comment on top so that I can print & send to Tim with a note. The good news is: perhaps they're looking to us because Schein told them NO. That works for me.

(CX0018 at 001 (emphasis in original)).

Schein's Response:

Schein does not dispute that Mr. Cohen wrote the quoted language. Schein notes, however, that there is no evidence that Mr. Ryan resent the email without his comment. Instead, he followed up with a question about whether Smile Source is in fact a buying group. (CX 1147). Mr. Cohen then responded to the question noting that he “agree[d].” (CX 1251). The topic seems to have ended there, with no further follow-up or communication. There is no evidence that Mr. Cohen sent a copy of Mr. Ryan’s email with a note to Mr. Sullivan. There is no evidence of any communication between Mr. Sullivan and Mr. Cohen for over five months after Mr. Ryan’s email. (CX 6027-025-26).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Although Cohen responded requesting that Ryan forward the e-mail chain to him without Ryan’s off-color comment so that he could send it to Tim, there is no evidence that Ryan ever re-forwarded the e-mail to Cohen. Instead, Ryan responded to Cohen by e-mailing back that Dr. Goldsmith described Smile Source as a ‘franchise’, and not a GPO. (CX1147). That was the end of Ryan’s e-mail exchange with Cohen concerning Smile Source. (Ryan, Tr. 1193-1194).

There is no evidence in the record that Cohen ever sent Ryan’s e-mail to Sullivan at Schein, Cohen does not recall ever sending it, and Sullivan did not receive any note from

Cohen about Smile Source or buying groups generally. (Cohen, Tr. 885-886; Sullivan, Tr. 4252-53).

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

Accordingly, the evidence does not support the allegation that Benco communicated with Schein in or around July 25, 2012 about Smile Source or buying groups, that Benco attempted to “enforce” any pre-existing agreement with Schein, or that Schein reached or re-affirmed any such agreement.

991. At the time Cohen wrote his email (CX0018), he was planning to print the email without Ryan’s comment and send it to Sullivan with a note. (Cohen, Tr. 522).

Schein’s Response:

The asserted fact is contradicted by Mr. Cohen’s actual testimony. (Cohen, Tr. 521 (“Q. And you were planning to send this to Mr. Sullivan because Smile Source in the first e-mail referenced Tim Sullivan; right? A. I mean, I can’t say from now what I was planning on doing....”)). While Ms. Kahn asked the question a second time asking him to interpret the words in the email and got a different answer, Mr. Cohen’s lack of recollection does not make that answer any more reliable than the first. The reality is that, while Mr. Cohen may have *considered* sending a note to Mr. Sullivan for a few seconds or minutes, he did not actually do so and it is not clear that the thought rose to the level of a “plan.” In any event, what Mr. Cohen *planned* to do but never did is irrelevant.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Although Cohen responded requesting that Ryan forward the e-mail chain to him without Ryan's off-color comment so that he could send it to Tim, there is no evidence that Ryan ever re-forwarded the e-mail to Cohen. Instead, Ryan responded to Cohen by e-mailing back that Dr. Goldsmith described Smile Source as a 'franchise', and not a GPO. (CX1147). That was the end of Ryan's e-mail exchange with Cohen concerning Smile Source. (Ryan, Tr. 1193-1194).

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

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

Accordingly, the evidence does not support the allegation that Benco communicated with Schein in or around July 25, 2012 about Smile Source or buying groups, that Benco attempted to "enforce" any pre-existing agreement with Schein, or that Schein reached or re-affirmed any such agreement.

992. Cohen sent Sullivan notes in the mail from time to time, and he testified that it would not surprise him if he did send Sullivan a physical note about Smile Source. (Cohen, Tr. 526-527; CX0301 (Cohen, IHT at 223)).

Schein's Response:

Complaint Counsel's proposed finding is irrelevant, contradicted by the testimony, and misleading.

Mr. Cohen *affirmatively* testified that he did not believe he sent a note to Mr. Sullivan about Smile Source. (Cohen, Tr. 885). He also testified that he does not recall receiving a clean email from Mr. Ryan without his comment on or around July 25, 2015 and since then, he has never been shown any such email. (Cohen, Tr. 886). Mr. Cohen testified that he does not recall printing out any version of Mr. Ryan's email, writing a note on a printed version of the email, giving such a note to an assistant to mail, or himself mailing a note to Mr. Sullivan. (Cohen, Tr. 886). Mr. Sullivan also denied receiving any note from Mr. Cohen about Smile Source or buying groups generally. (Sullivan, Tr. 4252-53). Mr. Ryan also testified that he was unaware of any such communication having occurred. (Ryan, Tr. 1248-49).

Unsatisfied with this testimony, Complaint Counsel tried to lay a trap for Mr. Cohen by asking whether he would be "surprised" if such a note had been sent. At trial, Mr. Cohen did not fall for the trick:

Q. And it would not surprise you if you did send Mr. Sullivan a note with this e-mail about Smile Source?

A. I don't recall doing it. I – I don't think I did. I might have. I might not.

Q. Would it surprise you if you did send Tim Sullivan a note with this e-mail?

A. I can't say whether it would surprise me or not.

(Cohen, Tr. 526).

Still unsatisfied with this response, Complaint Counsel then tried to impeach Mr. Cohen with his IHT. But the IHT testimony was not inconsistent with his trial testimony. Mr. Cohen affirmatively testified that he did not recall sending Mr. Sullivan a note. (CX 0301 (Cohen, IHT at 232)). While he could not recall any notes he sent specifically, and therefore stated he would not be "surprised" if his memory was wrong (CX 0301 (Cohen, IHT at 233)), that does not change the fact that he did not recall sending any note, nor does it create an inference that such a note was sent.

Finally, Complaint Counsel's attempt to draw an inference from the fact that Mr. Cohen would send notes to Mr. Sullivan from time-to-time is improper. There are no allegations relating to notes Mr. Cohen sent Mr. Sullivan "in the mail from time to time," nor is there a record of the content of such notes. (Cohen, Tr. 526; Sullivan, Tr. 3885-86, 4253). Mr. Sullivan testified, however, that the notes he received were personal in nature, none of the notes related to buying groups, and none of the notes related to business. (Sullivan, Tr. 4293). As such, evidence that Mr. Cohen communicated with Mr. Sullivan about topics unrelated to buying groups constitutes inadmissible "other act" evidence, and cannot be used to show that Mr. Cohen sent a note to Mr. Sullivan at this particular time on this particular subject. *See* Fed. R. Evid. 404 (excluding evidence of other acts to show conduct in conformity therewith).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Although Cohen responded requesting that Ryan forward the e-mail chain to him without Ryan's off-color comment so that he could send it to Tim, there is no evidence that Ryan ever re-forwarded the e-mail to Cohen. Instead, Ryan responded to Cohen by e-mailing back that Dr. Goldsmith described Smile Source as a 'franchise', and not a GPO. (CX1147). That was the end of Ryan's e-mail exchange with Cohen concerning Smile Source. (Ryan, Tr. 1193-1194).

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

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

Accordingly, the evidence does not support the allegation that Benco communicated with Schein in or around July 25, 2012 about Smile Source or buying groups, that Benco attempted to "enforce" any pre-existing agreement with Schein, or that Schein reached or re-affirmed any such agreement.

993. Despite Dr. Goldsmith's statements to Benco that Smile Source had worked with Schein, at the time of this email chain (CX0018) in July 2012, Cohen was skeptical that Henry Schein would be working with Smile Source. (Cohen, Tr. 524-26 ("I think I would— I would say that they were not working with Henry Schein.")).

Schein's Response:

Complaint Counsel's proposed finding is misleading and incomplete. The asserted fact is also substantially similar to CCFF 674, and Schein incorporates its response to that finding here.

As an initial matter, Dr. Goldsmith did ***not*** state that Smile Source was working with Schein at the time of the email. In fact, Dr. Goldsmith said the exact *opposite*. As the email states, "***In the past***, we were in Special Markets division of Henry Schein and worked directly with Tim Sullivan." (CX 0018 (emphasis added)).

Second, there is no evidence that Mr. Cohen had formed a belief at the time the email was sent. In fact, the email shows the opposite. It notes that "*perhaps* [Smile Source is] looking to us because Schein told them NO." (CX 0018 (emphasis added)). This is clearly speculation concerning the reasons why Smile Source reached out to Benco, a much smaller distributor. It does not suggest inside information about Schein.

Third, while Mr. Cohen agreed with Complaint Counsel that he probably would have been skeptical that Schein was working with Smile Source, he made it clear that he had no knowledge one way or the other, and that any skepticism would have simply been natural skepticism about buying group's uncorroborated, self-serving claims. For example, Complaint Counsel omits the first question it asked: "Mr. Cohen, you didn't believe it was true that Schein was working with Smile Source; right?" (Cohen, Tr. 522). Mr. Cohen answered, "I'm always skeptical about what customers say, who they're working with, who they're not working with. *So I can't say what I believed about Smile Source at the time*

this was written.” (Cohen, Tr. 523 (emphasis added)). Complaint Counsel tried again, switching to GPOs, and then trying again with Smile Source:

Q. Is it fair to say that in July of 2012 it was your understanding that Schein was not selling to GPOs?

A. I couldn’t say one way or the other.

Q. What about Smile Source?

A. I don’t know.

(Cohen, Tr. 522-23).

Unhappy with this trial testimony, Complaint Counsel tried to “refresh [Mr. Cohen’s] recollection” with his IHT testimony, which was about GPOs generally and not Smile Source specifically. (Cohen, Tr. 524-25). But Complaint Counsel did not establish that the IHT testimony refreshed Mr. Cohen’s recollection of what he understood in July 2012. Mr. Cohen just reiterated his lack of knowledge: “I’m trying to answer the question directly, but the answer is I don’t really know, but I’m *assuming* that they were not.” (Cohen, Tr. 524-25 (emphasis added)).

Importantly, Mr. Cohen explained in his IHT that his skepticism was based on the lack of corroborating information obtained from customers by Benco sales reps. As Mr. Cohen testified, “If Henry Schein was working with Smile Source, we probably would have heard it from the individuals and customers other than the guy who works at Smile Source[,]” and because he had not heard such “scuttlebutt,” he would be skeptical of information to the contrary. (CX 0301 (Cohen, IHT at 216-17)). Such skepticism is normal, rational business behavior and does not support an inference that Mr. Cohen had discussions with Schein about Schein’s policies, practices, or dealings with buying groups.

Moreover, the inference Complaint Counsel seeks to draw – namely that Mr. Cohen possessed inside knowledge of Schein’s dealings with Smile Source in July 2012 – is contrary to the allegations and the evidence in the case. There is no *allegation* that, even if Mr. Cohen sent Mr. Sullivan a note, Mr. Sullivan responded. Moreover, Complaint Counsel’s communication log, as well as the testimony of all witnesses, reflects the absence of such a response. (CX 6027; Sullivan, Tr. 4252-53; Cohen, Tr. 888). As such, any inference that Schein shared information with Benco about its dealings with Smile Source would be pure unsupported speculation contrary to the weight of the evidence.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, Chuck Cohen testified that he was “always skeptical about what customers say, who they’re working with, who they’re not working with.” (Cohen, Tr. 522-23). Testifying specifically about Dr. Goldsmith’s e-mail – the cited exhibit in this proposed finding (CX0018) – Cohen said, “I’m always skeptical of what customers or those with an agenda say, so I didn’t know what to think.” (Cohen, Tr. 525).

Second, Cohen’s skepticism of Dr. Goldsmith was well founded, as Dr. Goldsmith’s testimony is not credible. (HSFF ¶¶ 1122-28). Specifically, Dr. Goldsmith’s e-mails to Benco were littered with false statements aimed at gaining credibility with Benco. (HSFF ¶¶ 1122-28). Exactly as Cohen had feared. (Ryan, Tr. 525).

3. Dental Alliance (2013)

994. On March 26, 2013, Cohen notified Sullivan of market intelligence that Schein may be doing business with a buying group. (CCFF ¶¶ 995-1004).

Schein's Response:

Schein does not dispute that, on March 26, 2013, Mr. Sullivan received an unsolicited text message from Mr. Cohen stating, "As per my guy in Raleigh: 'Dental alliance. They apparently get 7% off of catalog pricing just for joining. Dr. Ben Koren is the dentist involved. A guy named Sam contacted me about a year ago and asked if Benco was interested.. Told him he was out of his tree.'" (CX 6027-028; CX 2670; Cohen, Tr. 557-58). Importantly, Mr. Sullivan never responded and, in fact, Schein had been doing business with the Dental Alliance since July 2011, and continued to do business with them throughout the relevant period. (Sullivan, Tr. 4241; SF 1319, 1543).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding.

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

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Chuck Cohen testified that the reason for his e-mail to Kasinski was that he "wanted more market intelligence on the topic." (Cohen, Tr. 556-57).

996. On March 26, 2013, Kasinski responded to Cohen and informed him that Schein was selling to Dental Alliance. (Cohen, Tr. 556-557; CX0061 at 001).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit and testimony.

First, the cited exhibit does not say that "Schein was selling to Dental Alliance." (CX0061). All it says is "Dental Alliance" – period. (CX0061).

Second, Chuck Cohen testified how he understood Kasinski's e-mail. Specifically, Cohen did not have conclusive information that Dental Alliance was working with Schein – only that Dental Alliance said it was working with Schein. (Cohen, Tr. 557). Cohen was "always skeptical about what customers say, who they're working with, who they're not working with." (Cohen, Tr. 522-23). With respect to the information regarding Dental

Alliance, Cohen made it clear in his trial testimony that the only market information he obtained was Dental Alliance itself saying it worked with Schein. (Cohen, Tr. 557 (Q. And Mr. Kasinski responded with the name of the buying group that was working with Schein; right? A. That said they were working with Schein.”)).

997. Within minutes of receiving Kasinski’s email on March 26, 2013 (CX0061), Cohen copied and pasted that email message into a text message to Sullivan:

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

(Cohen, Tr. 557-558; CX6027 at 028 (Rows 245-246); CX0061 at 001; *see also* CX0196 at 008-009, Sullivan, Tr. 4196-4197).

Schein’s Response:

Schein does not dispute that Mr. Cohen sent the quoted, unsolicited text messages to Mr. Sullivan.

But Complaint Counsel’s attempt to characterize these unsolicited texts as an example of Benco “confronting Schein when it received market intelligence that indicated that Schein was deviating from their agreement” is not supported by the evidence. (*See* CC Br. 29, 31-32). There is no evidence concerning *why* Mr. Cohen sent the texts. Complaint Counsel’s effort to characterize this as an attempt to “enforce” a pre-existing agreement improperly assumes the existence of such an agreement. Indeed, Mr. Cohen’s follow-up text – in which he says, “[c]ould be a rumor, sometimes stories go around” – is consistent with Mr. Cohen’s testimony that he was trying to *gain* competitive intelligence, ***not*** that he was seeking an agreement from Schein to terminate the Dental Alliance or

otherwise change Schein's behavior. (CCFF 999 (conceding as much); *see also* Cohen, Tr. 557 ("I wanted more market intelligence on the topic.")).¹³

Even if one speculated that Mr. Cohen sought to invite collusion through this vague text, there is no evidence of acceptance – either by words or deed. As for words, the *sole* record evidence is that Mr. Sullivan delivered “a much stronger message” to Mr. Cohen that Mr. Cohen should not be discussing specific customers with him. (Sullivan, Tr. 4205-06; CX 6027-029). Indeed, Mr. Sullivan testified that, at the time, he did not even appreciate that the text related to the Dental Alliance, as opposed to ADC, or that it related to a group with which Schein was doing business. (Sullivan, Tr. 4197-98). Nor should this be surprising because the text follows on the heels of a text exchange about ADC, does *not* mention Schein or any deal with Schein, and – if the difference in name was not appreciated – could easily be interpreted as information about ADC. (*See* CX 6027-028).

As for deeds, Schein had been doing business with the Dental Alliance since July 2011, and continued to do business with them throughout the relevant period. (Sullivan, Tr. 4241; SF 1319, 1543). As such, no inference of an agreement can be drawn from this unsolicited text.

Patterson's Response:

No specific response.

¹³ Complaint Counsel may *argue* that Benco should not have tried to obtain competitive intelligence from Schein. But if that is all that has occurred, it does not rise to the level of an *agreement* to boycott buying groups. Information exchanges among competitors are judged under the rule of reason, not the *per se* rule. Complaint Counsel is not bringing a rule-of-reason information exchange case; it is bringing a boycott case. But even if it was bringing such a case, there is no evidence that Schein disclosed *its* information. Thus, there was no information exchange.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Sullivan testified that he "never spoke to [Cohen] about Dental Alliance," that the two text messages (CX6027-028 (citing CX 2670 and CX 6504)) were the only communications he ever received from Cohen about this group, that he never responded to the text messages, and that he never called Cohen about this group. (CX 0311 (Sullivan, IHT at 307-08); RX 2941 (Sullivan, Dep. at 475-77)).

Nothing in Cohen's text messages is indicative of an agreement with Schein or an effort to enforce an agreement with Schein by trying to stop Schein from doing business with Universal Dental Alliance. Schein continued doing business with Universal Dental Alliance, Cohen did not share any competitively sensitive information, and Sullivan did not respond.

998. Sullivan tried to call Cohen the following morning but did not reach him. (CX6027 at 028 (Row 247); Sullivan, Tr. 3959).

Schein's Response:

As Mr. Sullivan testified, he attempted to call Mr. Cohen to reiterate, in stronger terms, that Mr. Cohen should not be discussing specific customers with him. (Sullivan, Tr. 4197-98). After playing phone tag with Mr. Cohen, Mr. Sullivan was able to deliver a "much stronger message" on April 3, 2013. (Sullivan, Tr. 4205-06; CX 6027-029). Mr. Sullivan's testimony about this April 3, 2013 call is corroborated by his later, internal email about the Texas Dental Association, instructing members of his team that "Agree that we

should NOT be having these discussions w[ith] Benco. Chuck has not contacted me nor would he on such a topic.” (RX 2362-001; Sullivan, Tr. 4207-08).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Sullivan testified that he “never spoke to [Cohen] about Dental Alliance,” that the two text messages (CX6027-028 (citing CX 2670 and CX 6504)) were the only communications he ever received from Cohen about this group, that he never responded to the text messages, and that he never called Cohen about this group. (CX 0311 (Sullivan, IHT at 307-08); RX 2941 (Sullivan, Dep. at 475-77)).

Nothing in Cohen’s text messages is indicative of an agreement with Schein or an effort to enforce an agreement with Schein by trying to stop Schein from doing business with Universal Dental Alliance. Schein continued doing business with Universal Dental Alliance, Cohen did not share any competitively sensitive information, and Sullivan did not respond.

999. Cohen texted Sullivan on March 26, 2013 (CX6027) about market intelligence on Schein doing business with a buying group. (Cohen, Tr. 556-557 (“Q. You wanted more information about Schein working with this buying group. A. I wanted more market intelligence on the topic. Yes.”)).

Schein’s Response:

The asserted fact is a repeat of, and merely describes, the text message quoted in CCFF 997. Schein incorporates its response to CCFF 997 here. Further, Schein notes that

this proposed finding makes clear that Mr. Cohen was seeking market intelligence, not an agreement from Schein to boycott, terminate, or otherwise change its relationship with, the Dental Alliance.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Sullivan testified that he "never spoke to [Cohen] about Dental Alliance," that the two text messages (CX6027-028 (citing CX 2670 and CX 6504)) were the only communications he ever received from Cohen about this group, that he never responded to the text messages, and that he never called Cohen about this group. (CX 0311 (Sullivan, IHT at 307-08); RX 2941 (Sullivan, Dep. at 475-77)).

Nothing in Cohen's text messages is indicative of an agreement with Schein or an effort to enforce an agreement with Schein by trying to stop Schein from doing business with Universal Dental Alliance. Schein continued doing business with Universal Dental Alliance, Cohen did not share any competitively sensitive information, and Sullivan did not respond.

1000. Cohen texted Sullivan on March 26, 2013 (CX6027) and told him the market intelligence could be a rumor or false information that Schein was working with that buying group. (Cohen, Tr. 559; CX6027 at 28 (Row 246)).

Schein's Response:

The asserted fact simply describes the text message quoted in CCFF 997. Schein incorporates its response to CCFF 997 here. Schein further notes that this proposed finding

makes clear that Mr. Cohen was seeking intelligence regarding something he was uncertain about, not that he was seeking agreement from Schein. Moreover, the text itself does not even mention Schein.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Sullivan testified that he "never spoke to [Cohen] about Dental Alliance," that the two text messages (CX6027-028 (citing CX 2670 and CX 6504)) were the only communications he ever received from Cohen about this group, that he never responded to the text messages, and that he never called Cohen about this group. (CX 0311 (Sullivan, IHT at 307-08); RX 2941 (Sullivan, Dep. at 475-77)).

Nothing in Cohen's text messages is indicative of an agreement with Schein or an effort to enforce an agreement with Schein by trying to stop Schein from doing business with Universal Dental Alliance. Schein continued doing business with Universal Dental Alliance, Cohen did not share any competitively sensitive information, and Sullivan did not respond.

1001. Cohen texted Sullivan on March 26, 2013 and told Sullivan Benco had turned down the Dental Alliance buying group. (Cohen, Tr. 558)

Schein's Response:

The asserted fact simply describes the text message quoted in CCFF 997. Schein incorporates its response to CCFF 997 here. In addition, Schein notes that Mr. Cohen's

text merely copied an email he received from Jamie Kasinski, in which Mr. Kasinski noted that he turned away an inquiry about the Dental Alliance *a year ago*. Mr. Cohen had not asked for that information. Nor is there evidence that Mr. Cohen purposefully intended to inform Mr. Sullivan of this fact, as opposed to simply not editing Mr. Kasinski's email.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

This proposed finding, yet again, differs from Chuck Cohen's actual testimony. In response to Complaint Counsel's question, Cohen testified that: "it's an indication to me that Jamie Kasinski, our local sales rep, said Benco doesn't work with buying groups." (Cohen, Tr. 558).

Sullivan testified that he "never spoke to [Cohen] about Dental Alliance," that the two text messages (CX6027-028 (citing CX 2670 and CX 6504)) were the only communications he ever received from Cohen about this group, that he never responded to the text messages, and that he never called Cohen about this group. (CX 0311 (Sullivan, IHT at 307-08); RX 2941 (Sullivan, Dep. at 475-77)).

Nothing in Cohen's text messages is indicative of an agreement with Schein or an effort to enforce an agreement with Schein by trying to stop Schein from doing business with Universal Dental Alliance. Schein continued doing business with Universal Dental Alliance, Cohen did not share any competitively sensitive information, and Sullivan did not respond.

1002. On March 26, 2013, Cohen forwarded to Sullivan the email from Kasinski including the part about Benco having turned down Dental Alliance. (Cohen, Tr. 558; CX0061 at 001).

Schein's Response:

The asserted fact merely describes the text message quoted and discussed in CCFF 997 and 1001. Schein incorporates its responses to those findings here.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

This proposed finding, yet again, differs from Chuck Cohen's actual testimony. In response to Complaint Counsel's question, Cohen testified that: "it's an indication to me that Jamie Kasinski, our local sales rep, said Benco doesn't work with buying groups." (Cohen, Tr. 558).

Sullivan testified that he "never spoke to [Cohen] about Dental Alliance," that the two text messages (CX6027-028 (citing CX 2670 and CX 6504)) were the only communications he ever received from Cohen about this group, that he never responded to the text messages, and that he never called Cohen about this group. (CX 0311 (Sullivan, IHT at 307-08); RX 2941 (Sullivan, Dep. at 475-77)).

Nothing in Cohen's text messages is indicative of an agreement with Schein or an effort to enforce an agreement with Schein by trying to stop Schein from doing business with Universal Dental Alliance. Schein continued doing business with Universal Dental Alliance, Cohen did not share any competitively sensitive information, and Sullivan did not respond.

1003. Cohen offered no explanation at trial for why he sent his own employee's email to Sullivan or why he notified Sullivan of rumors of Schein discounting to a buying group. (*See* Cohen, Tr. 557-558).

Schein's Response:

Complaint Counsel's proposed finding is misleading. At trial, Complaint Counsel did not ask Mr. Cohen why he sent the text message to Mr. Sullivan. It is improper to speculate about the lack of explanation for an email when Complaint Counsel *intentionally* declined to ask the question.

Moreover, Mr. Cohen testified that he did not recall the buying group Dental Alliance. (Cohen, Tr. 555). Mr. Cohen also testified that the message was sent in the "context of the text messages about American -- Atlantic Dental Care [and] at the time, [he] maybe not have been able to tell the difference." (Cohen, Tr. 968). Further, the referenced text message does not even reference Schein.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Complaint Counsel never asked Chuck Cohen for any such explanation at trial. (Cohen, Tr. 557-58).

Sullivan testified that he "never spoke to [Cohen] about Dental Alliance," that the two text messages (CX6027-028 (citing CX 2670 and CX 6504)) were the only communications he ever received from Cohen about this group, that he never responded to

the text messages, and that he never called Cohen about this group. (CX 0311 (Sullivan, IHT at 307-08); RX 2941 (Sullivan, Dep. at 475-77)).

Nothing in Cohen's text messages is indicative of an agreement with Schein or an effort to enforce an agreement with Schein by trying to stop Schein from doing business with Universal Dental Alliance. Schein continued doing business with Universal Dental Alliance, Cohen did not share any competitively sensitive information, and Sullivan did not respond.

1004. Cohen testified at his investigational hearing regarding his March 26, 2013 text to Sullivan, "Q. And why were you sending Mr. Sullivan this text? A. T he context could have been in the conversation we had the day before. Maybe he said he hadn't heard of it before. I can't say, from this vantage point, why I sent it to him. Probably answering a question that was asked or offering information. It might be that." (CX0301 (Cohen, IHT at 287)). Cohen could not explain why he was communicating with Sullivan about buying groups. (CX0301 (Cohen, IHT at 287) ("I can't imagine any specific reasons why we were or why we weren't. I suppose it looks like the topic came up in this conversation.")).

Schein's Response:

Complaint Counsel's proposed finding improperly offers speculation as fact. During his Investigational Hearing, Mr. Cohen testified that he did not recall the text message; he did not recall the underlying email; he did not recall what the message meant; and he did not recall whether Dental Alliance was a buying group. (CX 0301 (Cohen, IHT at 283-284)). At trial, Mr. Cohen testified that he did not recall the buying group Dental Alliance. (Cohen, Tr. 555). His speculation in response to Complaint Counsel's continued questioning, despite Mr. Cohen's lack of recollection, is not reliable or probative evidence.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Sullivan testified that he "never spoke to [Cohen] about Dental Alliance," that the two text messages (CX6027-028 (citing CX 2670 and CX 6504)) were the only communications he ever received from Cohen about this group, that he never responded to the text messages, and that he never called Cohen about this group. (CX 0311 (Sullivan, IHT at 307-08); RX 2941 (Sullivan, Dep. at 475-77)).

Nothing in Cohen's text messages is indicative of an agreement with Schein or an effort to enforce an agreement with Schein by trying to stop Schein from doing business with Universal Dental Alliance. Schein continued doing business with Universal Dental Alliance, Cohen did not share any competitively sensitive information, and Sullivan did not respond.

4. Smile Source (2013)

1005. Schein and Benco communicated about Smile Source once more in the fall of 2013 when Smile Source approached both companies regarding potentially working together. (CCFF ¶¶ 1006-1019).

Schein's Response:

Complaint Counsel's proposed finding cites no record evidence in support of its assertion. It only cites to other proposed findings, which – as set forth in Schein's specific replies – also fail to support its characterization of the evidence.

The evidence does not support Complaint Counsel's characterization of the October 1, 2013 phone call as "once more" communicating about Smile Source. As noted in SRFs

978 and 993, there is no evidence whatsoever that Mr. Cohen and Mr. Sullivan communicated about Smile Source in 2012, as Complaint Counsel alleges.

Substantively, the asserted fact contains falsehoods and does not support an inference of an agreement. The communication Complaint Counsel cites was an unsolicited October 1, 2013 phone call from Mr. Ryan to Mr. Foley, but Smile Source did not approach Schein about potentially working together again until October 28, 2013, after having terminated its relationship with Schein in early 2012. (CX 2580). Mr. Foley reported the call to his superior, Mr. Muller, noting he was “careful not to cross any boundaries, like collusion.” (CX 0243-001). As Mr. Foley testified, he “didn’t share any information about Schein or Schein’s policies” or “make any return comment about what Schein would do....” (Foley, Tr. 4705, 4579). At the time, Mr. Foley had no responsibility for or knowledge of the Smile Source relationship. (SF 1464; Foley, Tr. 4579, 4608). Smile Source’s primary contact at Schein was Mr. Sullivan, who, on October 29, 2013 (the day after being contacted by Smile Source), responded, “John Chatham and I would enjoy catching up with you. ... I look forward to learning more.” (CX 2580-001). And on November 20, 2013, Mr. Sullivan told Smile Source that Schein “absolutely would like to discuss further” and would “need more than a few minutes together on a convention floor.” (RX 2328-001). Mr. Sullivan’s response to Smile Source was in stark contrast to Benco’s, which, as Mr. Ryan described to Mr. Cohen, was that “[n]othing is different.... Buh-bye.” (CX 0019; *see also* CX 1162 (“I have blown these guys off three times.”); CX 1164).

Patterson’s Response:

No specific response.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding.

1006. In the fall of 2013, Ryan wondered if Schein was discounting to Smile Source. (Ryan, Tr. 1099; CX1158 at 001).

Schein's Response:

The asserted fact does not fairly characterize the document. Mr. Ryan was responding to an email from a Benco Director of Sales about *manufacturers* “giving discounts” to Smile Source members. (CX 1158-002). Mr. Ryan simply asked which manufacturers were giving discounts, and whether the products were going through Schein. (CX 1158). In point of fact, Schein was not working with Smile Source at the time since Smile Source had terminated the relationship in early 2012. (SF 1108-11, 1450 & n.13). Thus, while the email contains a question about Schein – and Mr. Ryan admitted as much in response to Complaint Counsel’s leading question (Ryan, Tr. 1098-99) – it is not really about Schein’s buying group practices, but rather *manufacturers’* practices. Indeed, when Mr. Evans responded to Mr. Ryan, his email only discussed manufacturers, not Schein. (CX 1158).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

The cited exhibit is an internal Benco e-mail between Pat Ryan and Brian Evans.

(CX1158). Nowhere in the cited exhibit does Ryan “wonder” anything. (CX1158).

1007. On September 24, 2013, Ryan received market intelligence from Brian Evans (Benco Director of Sales-West) that manufacturers were giving discounts to Smile Source. (CX1158 at 002 (“Apparently our vendor partners (mostly eq) giving discounts to members of this group when making purchases.”); CX8037 (Ryan, Dep. at 255) (“Q. In Mr. Evans’ earliest e-mail – this is dated September 24th, 2013. The subject is ‘Smile Source.’ Mr. Evans was telling you that manufacturers were giving discounts to members of Smile Source? A. Yes, that’s what it says.”)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

In the cited exhibit, Brian Evans’ comment is couched with “apparently,” which indicates that Evans was not conclusively telling Ryan anything – only what he had heard, which may apparently be true, or not true. (CX1158).

1008. On September 24, 2013, Ryan wrote regarding Smile Source, “I know exactly who they are. We’ve had 2 run ins with them. Who are vendor partners and is it going through HSI?” (CX1158 at 001). At trial, Ryan explained that he asked Evans whether Henry Schein was supplying Smile Source. (Ryan, Tr. 1098-1099). Ryan’s reference to “HSI” in CX1158 was a reference to Henry Schein. (Ryan, Tr. 1098-1099; CX8037 (Ryan, Dep. at 255)).

Schein’s Response:

The asserted fact merely quotes the email cited in CCFF 1006. Schein incorporates its responses to that proposed finding here. (SRF 1006).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

In the cited exhibit, Brian Evans' comment is couched with "apparently," which indicates that Evans was not conclusively telling Ryan anything – only what he had heard, which may apparently be true, or not true. (CX1158).

1009. About a week later, on October 1, 2013, Ryan called his counterpart at Henry Schein, Foley. (Ryan, Tr. 1099-1100; CX6027 at 036 (Row 290); Foley, Tr. 4576-4578).

Schein's Response:

No response, other than to note that Mr. Ryan testified that his purpose in calling Mr. Foley was to gain competitive intelligence about *manufacturer* discounts. (Ryan, Tr. 1225-26).¹⁴

Patterson's Response:

No specific response.

¹⁴ Mr. Ryan's testimony appears to have slightly conflated a few related issues. Mr. Ryan testified that the call with Mr. Foley centered around *Dentsply's* attempt to engage in product bundling. (Ryan, Tr. 1222-25). But other Benco documents, from about a year later, express concern about Dentsply's decision to offer a deal to Smile Source members. (CX 0015). It appears that, in his testimony, Mr. Ryan may have conflated manufacturers' Smile Source discounts, Dentsply's Smile Source discounts, and Dentsply's bundling discounts. The comingling of recollections is, of course, not unexpected given the passage of time. Regardless, the evidence shows that Mr. Ryan's concerns relate not to Schein doing business with Smile Source (which it was not doing) or any response to an RFP from Smile Source (of which none were outstanding), but to discounts offered by manufacturers. In that regard, it is important to note that, while Mr. Foley would have responsibilities for negotiating with manufacturers (for DSO chargebacks), he did not have responsibility for Smile Source. (Foley, Tr. 4515-16, 4579, 4608; Steck, Tr. 3689; RX 2714).

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

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

Prior to Dentsply's change, a customer purchasing \$5 million of one product would get a certain level of discount, and after the change, that same customer would get a significantly smaller discount unless they started purchasing more categories of products from Dentsply. (Ryan, Tr. 1223). Because Benco provides cost-plus pricing to DSO's and passes manufacturer discounts on to its DSO customers, Dentsply's policy change did not affect Benco's margins, but it would matter greatly to the customer. (Ryan, Tr. 1224).

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

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

The October 1, 2013 phone call was the only conversation that Mr. Ryan had with Mr. Foley. (Ryan, Tr. 1242), and Mr. Foley never told Mr. Ryan about Schein's position

on buying groups or discounts to buying groups. (Ryan, Tr. 1243). The call did not include any agreement of any kind between Mr. Ryan and Mr. Foley. (Ryan, Tr. 1243-1244).

1010. The October 1, 2013 call between Ryan and Foley lasted 18 minutes. (Ryan, Tr. 1100-1101; Foley, Tr. 4578-4579; CX6027 at 036 (Row 290)).

Schein's Response:

No response, other than to note that, as Mr. Foley testified, the portion of the call relating to Smile Source lasted "only a minute or two...." (Foley, Tr. 4578, 4585).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

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

Prior to Dentsply's change, a customer purchasing \$5 million of one product would get a certain level of discount, and after the change, that same customer would get a significantly smaller discount unless they started purchasing more categories of products from Dentsply. (Ryan, Tr. 1223). Because Benco provides cost-plus pricing to DSO's and passes manufacturer discounts on to its DSO customers, Dentsply's policy change did not affect Benco's margins, but it would matter greatly to the customer. (Ryan, Tr. 1224).

At that time, Benco and Schein were basically the only dental distributors serving DSO's. Because it was such a big change for DSO customers, Mr. Ryan wanted to talk to

Mr. Foley about what he thought of it and get a gut check reaction to see if Mr. Foley understood the ramifications of Dentsply's change to customers the same way Mr. Ryan did. (Ryan, Tr. 1225- 1226).

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

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

1011. On the October 1, 2013 phone call, Ryan informed Foley that Benco would not bid on Smile Source. (Foley, Tr. 4579; CX0306 (Foley, IHT at 176, 183, 185); CX8003 (Foley, Dep. at 354-355) ("I received a call from Pat Ryan at Benco Dental . . . he basically was making a statement – it was around the Smile Source time – that they didn't like working with buying groups and wasn't going to bid on it.")).

Schein's Response:

Mr. Foley's general recollection is that Mr. Ryan informed him that Benco would not bid on Smile Source. However, Mr. Foley's contemporaneous report of this call to his boss, Mr. Muller, did not make any statement about whether Benco would or would not bid on Smile Source. He merely noted that Mr. Ryan mentioned that Benco is "anti Buying Group and that Smile Source recently reached out to them." (CX 0243-001). At trial, Mr. Foley testified that he didn't "remember the contents of the call," and thus, it is not clear whether Benco made that statement about bidding or whether Mr. Foley inferred it based on reading his email report to Mr. Muller. (Foley, Tr. 4579). Regardless, this

communication had absolutely no bearing on Schein's dealings with Smile Source, as demonstrated by the fact that on November 20, 2013 – less than a month after Mr. Ryan's unsolicited call to Mr. Foley – Mr. Sullivan told Smile Source that Schein "absolutely would like to discuss further" and would "need more than a few minutes together on a convention floor." (RX 2328-001).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

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

Prior to Dentsply's change, a customer purchasing \$5 million of one product would get a certain level of discount, and after the change, that same customer would get a significantly smaller discount unless they started purchasing more categories of products from Dentsply. (Ryan, Tr. 1223). Because Benco provides cost-plus pricing to DSO's and passes manufacturer discounts on to its DSO customers, Dentsply's policy change did not affect Benco's margins, but it would matter greatly to the customer. (Ryan, Tr. 1224).

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

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

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

1012. On the October 1, 2013 phone call, Foley "got the impression that they're anti buying group." (Foley, Tr. 4584, 4589; CX0243 at 001).

Schein's Response:

Mr. Foley testified, "I don't remember the call," but that he did share "with my boss, Hal Muller, that I got the impression that they're anti buying group." (Foley, Tr. 4583-84). It was only by "reading this e-mail" to Mr. Muller that Mr. Foley made "that reference ... that they must be anti buying group." (Foley, Tr. 4589). An impression from an internal Schein email is not evidence of what specifically was shared on the phone call.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

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

Prior to Dentsply's change, a customer purchasing \$5 million of one product would get a certain level of discount, and after the change, that same customer would get a significantly smaller discount unless they started purchasing more categories of products from Dentsply. (Ryan, Tr. 1223). Because Benco provides cost-plus pricing to DSO's and passes manufacturer discounts on to its DSO customers, Dentsply's policy change did not affect Benco's margins, but it would matter greatly to the customer. (Ryan, Tr. 1224).

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

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

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

1013. Foley testified that on the October 1, 2013 phone call, Ryan wanted to know whether Schein would bid on Smile Source. (CX0306 (Foley, IHT at 182)).

Schein's Response:

Complaint Counsel's proposed finding is misleading and mischaracterizes Mr. Foley's Investigational Hearing testimony. Mr. Foley testified at trial that "I don't remember the call." (Foley, Tr. 4583-84). At his Investigational Hearing, Mr. Foley was asked whether he developed a "*sense* as to why Mr. Ryan was asking you about Smile Source," and Mr. Foley said his sense was that "if they're up for bid, he wondered if I would be bidding against it." (CX 0306 (Foley, IHT at 182) (emphasis added)). At trial, when asked whether he developed a *sense*, Mr. Foley testified that he "got the *impression* that they're anti buying group." (Foley, Tr. 4583-84 (emphasis added)). Particularly in the absence of actual recollection, Mr. Foley's "sense" and "impression" is not evidence of what was specifically said on the call.

Regardless, Mr. Foley was not involved with Smile Source at the time of Mr. Ryan's unsolicited call and had no information to share. As Mr. Foley testified, he "didn't share any information about Schein or Schein's policies" or "make any return comment about what Schein would do...." (Foley, Tr. 4705, 4579). Indeed, Smile Source had not even reached out to Schein to request a bid at that point.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

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

Prior to Dentsply's change, a customer purchasing \$5 million of one product would get a certain level of discount, and after the change, that same customer would get a significantly smaller discount unless they started purchasing more categories of products from Dentsply. (Ryan, Tr. 1223). Because Benco provides cost-plus pricing to DSO's and passes manufacturer discounts on to its DSO customers, Dentsply's policy change did not affect Benco's margins, but it would matter greatly to the customer. (Ryan, Tr. 1224).

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

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

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

1014. Following the call on October 1, 2013 with Foley, Ryan wrote to his boss, Cohen:

[Smile Source is] [v]ery familiar. Talked to them three times. Nothing is different. Randy at Schein and I talked specifically about them. Buh-bye.

(CX0019 at 001; Ryan, Tr. 1101). Ryan's reference to "Randy" in CX0019 meant Foley.

(Ryan, Tr. 1101).

Schein's Response:

Schein does not dispute that Mr. Ryan sent Mr. Cohen the quoted email. But it was not "[f]ollowing the call on October 1, 2013," it was almost *four months* later, on January 27, 2014.

More importantly, the email does not support any inference that Schein disclosed its policies, practices, or plans relating to Smile Source or buying groups on that call. While Mr. Ryan's email notes that Smile Source was discussed, it does not say that Schein disclosed any information. In fact, Mr. Foley was not responsible for Smile Source at the time, and Schein had not been approached by Smile Source for a bid at the time of the call. (SRF 1005; SF 1464; Foley, Tr. 4579, 4590, 4607-08; CX 2580). Rather, the evidence – *at the time of the call* – is that Smile Source was not interested in Schein, having *terminated* Schein the prior year. As such, there would be no reason to believe that Smile Source intended to go back to Schein for a new contract. Mr. Ryan's reference to "Buh-bye," therefore, does not indicate any plan by Schein to not bid for Smile Source in the future. In fact, a few weeks after the call, when Smile Source did reach out to Schein, Schein enthusiastically embraced the opportunity and submitted a bid shortly after Mr. Ryan sent the above-referenced email to Mr. Cohen. (SF 1156-63).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

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

Prior to Dentsply's change, a customer purchasing \$5 million of one product would get a certain level of discount, and after the change, that same customer would get a significantly smaller discount unless they started purchasing more categories of products from Dentsply. (Ryan, Tr. 1223). Because Benco provides cost-plus pricing to DSO's and passes manufacturer discounts on to its DSO customers, Dentsply's policy change did not affect Benco's margins, but it would matter greatly to the customer. (Ryan, Tr. 1224).

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

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

The October 1, 2013 phone call was the only conversation that Mr. Ryan had with Mr. Foley. (Ryan, Tr. 1242), and Mr. Foley never told Mr. Ryan about Schein's position

on buying groups or discounts to buying groups. (Ryan, Tr. 1243). The call did not include any agreement of any kind between Mr. Ryan and Mr. Foley. (Ryan, Tr. 1243-1244).

1015. Ryan would not have intentionally written something false to Cohen. (Ryan, Tr. 1102).

Schein's Response:

The asserted fact has no evidentiary value. The fact that an author of a document does not intentionally lie does not shed light on the meaning of a vague and ambiguous email.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

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

1016. At trial, Foley testified that he waited a week to tell his boss, Muller, about the call with Patrick Ryan. (Foley, Tr. 4586).

Schein's Response:

The fact that Mr. Ryan's unsolicited call to Mr. Foley occurred on October 1, 2013, and Mr. Foley reported it to his boss Mr. Muller on October 9, 2013 is irrelevant. (CX 0243). The relevant fact is that Mr. Foley reported that he was "being careful not to cross any boundaries, like collusion," and that he never provided any information about Schein to Mr. Ryan. (CX 0243; Foley, Tr. 4579; *see also* CX 0309 (Muller, IHT at 161 ("I think

it's a great sentence. He is telling me here that he didn't share information or have any collusion-type discussions. ... [W]e're very careful about what we discuss....")))).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness discussing Schein's business.

1017. In response to an email concerning other matters regarding Smile Source, Foley reported his October 1, 2013 call with Ryan to his boss, Muller. (Foley, Tr. 4589). On October 9, 2013, Foley wrote to Muller:

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

(CX0243 at 001; Foley, Tr. 4588-4589).

Schein's Response:

No response, other than to note that Mr. Foley made it clear that he was "careful not to cross any boundaries, like collusion," and that he never provided any information about Schein to Mr. Ryan. (CX 0243; Foley, Tr. 4579 ("I know I did not share any information about Schein or make any return comment about what Schein would do in response to what he just stated."); *see also* CX 0309 (Muller, IHT at 161 ("I think it's a great sentence. He is telling me here that he didn't share information or have any collusion-type discussions. ... [W]e're very careful about what we discuss")))).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness discussing Schein's business.

1018. Foley did not report the call to anyone else at Schein. (Foley, Tr. 4589).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness discussing Schein's business.

1019. Foley was "uneasy" about the discussion because it was regarding a potential customer and it is "against company . . . rules" to discuss customers with competitors. (CX0306 (Foley, IHT at 177-178); Foley, Tr. 4585-4586).

Schein's Response:

Complaint Counsel's proposed finding is imprecise and misleading. Mr. Foley testified that he was uneasy when Mr. Ryan brought up Smile Source. (CX 0306 (Foley, IHT at 177-78); Foley, Tr. 4585-86). As soon as Mr. Ryan began talking about Smile Source, Mr. Foley ended the call. (Foley, Tr. 4579; 4585-86). Mr. Foley never engaged in a discussion with Mr. Ryan about Smile Source. (Foley, Tr. 4585-86).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness discussing Schein's business.

1020. Following these communications, Benco declined to work with Smile Source in 2013 and 2014. [REDACTED]

[REDACTED] Ryan, Tr. 1131; *see also* CX8015 (Cohen, Dep. at 266-267) (Benco did not do business with Smile Source in 2014)).

Schein's Response:

Complaint Counsel's proposed finding is misleading and inaccurate. Benco consistently declined to work with Smile Source since at least 2011, well before Mr. Ryan's unsolicited call to Mr. Foley. (CX 1138). Benco declined again in 2012. (CX 1220). In January 2014 – *almost four months after* Mr. Ryan called Mr. Foley – Mr. Cohen wrote that while "I'd be happy to speak with the leaders [of Smile Source]; ... they should know going in that we do NOT work with, or recognize, buying groups." (CX 1164-003).

Notably, Schein took the opposite approach. Mr. Sullivan told Smile Source on October 29, 2013 that "John Chatham and I would enjoy catching up with you. ... I look forward to learning more." (CX 2580-001). And on November 20, 2013, Mr. Sullivan wrote that Schein "absolutely would like to discuss further" and would "need more than a few minutes together on a convention floor...." (RX 2328-001). After meeting in January 2014, Mr. Chatham wrote that Schein was "excited about the opportunity and will move the process along as fast as possible." (CX 2587; CX 2588-001). Schein made a proposal to Smile Source, but Smile Source rejected it. (SF 1163-67).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

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

1021. On August 14, 2014, Ryan described Smile Source as "terrifying." (Ryan, Tr. 1045; CX0015 at 001).

Schein's Response:

The asserted fact is incomplete and imprecise. Mr. Ryan's statement describing Smile Source as "terrifying" was specifically in the context of Smile Source's exclusive deals with manufacturers like Dentsply. (CX 0015-001 ("If Dentsply is offering their deal on the side, and they would offer the same deal to a Benco customer, then that's different. But if this is a Smile Source exclusive, then that is a real problem.")). Benco's concern was thus its ability to compete against discounts that *manufacturers* gave to Smile Source members.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The cited phrase in the proposed finding is taken from a larger text message exchange between Pat Ryan and Mitch Huber. The initial text message in the conversation,

written by Ryan, was: “I think we need to stop talking about Amazon and start talking about Smile Source.” (CX0015). Ryan later writes “[t]hey are terrifying,” about Smile Source to underscore his point that he believed Amazon was being talked about too much and that there should be more discussion regarding Smile Source. (CX0015; Ryan, Tr. 1044 (testifying that in his personal opinion, Amazon was “overblown”)). Beyond that, Ryan testified that he did not know why he would have used the phrase. (Ryan, Dep. at 339-40).

Pat Ryan has led Benco’s Special Markets division since he founded it in 2004. (Ryan, Tr. 1155; Cohen, Tr. 803-804). Smile Source is a franchise DSO. (Maurer, Tr. 4935-36; Ryan, Tr. 1250). Amazon, in so far as it relates to the dental supply industry, is an online distributor of dental supplies. (Cohen, Tr. 489-490, 834). Therefore, Smile Source falls within Benco’s Special Markets division, whereas Amazon does not. (Cohen, Tr. 802-803). Accordingly, Pat Ryan as the head of Special Markets was more focused on Smile Source than on Amazon. (CX0015).

Lastly, the cited exhibit and testimony contains only the statements and impressions of Pat Ryan, not Benco as a whole.

D. Benco and Schein Communicated When They Were Uncertain Whether a Customer Qualified as a Buying Group.

1022. On March 22, 2013, a customer called Atlantic Dental Care, PLC (“ADC”) approached Benco asking for a bid for its \$3.5 million dental supply business. (CX0021 at 003-004 (email from Atlantic Dental Care to Benco Regional Manager He Zhao)).

Schein’s Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

The cited exhibit begins with Benco receiving a cold solicitation from an entity calling itself Atlantic Dental Care, PLC. (CX0021). ADC was not a customer yet, as Benco had not yet made any determination what type of entity ADC was. (CX0021).

1023. On March 25, 2013 at 10:22 a.m., He Zhao, BencoRegional Manager for Virginia, forwarded the ADC request for a bid to Ryan, writing, "Attached is the opportunity I picked your brain about. They claim to not be a buying group. The bid deadline is 4/5. Please let me know if this is something I can pursue." (CX0021 at 002-003).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

In addition to the language quoted in the proposed finding, the cited exhibit also noted that "I have 2 local reps covering the area and suspect some of their customers may fall under this." (CX0021). Benco's regional manager was indicating that some dentist members of ADC were already Benco customers. (CX0021).

1024. On March 25, 2013, Ryan responded to Zhao's email from earlier that day and instructed him not to bid on ADC. (CX0021 at 002 ("We're out"); Ryan, Tr. 1093-1094 ("We're out" meant "Benco would not bid on ADC")).

Schein's Response:

Complaint Counsel's proposed finding excludes relevant information that undermines the asserted fact. Specifically, Mr. Ryan's comment that "[w]e're out" was a *preliminary* view sent at 12:46 pm on March 25, 2013. Two hours *later*, at 2:45 pm, after Mr. Ryan received additional information about ADC, Mr. Ryan expressed uncertainty about whether ADC was a buying group, and asked to speak with Mr. Cohen. (CX 0020-001 (Mr. Ryan: "We need to speak about this quickly. I can't figure out if this is a buying group or not.")). As such, as of the afternoon of March 25, 2013, Benco had not made a determination about ADC's status.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

The language quoted in the proposed finding is merely Pat Ryan's conclusion. The proposed finding ignores the majority of the text of the e-mail, which describes Pat Ryan's analysis and application of Benco's no-middleman policy. (CX0021). Ryan's complete e-mail reads as follows:

The fact that they created an LLC (it's not a PLC) and put \$50K in it is meaningless. The practices are all still independently owned and operated, and the LLC has no ownership whatsoever of the practices (even the hard assets).

We're out.

(CX0021).

1025. On March 25, 2013 at 2:45 p.m., Ryan emailed his boss Cohen with an urgent request: “We need to speak about this quickly. I can’t figure out if this is a buying group or not.” (CX0020 at 001 (email from Ryan to Cohen, forwarding article entitled, “Atlantic Dental Care Plc raises \$56,000 as noted in SEC filing”)).

Schein’s Response:

Mr. Ryan emailed Mr. Cohen at 2:45 p.m., about two hours after he instructed Mr. Zhao not to bid on ADC. (CX 0020; CX 0021; *see also* SRF 1122-24). Mr. Ryan’s email was not marked urgent, however. Mr. Ryan attached a November 21, 2012 article about ADC’s securities offering and noted that he could not “figure out if [ADC] is a buying group or not.” (CX 0020-001; Ryan, Tr. 1199-200).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

When a group like ADC approaches Benco, Benco must gather information about the group so that it can apply its policy. (Cohen, Tr. 716-17). Benco must determine whether the group is a single group of dental practices with common ownership and control or whether it’s a collection of independent dental practices without common ownership or common control. (Cohen, Tr. 716-717).

When assessing groups, Benco’s focus is always on the ownership structure and the control of the purchasing decisions of the dental practices. (Cohen, Tr. 717). The groups that approach Benco tend to be very different when it comes to the ownership

structure. (Cohen, Tr. 717). It is often a challenge for Benco to determine the ownership structure and control structure of a group. (Cohen, Tr. 717).

Pat Ryan is a long-time Benco employee, who at the time of the events at issue here, was Benco's Director of Special Markets. (Cohen, Tr. 717-18). Pat Ryan's job was to serve as the point of contact for groups approaching Benco and was the first person tasked with determining the ownership and control structure of a group. (Cohen, Tr. 717-18).

In situations where Pat Ryan was unable to determine the ownership or control structure of a group, Chuck Cohen would get involved to help Pat Ryan reach a determination so that Benco could apply its policy. (Cohen, Tr. 718). In addition to discussing the group's structure with Chuck Cohen, Pat Ryan would also ask the group for documentation and conduct independent research regarding the group. (Cohen, Tr. 718).

1026. The subject of Ryan's March 25, 2013, email to Cohen was "buying group?" In this email, Ryan forwarded to Cohen a news article regarding Atlantic Dental Care. (CX0020 at 001).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

When a group like ADC approaches Benco, Benco must gather information about the group so that it can apply its policy. (Cohen, Tr. 716-17). Benco must determine

whether the group is a single group of dental practices with common ownership and control or whether it's a collection of independent dental practices without common ownership or common control. (Cohen, Tr. 716-717).

When assessing groups, Benco's focus is always on the ownership structure and the control of the purchasing decisions of the dental practices. (Cohen, Tr. 717). The groups that approach Benco tend to be very different when it comes to the ownership structure. (Cohen, Tr. 717). It is often a challenge for Benco to determine the ownership structure and control structure of a group. (Cohen, Tr. 717).

Pat Ryan is a long-time Benco employee, who at the time of the events at issue here, was Benco's Director of Special Markets. (Cohen, Tr. 717-18). Pat Ryan's job was to serve as the point of contact for groups approaching Benco and was the first person tasked with determining the ownership and control structure of a group. (Cohen, Tr. 717-18).

In situations where Pat Ryan was unable to determine the ownership or control structure of a group, Chuck Cohen would get involved to help Pat Ryan reach a determination so that Benco could apply its policy. (Cohen, Tr. 718). In addition to discussing the group's structure with Chuck Cohen, Pat Ryan would also ask the group for documentation and conduct independent research regarding the group. (Cohen, Tr. 718).

1027. Ryan was asking to speak quickly with Cohen because Ryan could not figure out whether the group, ADC, was a buying group or not. (Cohen, Tr. 543).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

When a group like ADC approaches Benco, Benco must gather information about the group so that it can apply its policy. (Cohen, Tr. 716-17). Benco must determine whether the group is a single group of dental practices with common ownership and control or whether it's a collection of independent dental practices without common ownership or common control. (Cohen, Tr. 716-717).

When assessing groups, Benco's focus is always on the ownership structure and the control of the purchasing decisions of the dental practices. (Cohen, Tr. 717). The groups that approach Benco tend to be very different when it comes to the ownership structure. (Cohen, Tr. 717). It is often a challenge for Benco to determine the ownership structure and control structure of a group. (Cohen, Tr. 717).

Pat Ryan is a long-time Benco employee, who at the time of the events at issue here, was Benco's Director of Special Markets. (Cohen, Tr. 717-18). Pat Ryan's job was to serve as the point of contact for groups approaching Benco and was the first person tasked with determining the ownership and control structure of a group. (Cohen, Tr. 717-18).

In situations where Pat Ryan was unable to determine the ownership or control structure of a group, Chuck Cohen would get involved to help Pat Ryan reach a determination so that Benco could apply its policy. (Cohen, Tr. 718). In addition to

discussing the group's structure with Chuck Cohen, Pat Ryan would also ask the group for documentation and conduct independent research regarding the group. (Cohen, Tr. 718).

1028. Cohen created a calendar entry on March 25, 2013 reminding himself to "Call Tim Sullivan re: Buying Groups." (CX0058 at 001; Cohen, Tr. 543).

Schein's Response:

CX 0058 consists of a "task entry," with a subject line reading, "Call Tim Sullivan re: Buying Groups," and a "due date" of March 25, 2013. CX 0058 does not indicate when the "task entry" was created.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Benco's evaluation of ADC was the most difficult and longest evaluation of a group that Benco had ever conducted. (Cohen, Tr. 718-19; Ryan, Tr. 1199). Benco was confused by ADC's ownership structure because it was a collection of 35-50 independent dental practices that had merged together to form a single entity. (Cohen, Tr. 716-19). Benco had never before seen an ownership structure like ADC. (Cohen, Tr. 719).

Pat Ryan and Benco's Strategic Markets team spent months assessing ADC. (Cohen, Tr. 719; Ryan, Tr. 1199). Benco tried several sources to obtain additional information regarding ADC, including asking ADC itself for documentation, consulting with Benco's local sales team, conducting independent research, and ultimately consulting with others in the dental industry. (Cohen, Tr. 719-20).

Chuck Cohen eventually reached out to Tim Sullivan to see if Mr. Sullivan had any additional information on the structure of ADC that Benco might be able to use in its independent evaluation of ADC. (Cohen, Tr. 719-20). Chuck Cohen's intent in reaching out to Tim Sullivan regarding ADC was to gather facts that might help Benco make its own independent evaluation of ADC. Chuck Cohen did not intend to make any collective decision with Tim Sullivan about ADC. (Cohen, Tr. 719-20).

1029. Cohen followed through on his March 25, 2013, calendar entry (CX0058 at 001). Shortly after Cohen received Ryan's March 25, 2013 email regarding buying groups, Cohen contacted Sullivan, his counterpart at Henry Schein. (CX6027 at 027 (Row 237);Cohen, Tr. 544).

Schein's Response:

Complaint Counsel's proposed finding is imprecise. At 4:13 pm, Mr. Cohen sent Mr. Sullivan an unsolicited text asking if Mr. Sullivan was "[a]vailable to talk" but did not identify the subject matter. (CX 6027-027 (row 237)). Mr. Sullivan replied that he would be available at 5 pm. Mr. Sullivan then called Mr. Cohen at 4:57 pm on March 25, 2013. (CX 6027-027 (row 240)). It is likely that Mr. Cohen created the task entry to "call" Mr. Sullivan in between Mr. Cohen's initial text at 4:13 pm and the call at 4:57 pm, though there is no documentary or testimonial evidence concerning when the task entry was created.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Benco's evaluation of ADC was the most difficult and longest evaluation of a group that Benco had ever conducted. (Cohen, Tr. 718-19; Ryan, Tr. 1199). Benco was confused by ADC's ownership structure because it was a collection of 35-50 independent dental practices that had merged together to form a single entity. (Cohen, Tr. 716-19). Benco had never before seen an ownership structure like ADC. (Cohen, Tr. 719).

Pat Ryan and Benco's Strategic Markets team spent months assessing ADC. (Cohen, Tr. 719; Ryan, Tr. 1199). Benco tried several sources to obtain additional information regarding ADC, including asking ADC itself for documentation, consulting with Benco's local sales team, conducting independent research, and ultimately consulting with others in the dental industry. (Cohen, Tr. 719-20).

Chuck Cohen eventually reached out to Tim Sullivan to see if Mr. Sullivan had any additional information on the structure of ADC that Benco might be able to use in its independent evaluation of ADC. (Cohen, Tr. 719-20). Chuck Cohen's intent in reaching out to Tim Sullivan regarding ADC was to gather facts that might help Benco make its own independent evaluation of ADC. Chuck Cohen did not intend to make any collective decision with Tim Sullivan about ADC. (Cohen, Tr. 719-20).

1030. On March 25, 2013, at 4:13 p.m., about an hour and a half after Cohen received Ryan's email, Cohen sent Sullivan a text message asking for a phone call. (CX6027 at 027 (Row 237) (text message from Cohen to Sullivan, "You around? Available to talk?"); Cohen, Tr. 544)

Schein's Response:

This is essentially a restatement of CCFF 1029, and Schein incorporates its response to CCFF 1029 here. Mr. Cohen's March 25, 2013, 4:13 pm text message to Mr. Sullivan was unsolicited and did not indicate the subject matter Mr. Cohen wished to discuss. (CX 6027-027; CX 0196-001; Sullivan, Tr. 4187-88; Cohen, Tr. 889).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

On March 25, 2015, Cohen received an internal e-mail from Ryan, attaching an article about ADC's recent securities offering, and noting that he could not "figure out if [ADC] is a buying group or not." (CX0020). Ryan then discussed the issue with Cohen. (Ryan, Tr. 1199).

Following that discussion, Cohen sent a text message to Sullivan at 3:13 pm on March 25, 2013, asking if Sullivan is "[a]vailable to talk." (CX6027-027). In his text message, Cohen did not indicate the subject matter he wished to talk about, and Sullivan testified that he did not know what Cohen wanted to talk about. (CX6027-027; Sullivan, Tr. 4187-88). Sullivan responded to Cohen's text message that he was available at 5:00 pm eastern, and he called Cohen at that time. (CX6027-027).

Call records show that the call lasted 8 minutes and 35 seconds, but the records do not reveal the content of the call. (CX6027-027). Both Cohen and Sullivan testified about the call. Cohen did not recall what was said on the March 25, 2013 call. (Cohen, Tr. 721). The purpose of Cohen's call was to find out if Sullivan had any information about ADC, since Benco could not determine whether it was a buying group or DSO. (Cohen, Tr. 719-20).

Cohen denied having reached any agreement with Sullivan about ADC, or discussing Benco's no middlemen policy on that call. (Cohen, Tr. 705; 715). Cohen also

stated he does not recall Sullivan revealing any information about Schein's policies, plans, or practices concerning ADC or buying groups generally. (Cohen, Tr. 848-50; 899).

The preponderance of the evidence thus does not support the allegation that Schein and Benco reached any agreement concerning ADC or buying groups on the March 25, 2013 call.

1031. Sullivan responded to Cohen's text message within two minutes. Cohen and Sullivan set a time to talk at 5 p.m. Eastern Time that day. (CX6027 at 027 (Rows 238-239); Cohen, Tr. 545).

Schein's Response:

Mr. Cohen's text message did not indicate what he wanted to talk about, and Mr. Sullivan did not know what Mr. Cohen wanted to discuss. (CX 6027-027; CX 0196-001; Sullivan, Tr. 4187-88; Cohen, Tr. 889). A few days earlier, Mr. Cohen and his brother had finalized arrangements to meet with Schein's CEO, Stanley Bergman, and Schein's head of Business Development, Mark Mlotek, to explore M&A opportunities the following Monday, April 1, 2013, in New York. (Cohen, Tr. 892-95; Sullivan, Tr. 4186-87; CX 1476; CX 1486). Mr. Sullivan testified that the ongoing merger discussions between Schein and Benco impacted his interactions with Mr. Cohen, as he wanted to be cordial and treat Mr. Cohen with respect since they might be working for one another if a merger went through. (Sullivan, Tr. 4260-61).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

On March 25, 2015, Cohen received an internal e-mail from Ryan, attaching an article about ADC's recent securities offering, and noting that he could not "figure out if [ADC] is a buying group or not." (CX0020). Ryan then discussed the issue with Cohen. (Ryan, Tr. 1199).

Following that discussion, Cohen sent a text message to Sullivan at 3:13 pm on March 25, 2013, asking if Sullivan is "[a]vailable to talk." (CX6027-027). In his text message, Cohen did not indicate the subject matter he wished to talk about, and Sullivan testified that he did not know what Cohen wanted to talk about. (CX6027-027; Sullivan, Tr. 4187-88). Sullivan responded to Cohen's text message that he was available at 5:00 pm eastern, and he called Cohen at that time. (CX6027-027).

Call records show that the call lasted 8 minutes and 35 seconds, but the records do not reveal the content of the call. (CX6027-027). Both Cohen and Sullivan testified about the call. Cohen did not recall what was said on the March 25, 2013 call. (Cohen, Tr. 721). The purpose of Cohen's call was to find out if Sullivan had any information about ADC, since Benco could not determine whether it was a buying group or DSO. (Cohen, Tr. 719-20).

Cohen denied having reached any agreement with Sullivan about ADC, or discussing Benco's no middlemen policy on that call. (Cohen, Tr. 705; 715). Cohen also stated he does not recall Sullivan revealing any information about Schein's policies, plans, or practices concerning ADC or buying groups generally. (Cohen, Tr. 848-50; 899).

The preponderance of the evidence thus does not support the allegation that Schein and Benco reached any agreement concerning ADC or buying groups on the March 25, 2013 call.

1032. At 4:57 p.m. Eastern Time on March 25, 2013, Sullivan called Cohen and the two spoke for 8 minutes and 35 seconds. (Cohen, Tr. 544-546, 968; Sullivan, Tr. 3945-3946; CX6027 at 027 (Row 240)).

Schein's Response:

The records do not reveal the content of the call. (CX 6027-027). However, both Mr. Cohen and Mr. Sullivan testified about the call. Mr. Cohen testified that he did not have a specific recollection of what was said on the March 25, 2013 call. But, based on his review of the documents before and after the call, he believes he called to find out if Mr. Sullivan had any information about ADC, since he could not determine whether it was a buying group. (Cohen, Tr. 721-22 (“Q. Do you remember anything about this call? A. Not specifically. Q. But you remember the purpose of the call. A. I do. Q. How is it that you remember the purpose? A. Well, it’s illustrated in the follow-up series of texts.”)). Mr. Cohen denied having reached any agreement with Mr. Sullivan about ADC, or discussing Benco’s no-buying-group policy on that call. (Cohen, Tr. 899, 877-78). Mr. Cohen also testified that he does not recall Mr. Sullivan revealing any information about Schein’s policies, plans, or practices concerning ADC, or buying groups generally. (Cohen, Tr. 899).

Mr. Sullivan also denied reaching any agreement with Mr. Cohen, and did not disclose any information to Mr. Cohen about ADC, or any buying group. (Cohen, Tr. 968-69; Sullivan, Tr. 4289-90). Mr. Sullivan did not tell Mr. Cohen Schein’s “philosophy about buying groups during this call.” (Sullivan, Tr. 4190). When Mr. Cohen asked about ADC on the March 25, 2013 call, Mr. Sullivan – who did not know anything about ADC at the time of the call – “immediately stopped” Mr. Cohen, informed Mr. Cohen that they should

not be talking about specific customers, and “cut off the discussion ... on that topic.” (Sullivan, Tr. 3946; CX 8025 (Sullivan, Dep. at 344-45, 401-03)).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

On March 25, 2015, Cohen received an internal e-mail from Ryan, attaching an article about ADC’s recent securities offering, and noting that he could not “figure out if [ADC] is a buying group or not.” (CX0020). Ryan then discussed the issue with Cohen. (Ryan, Tr. 1199).

Following that discussion, Cohen sent a text message to Sullivan at 3:13 pm on March 25, 2013, asking if Sullivan is “[a]vailable to talk.” (CX6027-027). In his text message, Cohen did not indicate the subject matter he wished to talk about, and Sullivan testified that he did not know what Cohen wanted to talk about. (CX6027-027; Sullivan, Tr. 4187-88). Sullivan responded to Cohen’s text message that he was available at 5:00 pm eastern, and he called Cohen at that time. (CX6027-027).

Call records show that the call lasted 8 minutes and 35 seconds, but the records do not reveal the content of the call. (CX6027-027). Both Cohen and Sullivan testified about the call. Cohen did not recall what was said on the March 25, 2013 call. (Cohen, Tr. 721). The purpose of Cohen’s call was to find out if Sullivan had any information about ADC, since Benco could not determine whether it was a buying group or DSO. (Cohen, Tr. 719-20).

Cohen denied having reached any agreement with Sullivan about ADC, or discussing Benco's no middlemen policy on that call. (Cohen, Tr. 705; 715). Cohen also stated he does not recall Sullivan revealing any information about Schein's policies, plans, or practices concerning ADC or buying groups generally. (Cohen, Tr. 848-50; 899).

The preponderance of the evidence thus does not support the allegation that Schein and Benco reached any agreement concerning ADC or buying groups on the March 25, 2013 call.

1033. Four minutes after the March 25, 2013 telephone call between Sullivan and Cohen, Sullivan sent Cohen a text message thanking him for the call. (CX6027 at 027 (Row 241) ("Hi Chuck. Thanks for the call."); Sullivan, Tr. 3957)).

Schein's Response:

Complaint Counsel's proposed finding is an incomplete representation of the record. Mr. Sullivan's text message goes on to say, "Yes, I am good with the terms we discussed and I look forward to joining Team Benco! Ps. Want to confirm that the Benco tooth logo will include a picture of me. :)" (CX 6027-027). Both Mr. Sullivan and Mr. Cohen testified that Mr. Sullivan's text message referred to a long-running joke between the two about who was going to work for whom in the event that ongoing merger discussions came to fruition. (Cohen, Tr. 554-55, 897-98; Sullivan, Tr. 3955-56, 4189-90; *see also* SRF 1031). As noted above, Mr. Cohen had plans to meet with Stanley Bergman, Schein's CEO, the following week on April 1, 2013, as part of the ongoing merger discussions. (Cohen, Tr. 894-95; SRF 1031). Notably, Mr. Sullivan's text message relates solely to the ongoing joke between the two about a potential merger and makes no mention of ADC, buying groups, or customers.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Immediately following the call, at 5:09 pm on March 25, 2013, Sullivan sent Cohen a text stating, "Yes, I am good with the terms we discussed and I look forward to joining Team Benco! Ps. Want to confirm that the Benco tooth logo will include a picture of me. :)" (CX6027-027). Both Sullivan and Cohen testified that Sullivan's text message referred to a long-running joke between the two about who was going to work for whom in the event that ongoing merger discussions came to fruition. (Cohen, Tr. 722; 897-98; Sullivan, Tr. 3955-56).

Regarding the ongoing merger discussions between Schein and Benco, a few days earlier Cohen and his brother had finalized arrangements to meet with Schein's CEO, Stanley Bergman, and its head of Business Development, Mark Mlotek, to explore M&A opportunities, the following Monday, April 1, 2013, in New York. (Cohen, Tr. 892-95; Sullivan, Tr. 4185-87; CX1476). Sullivan testified that the ongoing merger discussions between Schein and Benco impacted his interactions with Cohen. He wanted to be cordial and treat Cohen with respect because they might be working with, or for, one another if a merger went through. (Sullivan, Tr. 4260-61).

Sullivan's and Cohen's joke about who would work for whom is consistent with a discussion on the March 25, 2013 call about this upcoming meeting, as are follow-up texts between Cohen and Sullivan that continued to joke. (CX 6026-027). Later that evening on March 25, 2013, Cohen forwarded a link to an article reporting on ADC's financing.

(CX 6026-028). In response, Sullivan simply wrote, “unusual.” (CX 6026-028). Sullivan did not provide any information about ADC. Nor did Sullivan reveal Schein’s plans about ADC.

The preponderance of the evidence thus does not support the allegation that Schein and Benco reached any agreement concerning ADC or buying groups on the March 25, 2013 call.

1034. Cohen admits that he and Sullivan discussed ADC in their March 25, 2013, telephone call. (Cohen, Tr. 546, 968; CX0301 (Cohen IHT at 271)).

Schein’s Response:

Mr. Cohen testified that he does not have an independent recollection of the telephone call. (Cohen, Tr. 890). He infers, based on the surrounding documents, that ADC was mentioned, but he does not recall the extent of the discussion. (Cohen, Tr. 553, 721, 890). As such, his testimony about this call is not reliable evidence of its contents. That said, Mr. Cohen testified that his purpose in reaching out to Mr. Sullivan was to gain more information about ADC. (Cohen, Tr. 553, 721).

In contrast to Mr. Cohen’s lack of recollection, Mr. Sullivan provided affirmative testimony concerning the call. As he testified, Mr. Cohen “started talking about Atlantic Dental Care... He asked if I knew what they were, and I told him I did not. Then he started to tell me more about them, and I immediately stopped him, and I said, ‘Chuck, this is not a discussion that you and I should be having’ ... [and] I cut off discussion with him on that topic.” (Sullivan, Tr. 3946).

Mr. Cohen did not discuss Benco’s no-buying-group policy on the call. (Cohen, Tr. 877-78 (“Q. Did you share this policy with Mr. Sullivan on that call? A. I did not. Q.

Did you ever send this policy to Mr. Sullivan? A. I did not.”)). Mr. Sullivan corroborated this testimony. (Sullivan, Tr. 3944 (“Q. [D]id Chuck Cohen ever share with you that Benco had a policy of not selling or offering discounts to buying groups? A. He did not. Q. Did Chuck Cohen ever share with you that Benco had a no buying group policy? A. He did not.”), 3946, 4189). Nor did Mr. Sullivan reveal any information about Schein’s policies, plans, or practices concerning ADC, or buying groups generally. (Cohen, Tr. 899; Sullivan, Tr. 4190-91).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Call records show that the call lasted 8 minutes and 35 seconds, but the records do not reveal the content of the call. (CX6027-027). Both Cohen and Sullivan testified about the call. Cohen did not recall what was said on the March 25, 2013 call. (Cohen, Tr. 721). The purpose of Cohen’s call was to find out if Sullivan had any information about ADC, since Benco could not determine whether it was a buying group or DSO. (Cohen, Tr. 719-20).

Cohen denied having reached any agreement with Sullivan about ADC, or discussing Benco’s no middlemen policy on that call. (Cohen, Tr. 705; 715). Cohen also stated he does not recall Sullivan revealing any information about Schein’s policies, plans, or practices concerning ADC or buying groups generally. (Cohen, Tr. 848-50; 899).

The preponderance of the evidence thus does not support the allegation that Schein and Benco reached any agreement concerning ADC or buying groups on the March 25, 2013 call.

1035. Sullivan admits that he and Cohen discussed ADC in their March 25, 2013 telephone call. (Sullivan, Tr. 3946-3947; CX0311 (Sullivan, IHT at 261)).

Schein's Response:

The asserted fact mischaracterizes Mr. Sullivan's testimony. Mr. Sullivan testified that he shut down Mr. Cohen's *attempt* to discuss ADC. (Sullivan, Tr. 3946; CX 0311 (Sullivan, IHT at 261); CX 8025 (Sullivan, Dep. at 344-45, 401-03)). As Mr. Sullivan testified, when Mr. Cohen "started talking about Atlantic Dental Care," he "asked if I knew what they were, and I told him I did not. Then he started to tell me more about them, and I immediately stopped him, and I said, 'Chuck, this is not a discussion that you and I should be having' ... [and] I cut off discussion with him on that topic." (Sullivan, Tr. 3946; CX 0311 (Sullivan, IHT at 261 (when Mr. Cohen raised ADC, "I immediately said that, Chuck, I don't know why you're telling me this; this is not something you and I should be talking about. And I don't know who they are; I've not met them;"))); CX 8025 (Sullivan, Dep. at 344-45, 401-03 (Mr. Sullivan "shut [] down" the conversation and switched the topic))). Mr. Sullivan also did not share any information about Schein's policies, practices, or plans about buying groups or ADC. (Sullivan, Tr. 4190-91).

In light of this evidence, Complaint Counsel's characterization that Mr. Sullivan and Mr. Cohen "discussed" ADC is misleading and unfounded.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Call records show that the call lasted 8 minutes and 35 seconds, but the records do not reveal the content of the call. (CX6027-027). Both Cohen and Sullivan testified about the call. Cohen did not recall what was said on the March 25, 2013 call. (Cohen, Tr. 721). The purpose of Cohen's call was to find out if Sullivan had any information about ADC, since Benco could not determine whether it was a buying group or DSO. (Cohen, Tr. 719-20).

Cohen denied having reached any agreement with Sullivan about ADC, or discussing Benco's no middlemen policy on that call. (Cohen, Tr. 705; 715). Cohen also stated he does not recall Sullivan revealing any information about Schein's policies, plans, or practices concerning ADC or buying groups generally. (Cohen, Tr. 848-50; 899).

The preponderance of the evidence thus does not support the allegation that Schein and Benco reached any agreement concerning ADC or buying groups on the March 25, 2013 call.

1036. Sullivan and Cohen discussed whether ADC was a buying group or corporate group, and ADC in general, on the March 25, 2013 telephone call. (Cohen, Tr.at 547-548; *see also* CX0301 (Cohen, IHT at 271-272 ("[W]e were exchanging information about whether Atlantic Dental Care was a group buying or group purchase organization or a DSO."))).

Schein's Response:

False.

Complaint Counsel's proposed finding is inaccurate and improperly relies on speculation and conjecture.

In Mr. Cohen's Investigational Hearing, Complaint Counsel asked him why he sent Mr. Sullivan a press release about ADC after the March 25, 2013 call. (CX 0301 (Cohen, IHT at 271-72)). Mr. Cohen did not testify as to any actual knowledge or recollection as to why, but instead speculated: "**Probably** because he wanted to know from me or ... we were exchanging information about whether Atlantic Dental Care was a group buying or group purchase organization or a DSO." (CX 0301 (Cohen, IHT at 272)). Complaint Counsel asked "why" again, and Mr. Cohen responded, "I don't know" and noted he was only sharing a "public press release" not confidential information. (CX 0301 (Cohen, IHT at 272)). Complaint Counsel asked "why" a third time, and Mr. Cohen reiterated, "I can't recall ... I don't remember the context of it, but this is public information." (CX 0301 (Cohen, IHT at 272)). Complaint Counsel asked "why" a fourth time, and Mr. Cohen stopped speculating, answering, "I can't say why. I don't know why." (CX 0301 (Cohen, IHT at 272-73)). Yet Complaint Counsel asked "why" a fifth time. Answer: "I don't remember" (CX 0301 (Cohen, IHT at 273)). All Mr. Cohen could testify to was the fact of the phone call and what he read in the following text messages: "I don't remember the specifics around the call. It seems like I did have a call with Tim that lasted nine minutes. It seems like it was followed up with a press release that I sent him. I agree to all that. And that is my testimony. The context and what was discussed in the call. I truly don't recall." (CX 0301 (Cohen, IHT at 273)). Then, recognizing that "you don't recall why you sent it," Complaint Counsel asked Mr. Cohen to continue to speculate "sitting here today." (CX 0301 (Cohen, IHT at 273-74)).

At trial, Complaint Counsel again pressured Mr. Cohen to speculate about the March 23, 2013 call based on Mr. Cohen's subsequent text message attaching a public press release about ADC.

Q. And you were exchanging market intelligence about whether Atlantic Dental Care was a buying group or corporate group; right?

A. That would be the subject. Yes.

Q. That would be the subject of your call with Tim Sullivan?

A. That would be the subject of the press release.

Q. Do you know why you sent him that press release?

A. *Probably* because we just -- we talked about it on the phone.

Q. Talked about whether ADC was a buying group or a DSO?

A. *I think* we were probably talking about ADC in general. *I can't recall* the exact conversation."

(Cohen, Tr. 547 (emphasis added)). Complaint Counsel, unhappy with Mr. Cohen's lack of recollection at trial and speculation, attempted to impeach Mr. Cohen with his Investigational Hearing testimony. But as just recounted, Mr. Cohen's IHT testimony was no different. He had no actual recollection or knowledge of the call, and merely speculated based on reading documents Complaint Counsel put in front of him.

Mr. Cohen's speculation is not evidence of any exchange of information or any actual discussion of ADC on the March 23, 2013 call. As noted, the non-speculative testimony is to the contrary. (SRF 1034). There was no "exchange" of information. As Mr. Sullivan testified, when Mr. Cohen "started talking about Atlantic Dental Care... He asked if I knew what they were, and I told him I did not. Then he started to tell me more about them, and I immediately stopped him, and I said, 'Chuck, this is not a discussion that

you and I should be having’ ... [and] I cut off discussion with him on that topic.” (Sullivan, Tr. 3946; CX 0311 (Sullivan, IHT at 261 (when Mr. Cohen raised ADC, “I immediately said that, Chuck, I don’t know why you’re telling me this; this is not something you and I should be talking about. And I don’t know who they are; I’ve not met them;”)); CX 8025 (Sullivan, Dep. at 344-45, 401-03 (Mr. Sullivan “shut [] down” the conversation and switched the topic))).

Mr. Cohen did not discuss Benco’s no-buying-group policy on the call. (Cohen, Tr. 877-78 (“Q. Did you share this policy with Mr. Sullivan on that call? A. I did not. Q. Did you ever send this policy to Mr. Sullivan? A. I did not.”)). Mr. Sullivan corroborated this testimony. (Sullivan, Tr. 3944 (“Q. [D]id Chuck Cohen ever share with you that Benco had a policy of not selling or offering discounts to buying groups? A. He did not. Q. Did Chuck Cohen ever share with you that Benco had a no buying group policy? A. He did not.”), 3946, 4189). Nor did Mr. Sullivan reveal any information about Schein’s policies, plans, or practices concerning ADC or buying groups generally. (Cohen, Tr. 899; Sullivan, Tr. 4190-91).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The cited testimony does not support the proposed finding. Although Complaint Counsel asked Chuck Cohen the question that forms the basis of the proposed finding – “Talked about whether ADC was a buying group or DSO?.” Cohen’s response does not

support the proposed finding: “I think we were probably taking about ADC in general. I can’t recall the exact conversation.” (Cohen, Tr. 547).

The purpose of Cohen’s call was to find out if Sullivan had any information about ADC, since Benco could not determine whether it was a buying group or DSO. (Cohen, Tr. 719-20).

Cohen denied having reached any agreement with Sullivan about ADC, or discussing Benco’s no middlemen policy on that call. (Cohen, Tr. 705; 715). Cohen also stated he does not recall Sullivan revealing any information about Schein’s policies, plans, or practices concerning ADC or buying groups generally. (Cohen, Tr. 848-50; 899).

The preponderance of the evidence thus does not support the allegation that Schein and Benco reached any agreement concerning ADC or buying groups on the March 25, 2013 call.

1037. Cohen testified that the reason he contacted Sullivan on March 25, 2013 was to obtain helpful “facts” and “knowledge.” (Cohen, Tr. 719-720). Cohen testified that the purpose of gathering that information from Sullivan was that “[i]t would help us make our decision and it would help us form an opinion and a ruling on how we would handle that account.” (Cohen, Tr. 720).

Schein’s Response:

No response other than to note that Mr. Sullivan did not provide any information about ADC, any buying group, or Schein, nor did he engage in a discussion about ADC, or any other buying group or DSO. (SRF 1032-35; Sullivan, Tr. 3946; CX 8025 (Sullivan, Dep. at 344-45, 401-03)).

Patterson’s Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Benco's evaluation of ADC was the most difficult and longest evaluation of a group that Benco had ever conducted. (Cohen, Tr. 718-19; Ryan, Tr. 1199). Benco was confused by ADC's ownership structure because it was a collection of 35-50 independent dental practices that had merged together to form a single entity. (Cohen, Tr. 716-19). Benco had never before seen an ownership structure like ADC. (Cohen, Tr. 719).

Pat Ryan and Benco's Strategic Markets team spent months assessing ADC. (Cohen, Tr. 719; Ryan, Tr. 1199). Benco tried several sources to obtain additional information regarding ADC, including asking ADC itself for documentation, consulting with Benco's local sales team, conducting independent research, and ultimately consulting with others in the dental industry. (Cohen, Tr. 719-20).

Chuck Cohen eventually reached out to Tim Sullivan to see if Mr. Sullivan had any additional information on the structure of ADC that Benco might be able to use in its independent evaluation of ADC. (Cohen, Tr. 719-20). Chuck Cohen's intent in reaching out to Tim Sullivan regarding ADC was to gather facts that might help Benco make its own independent evaluation of ADC. Chuck Cohen did not intend to make any collective decision with Tim Sullivan about ADC. (Cohen, Tr. 719-20).

The purpose of Cohen's call was to find out if Sullivan had any information about ADC, since Benco could not determine whether it was a buying group or DSO. (Cohen, Tr. 719-20).

Cohen denied having reached any agreement with Sullivan about ADC, or discussing Benco's no middlemen policy on that call. (Cohen, Tr. 705; 715). Cohen also

stated he does not recall Sullivan revealing any information about Schein's policies, plans, or practices concerning ADC or buying groups generally. (Cohen, Tr. 848-50; 899).

The preponderance of the evidence thus does not support the allegation that Schein and Benco reached any agreement concerning ADC or buying groups on the March 25, 2013 call.

1038. Sullivan testified under oath at his investigational hearing that, in his March 25, 2013 call with Cohen, Cohen "basically said to me that they [Benco] don't plan to, you know, bid on their – this group . . ." (CX0311 (Sullivan, IHT at 260-261)).

Schein's Response:

Complaint Counsel's exclusive reliance on Mr. Sullivan's Investigational Hearing testimony is improper. After Mr. Sullivan testified at trial that on March 25, 2013, Mr. Cohen did not tell Mr. Sullivan that Benco wasn't going to bid on Atlantic Dental Care (Sullivan, Tr. 3946), Complaint Counsel attempted to impeach Mr. Sullivan with his IHT testimony asking if Mr. Sullivan "recall[ed] how [he] testified" at the IHT. Mr. Sullivan answered, "At some point, he sent me a text stating that they weren't going to, but I don't believe on that phone call he said anything about that." (Sullivan, Tr. 3946-47). At trial, Mr. Sullivan explained, "I believe I was confusing the two [at the IHT], between the text that he sent me later about that fact." (Sullivan, Tr. 3946-47). So Complaint Counsel asked a broader question, "You did testify that Chuck Cohen *at some point* told you they were not going to go to bid on ADC ...?" Still, that was not quite right. Mr. Sullivan answered: "At some point. ... I believe it was in a follow up text, about their plans to bid or not to bid. ... I believe the text is actually that they were going to." (Sullivan, Tr. 3947-48; CX 6027-029). Mr. Sullivan explained that, at the time of the IHT, he had not had the benefit

of reviewing the full chronology of documents, which refreshed his recollection. (Sullivan, Tr. 3948-49).

Whatever Mr. Cohen said about ADC on the March 23, 2013 call, the testimony is consistent and clear that Mr. Sullivan immediately shut down the conversation and did not share any information about Schein, ADC, or buying groups. (SF 1035; Sullivan, Tr. 3946, 4190-91; CX 8025 (Sullivan, Dep. at 344-45, 401-03)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness.

1039. Sullivan testified under oath at his investigational hearing that he did not recall Cohen “saying why, just that he was – they were not going to go to bid on [ADC].” (CX0311 (Sullivan, IHT at 299-300) (“Q. During the call Mr. Cohen indicated to you that they were not going to bid on Atlantic Dental Care because it was a buying group; is that right? A. I don’t recall him saying why, just that he was – they were not going to go bid on it.”))

Schein's Response:

Complaint Counsel’s exclusive reliance on Mr. Sullivan’s Investigational Hearing testimony is improper for the reasons stated in SRF 1038, which Schein incorporates here. (SRF 1038). At the IHT, Mr. Sullivan had not had the benefit of reviewing the full chronology of documents in context. Once he did so at his subsequent deposition and at trial, his recollection of what Mr. Cohen said on the March 23, 2013 call was refreshed. (Sullivan, Tr. 3947-49; CX 8025 (Sullivan, Dep. 398-400 (“Q. Okay. So he never told you that Benco did not plan to bid? A. Not in that discussion, no.”))). Mr. Sullivan testified at trial that on March 25, 2013, Mr. Cohen did not tell him that Benco wasn’t going to bid on

Atlantic Dental Care. (Sullivan, Tr. 3946). Whatever Mr. Cohen said about ADC on the call, Mr. Sullivan's testimony regarding his response is clear. When Mr. Cohen raised ADC, Mr. Sullivan informed Mr. Cohen that they should not be talking about specific customers and changed the subject. (Sullivan, Tr. 3946; CX 8025 (Sullivan, Dep. at 344-45, 401-03 (Mr. Sullivan "shut [] down" the conversation and switched the topic to joking about Mr. Cohen recruiting Mr. Sullivan)); CX 0311 (Sullivan, IHT at 260-61 (Mr. Sullivan "immediately said that, Chuck, I don't know why you're telling me this; this is not something you and I should be talking about")))).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness.

1040. Sullivan testified under oath at his investigational hearing that, on the March 25, 2013 call, Cohen said, "we're not interested" in ADC. (CX0311 (Sullivan, IHT at 261)).

Schein's Response:

Complaint Counsel's exclusive reliance on Mr. Sullivan's Investigational Hearing testimony is improper for the reasons stated in Schein's response to CCFF 1038 and 1039, which is incorporated here. (SRF 1038-39). At the IHT, Mr. Sullivan had not yet had the benefit of reviewing the full chronology of documents in context. Once he did so at his subsequent deposition and trial, his recollection of what Mr. Cohen said on the March 25, 2013 call was refreshed. (Sullivan, Tr. 3947-49; CX 8025 (Sullivan, Dep. 398-400 ("Q. Okay. So he never told you that Benco did not plan to bid? A. Not in that discussion,

no.”))). At trial, Mr. Sullivan testified that on March 25, 2013, Mr. Cohen did not tell Mr. Sullivan that Benco wasn’t going to bid on Atlantic Dental Care. (Sullivan, Tr. 3946). Whatever Mr. Cohen said about ADC on the call, Mr. Sullivan’s testimony regarding his response is clear. When Mr. Cohen raised ADC, Mr. Sullivan informed Mr. Cohen that they should not be talking about specific customers and changed the subject. (Sullivan, Tr. 3946; CX 8025 (Sullivan, Dep. at 344-45, 401-03 (Mr. Sullivan “shut [] down” the conversation and switched the topic to joking about Mr. Cohen recruiting Mr. Sullivan))); CX 0311 (Sullivan, IHT at 260-61 (Mr. Sullivan “immediately said that, Chuck, I don't know why you're telling me this; this is not something you and I should be talking about”))).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness.

1041. At trial, Sullivan testified that he did not recall Cohen saying during the March 25, 2013 call that Benco was not planning to bid on ADC. (Sullivan, Tr. 3946-3947; 3949 (“As I sit here today, I don’t remember him [Cohen] saying that.”). Sullivan’s trial testimony is contradicted by his previous, sworn testimony, in which he testified that Cohen did inform him on the March 25, 2013, call that Benco was not planning to bid on ADC. (CX0311 (Sullivan IHT at 260-261, 299-300))).

Schein’s Response:

There is no contradiction. Rather, there is a clarification and a refreshing of recollection. As noted in SRF 1038-1041, Complaint Counsel attempted to impeach Mr. Sullivan’s recollection of what Mr. Cohen said on the March 25, 2013 call with his IHT

testimony, asking if Mr. Sullivan “recall[ed] how [he] testified” at the IHT. (SRF 1038-41) Mr. Sullivan answered, “At some point, [Mr. Cohen] sent me a text stating that they weren’t going to, but I don’t believe on that phone call he said anything about that.” (Sullivan, Tr. 3946-47). At trial, Mr. Sullivan explained, “I believe I was confusing the two [at the IHT], between the text that he sent me later about that fact.” (Sullivan, Tr. 3946-47). So Complaint Counsel asked a broader question, “You did testify that Chuck Cohen *at some point* told you they were not going to go to bid on ADC ...?” Still, that was not quite right. Mr. Sullivan answered: “At some point. ... I believe it was in a follow up text, about their plans to bid or not to bid. ... I believe the text is actually that they were going to.” (Sullivan, Tr. 3947-48; CX 6027-029). Mr. Sullivan explained that, at the time of the IHT, he had not had the benefit of reviewing the full chronology of documents, which refreshed his recollection. (Sullivan, Tr. 3948-49). Mr. Sullivan’s trial testimony was also consistent with the testimony he gave at his deposition in July 2018. (CX 8025 (Sullivan, Dep. at 398-400)).

Notably, Mr. Cohen’s trial testimony about the call corroborates Mr. Sullivan’s refreshed recollection at trial. He testified that he asked Mr. Sullivan for a call, not to share Benco’s bidding plans, but “to find out if Tim had any information about Atlantic Dental Care.” (Cohen, Tr. 721). Mr. Cohen did not have any independent recollection of what was discussed on the call, but rather “piec[ed] it together from the texts and the context and the timing.” (Cohen, Tr. 890). Complaint Counsel did not ask Mr. Cohen if he relayed Benco’s bidding plans to Mr. Sullivan on the call. (*See* Cohen, Tr. 890).

Patterson’s Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness.

1042. At trial, Sullivan testified that he no longer recalled the March 25, 2013 telephone call the same way he had at his investigational hearing. (Sullivan, Tr. 3949). Sullivan admitted that, at the time of his investigational hearing, he testified that Cohen had informed him that they were not going to bid on Atlantic Dental Care. (Sullivan, Tr. 3948).

Schein's Response:

The asserted fact simply reflects Mr. Sullivan's refreshed recollection at trial. (See SRF 1038-41). It is essentially a restatement of CCFF 1041, and Schein incorporates that response here. (SRF 1041).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness.

1043. At trial, Sullivan acknowledged that it was his "recollection at the time" of his investigational hearing that Cohen informed him on March 25, 2013, that that Benco was not going to bid on ADC. (Sullivan, Tr. 3948 ("Q. So you testified that Chuck Cohen somehow, at some point, told you that they were not going to bid on Atlantic Dental Care, right? A. That was my recollection at the time.")). Sullivan's investigational hearing occurred on May 25, 2017. (CX0311 (Sullivan, IHT at 001)). The investigational hearing occurred closer in time to the March 25, 2013 call at issue than Sullivan's trial testimony on December 13, 2018.

Schein's Response:

The asserted fact simply reflects Mr. Sullivan's refreshed recollection at trial. (See SRF 1038-41). It is essentially a restatement of CCFF 1041, and Schein incorporates that

response here. (SRF 1041). Complaint Counsel cites no support for its implication that Mr. Sullivan's recollection was better at his IHT (four years after the call) than at trial. To the contrary, Mr. Sullivan testified that, having had the opportunity to fully review the documents in chronology and context at trial (which he did not have the chance to do at his IHT), his recollection of the call was refreshed. (SRF 1038-42; Sullivan, Tr. 3948-49). Further, Mr. Sullivan's trial testimony was also consistent with the testimony he gave at his deposition in July 2018. (CX 8025 (Sullivan, Dep. at 398-400)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness.

1044. Text messages following the March 25, 2013 call corroborate Cohen's testimony that he and Sullivan discussed whether ADC was a buying group. (CCFF 1045-1047; *see also* Cohen Tr. 546; CX6027 at 028-029 (Rows 243, 244, 248); CX0196 at 005, 010).

Schein's Response:

Complaint Counsel's proposed finding is false. The text messages do not "corroborate ... that [Mr. Cohen] and [Mr.] Sullivan discussed whether ADC was a buying group." None of the text messages purport to describe what was "discussed" other than a public press release about ADC. (CX 6027-028). Nor does the cited testimony support the assertion that Mr. Cohen and Mr. Sullivan "discussed whether ADC was a buying group." Indeed, while Complaint Counsel used the word "discussed" in leading questions to Mr. Cohen, the questions were only whether ADC was discussed generally. (Cohen, Tr. 546). Moreover, Mr. Cohen's failure to correct Complaint Counsel's terminology in

leading questions is not evidence of a discussion. (*See* CX 0301 (Cohen, IHT at 271 (testifying only that “I think” ADC was discussed after being shown a later text message Mr. Cohen sent))).

There is no record of the call, and there is no evidence of a “discussion.” To the contrary, as Mr. Sullivan testified, Mr. Cohen “started talking about Atlantic Dental Care... He asked if I knew what they were, and I told him I did not. Then he started to tell me more about them, and I immediately stopped him, and I said, ‘Chuck, this is not a discussion that you and I should be having’ ... [and] I cut off discussion with him on that topic.” (Sullivan, Tr. 3946).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Benco’s evaluation of ADC was the most difficult and longest evaluation of a group that Benco had ever conducted. (Cohen, Tr. 718-19; Ryan, Tr. 1199). Benco was confused by ADC’s ownership structure because it was a collection of 35-50 independent dental practices that had merged together to form a single entity. (Cohen, Tr. 716-19). Benco had never before seen an ownership structure like ADC. (Cohen, Tr. 719).

Pat Ryan and Benco’s Strategic Markets team spent months assessing ADC. (Cohen, Tr. 719; Ryan, Tr. 1199). Benco tried several sources to obtain additional information regarding ADC, including asking ADC itself for documentation, consulting with Benco’s local sales team, conducting independent research, and ultimately consulting with others in the dental industry. (Cohen, Tr. 719-20).

Chuck Cohen eventually reached out to Tim Sullivan to see if Mr. Sullivan had any additional information on the structure of ADC that Benco might be able to use in its independent evaluation of ADC. (Cohen, Tr. 719-20). Chuck Cohen's intent in reaching out to Tim Sullivan regarding ADC was to gather facts that might help Benco make its own independent evaluation of ADC. Chuck Cohen did not intend to make any collective decision with Tim Sullivan about ADC. (Cohen, Tr. 719-20).

The purpose of Cohen's call was to find out if Sullivan had any information about ADC, since Benco could not determine whether it was a buying group or DSO. (Cohen, Tr. 719-20).

Cohen denied having reached any agreement with Sullivan about ADC, or discussing Benco's no middlemen policy on that call. (Cohen, Tr. 705; 715). Cohen also stated he does not recall Sullivan revealing any information about Schein's policies, plans, or practices concerning ADC or buying groups generally. (Cohen, Tr. 848-50; 899).

The preponderance of the evidence thus does not support the allegation that Schein and Benco reached any agreement concerning ADC or buying groups on the March 25, 2013 call.

1045. Following the March 25, 2013 telephone call, Cohen texted Sullivan at 10:50 p.m. Eastern Time: "Here's a link to the press release we discussed." (Cohen, Tr. 546; CX6027 at 028 (Row 243). In his text message to Sullivan, Cohen pasted a link to a press release regarding Atlantic Dental Care. (CX6027 at 028 (Row 243) ("Here's a link to the press release we discussed <http://marketbrief.com/atlantic-dental-care-plc/d/form-d/2012/11/21/9835185>")).

Schein's Response:

No response, other than to note that the press release was public.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

On March 25, 2013, Cohen forwarded a link to an article reporting on ADC's financing. (CX6027-028). The article was publically available on the internet and was not confidential information. (CX6027-028). In response, Sullivan simply wrote, "unusual." (CX6027-028). Sullivan did not provide any information about ADC. Nor did Sullivan reveal Schein's plans about ADC.

The preponderance of the evidence thus does not support the allegation that Schein and Benco reached any agreement concerning ADC or buying groups on the March 25, 2013 call.

1046. Cohen's 10:50 p.m. text to Sullivan on March 25, 2013 specifies that the two men discussed ADC on their telephone call. (CX6027 at 028 (Row 243) ("Here's a link to the press release we discussed . . .")).

Schein's Response:

Schein does not dispute that Mr. Cohen sent the quoted text message or that ADC was raised by Mr. Cohen on the March 25, 2013 call. Schein does dispute, however, that there is any evidence to support an inference that "the two men *discussed* ADC." There is no evidence that Mr. Sullivan provided any information about ADC, any buying group, or Schein. (Sullivan, Tr. 4190-91, 4289-90; *see also* Cohen, Tr. 899). Once Mr. Cohen "started talking about Atlantic Dental Care," Mr. Sullivan "immediately stopped him, and [] said, 'Chuck, this is not a discussion that you and I should be having' ... [and he] cut off discussion with him on that topic." (Sullivan, Tr. 3946).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

On March 25, 2013, Cohen forwarded a link to an article reporting on ADC's financing. (CX6027-028). The article was publically available on the internet and was not confidential information. (CX6027-028). In response, Sullivan simply wrote, "unusual." (CX6027-028). Sullivan did not provide any information about ADC. Nor did Sullivan reveal Schein's plans about ADC.

The preponderance of the evidence thus does not support the allegation that Schein and Benco reached any agreement concerning ADC or buying groups on the March 25, 2013 call.

1047. Sullivan responded to Cohen's 10:50 p.m. text message on March 25, 2013, "Thanks for the follow up on that article. Unusual." (CX6027 at 028 (Row 244); Cohen, Tr. 546; Sullivan, Tr. 3957).

Schein's Response:

In response to receiving a text message from Mr. Cohen containing a link to a public press release, Mr. Sullivan simply wrote, "Thanks for the follow up on that article. Unusual." (CX 6027-028). Importantly, the response – limited to the word "unusual" – does not suggest that Mr. Sullivan shared any information with Mr. Cohen about Schein's policies, practices, or plans with respect to ADC or buying groups. Nor does the word "unusual" indicate what Schein intended to do, or suggest that Mr. Cohen had disclosed

Benco's plans with respect to ADC. Rather, it confirms Mr. Cohen's testimony that Mr. Cohen was simply trying to learn more about ADC.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

On March 25, 2013, Cohen forwarded a link to an article reporting on ADC's financing. (CX6027-028). The article was publically available on the internet and was not confidential information. (CX6027-028). In response, Sullivan simply wrote, "unusual." (CX6027-028). Sullivan did not provide any information about ADC. Nor did Sullivan reveal Schein's plans about ADC.

The preponderance of the evidence thus does not support the allegation that Schein and Benco reached any agreement concerning ADC or buying groups on the March 25, 2013 call.

1048. Benco believed that the information in the press release regarding ADC would help determine whether ADC was a buying group. (CX0304 (Ryan, IHT at 227) (testifying regarding forwarding Cohen the press release about ADC: "Q. Did you think there was something in this information that you pasted into the e-mail that would help determine whether ADC was a buying group? A. I - I think that's what I thought at the time."); CX0020 at 001 (email from Ryan to Cohen, forwarding press release regarding ADC); Cohen, Tr. 722 (press release that Cohen sent to Sullivan was about the "merger of Atlantic Dental Care's practices into one entity"); Cohen, Tr. 966 (press release sent to Sullivan contained additional information about ADC)).

Schein's Response:

No response, other than to note that the press release was a publicly available document.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The press release did not help Benco make its decision regarding ADC as to whether or not ADC was a single customer under Benco's policy. Benco was only able to make its decision following a call between Pat Ryan and outside counsel, during which outside counsel provided legal advice to Benco regarding the ownership structure of ADC. (Ryan, Tr. 1201-1202).

On March 25, 2013, Cohen forwarded a link to an article reporting on ADC's financing. (CX6027-028). The article was publically available on the internet and was not confidential information. (CX6027-028). In response, Sullivan simply wrote, "unusual." (CX6027-028). Sullivan did not provide any information about ADC. Nor did Sullivan reveal Schein's plans about ADC.

The preponderance of the evidence thus does not support the allegation that Schein and Benco reached any agreement concerning ADC or buying groups on the March 25, 2013 call.

1049. Sullivan called the March 25, 2013 call from Cohen "crazy." (Sullivan, Tr. 3952; CX0311 (Sullivan, IHT 267-268)). Sullivan testified that at some point in the call, "a red flag went up." (Sullivan, Tr. 3947-3948, 3951-3952). Despite the "red flag," Sullivan did not report the call to Schein's Legal Department, Human Resources Department, or Senior Vice President of Administration. (Sullivan, Tr. 3954-3955). Sullivan did not report the call to anyone even though Schein's Antitrust Compliance Policy required such reporting. (Sullivan, Tr. 3954-3955; CX2673 at 017-018).

Schein's Response:

Schein does not dispute that Mr. Sullivan called Mr. Cohen's call "crazy" and that when Mr. Cohen raised ADC, "a red flag went up." Complaint Counsel leaves out what Mr. Sullivan did next: once Mr. Cohen "started talking about Atlantic Dental Care," Mr. Sullivan "immediately stopped him, and I said, 'Chuck, this is not a discussion that you and I should be having' ... [and] I cut off discussion with him on that topic." (Sullivan, Tr. 3946).

While Complaint Counsel elicited testimony that Mr. Sullivan did not report Mr. Cohen's call to the Schein legal department (Sullivan, Tr. 3953-55, 4194-96), the antitrust laws of course do not impose an obligation to report suspected wrongdoing by another person to legal counsel or anyone else; they simply prevent agreements in restraint of trade. By admonishing Mr. Cohen, changing the subject, and refraining from providing assurances or competitively sensitive information, Mr. Sullivan complied with antitrust laws and Schein's antitrust policy. Indeed, Complaint Counsel asserts that Benco sought to engage Burkhardt in similar communications, but that Burkhardt similarly, and appropriately, declined the invitation to discuss. (Complaint ¶¶ 53-59; Reece, Tr. 4486-87). Like Mr. Sullivan, Mr. Reece did not report the communications to the Burkhardt legal department. (Reece, Tr. 4486). And like Schein, Burkhardt simply refrained from engaging in any such discussions. (Reece, Tr. 4486-87).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness.

1050. Schein's Antitrust Compliance Policy states, "If you find yourself inadvertently in a situation where one or more competitors wish to discuss forbidden antitrust subjects, decline to discuss such subjects and let the competitor know that it is against Company policy to discuss such topics. . . . Always report every such incident to the Legal Department, the Human Resources Department or the Senior Vice President of Administration of the Company." (CX2673 at 017; Sullivan, Tr. 3953-3954). Schein's Antitrust Compliance Policy also states that "[a]greements with competitors" "[n]ot to do business with (to 'boycott') one or more customers" and agreements "not to bid" are "always illegal under the antitrust laws." (CX2673 at 001; Sullivan, Tr. 3868-3869).

Schein's Response:

As an initial matter, there is no evidence that the March 25, 2013 call had anything to do with any "agreements with competitors" "not to do business with (to 'boycott') one or more customers" or any agreement "not to bid." Schein notes that compliance policies are often broader than the antitrust laws and contain procedures that are not required under the antitrust laws. A failure to follow a compliance policy, if any, is not reliable evidence of a violation of law. Regardless, there is no evidence that Mr. Sullivan intentionally failed to comply with the policy or even failed to comply at all, as opposed to simply doing what he thought was right at that time.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness.

1051. Within minutes after the March 25, 2013 telephone call ended, Sullivan thanked Chuck for the call. (CX6027 at 027 (Row 241)). Sullivan wrote, "Hi Chuck. Thanks for the call. Yes, I am good with the terms we discussed and I look forward to joining Team Benco! Ps. Want to confirm that the Benco tooth logo will include a picture of me." (CX6027 at 027 (Row 241)).

Schein's Response:

Schein does not dispute that on March 25, 2013, Mr. Sullivan sent Mr. Cohen a text stating, "Yes, I am good with the terms we discussed and I look forward to joining Team Benco! Ps. Want to confirm that the Benco tooth logo will include a picture of me. :)" (CX 6027-027). Both Mr. Sullivan and Mr. Cohen testified that Mr. Sullivan's text message had nothing to do with buying groups and referred to a long-running joke between the two about who was going to work for whom in the event that ongoing merger discussions came to fruition. (Cohen, Tr. 554-55, 897-98; Sullivan, Tr. 3955-56, 4189-90). The surrounding evidence indicates this was a topic of discussion on the March 25, 2013 call, as a few days earlier Mr. Cohen and his brother had finalized arrangements to meet with Schein's CEO, Stanley Bergman, and its head of Business Development, Mark Mlotek, to explore M&A opportunities the following Monday, April 1, 2013, in New York. (Cohen, Tr. 892-95; Sullivan, Tr. 4186-87; CX 1476; CX 1486). Mr. Sullivan's and Mr. Cohen's joke about who would work for whom is consistent with a discussion on the March 25, 2013 call about this upcoming meeting, as are the follow-up texts between Mr. Cohen and Mr. Sullivan that continued the joke. (CX 6027-027; *see also* Cohen, Tr. 894-95).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Immediately following the call, at 5:09 pm on March 25, 2013, Sullivan sent Cohen a text stating, "Yes, I am good with the terms we discussed and I look forward to joining Team Benco! Ps. Want to confirm that the Benco tooth logo will include a picture of me.

:)” (CX6027-027). Both Sullivan and Cohen testified that Sullivan’s text message referred to a long-running joke between the two about who was going to work for whom in the event that ongoing merger discussions came to fruition. (Cohen, Tr. 722; 897-98; Sullivan, Tr. 3955-56).

Regarding the ongoing merger discussions between Schein and Benco, a few days earlier Cohen and his brother had finalized arrangements to meet with Schein’s CEO, Stanley Bergman, and its head of Business Development, Mark Mlotek, to explore M&A opportunities, the following Monday, April 1, 2013, in New York. (Cohen, Tr. 892-95; Sullivan, Tr. 4185-87; CX1476). Sullivan testified that the ongoing merger discussions between Schein and Benco impacted his interactions with Cohen. He wanted to be cordial and treat Cohen with respect because they might be working with, or for, one another if a merger went through. (Sullivan, Tr. 4260-61).

Sullivan’s and Cohen’s joke about who would work for whom is consistent with a discussion on the March 25, 2013 call about this upcoming meeting, as are follow-up texts between Cohen and Sullivan that continued to joke. (CX 6026-027). Later that evening on March 25, 2013, Cohen forwarded a link to an article reporting on ADC’s financing. (CX 6026-028). In response, Sullivan simply wrote, “unusual.” (CX 6026-028). Sullivan did not provide any information about ADC. Nor did Sullivan reveal Schein’s plans about ADC.

The preponderance of the evidence thus does not support the allegation that Schein and Benco reached any agreement concerning ADC or buying groups on the March 25, 2013 call.

1052. Sullivan admits that the portion of his March 25, 2013 text message to Cohen regarding “joining Team Benco” is a joke. (Sullivan, Tr. 3956; CX6027 at 027 (Row 241)).

Schein’s Response:

Complaint Counsel’s proposed finding is incomplete and thus inaccurate. Mr. Sullivan did not testify that just the snippet of his text quoted by Complaint Counsel was a joke. Rather, both Mr. Sullivan and Mr. Cohen testified that Mr. Sullivan’s entire text message referred to a long-running joke between the two about who was going to work for whom in the event that ongoing merger discussions came to fruition. (Cohen, Tr. 554-55, 897-98; Sullivan, Tr. 3955-56, 4189-90).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Immediately following the call, at 5:09 pm on March 25, 2013, Sullivan sent Cohen a text stating, “Yes, I am good with the terms we discussed and I look forward to joining Team Benco! Ps. Want to confirm that the Benco tooth logo will include a picture of me. :)” (CX6027-027). Both Sullivan and Cohen testified that Sullivan’s text message referred to a long-running joke between the two about who was going to work for whom in the event that ongoing merger discussions came to fruition. (Cohen, Tr. 722; 897-98; Sullivan, Tr. 3955-56).

Regarding the ongoing merger discussions between Schein and Benco, a few days earlier Cohen and his brother had finalized arrangements to meet with Schein’s CEO, Stanley Bergman, and its head of Business Development, Mark Mlotek, to explore M&A

opportunities, the following Monday, April 1, 2013, in New York. (Cohen, Tr. 892-95; Sullivan, Tr. 4185-87; CX1476). Sullivan testified that the ongoing merger discussions between Schein and Benco impacted his interactions with Cohen. He wanted to be cordial and treat Cohen with respect because they might be working with, or for, one another if a merger went through. (Sullivan, Tr. 4260-61).

Sullivan's and Cohen's joke about who would work for whom is consistent with a discussion on the March 25, 2013 call about this upcoming meeting, as are follow-up texts between Cohen and Sullivan that continued to joke. (CX 6026-027). Later that evening on March 25, 2013, Cohen forwarded a link to an article reporting on ADC's financing. (CX 6026-028). In response, Sullivan simply wrote, "unusual." (CX 6026-028). Sullivan did not provide any information about ADC. Nor did Sullivan reveal Schein's plans about ADC.

The preponderance of the evidence thus does not support the allegation that Schein and Benco reached any agreement concerning ADC or buying groups on the March 25, 2013 call.

1053. Cohen also admits that this text was a joke, and he did not recall trying to recruit Sullivan to join Benco on the March 25, 2013 telephone call. (Cohen, Tr. 555).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Immediately following the call, at 5:09 pm on March 25, 2013, Sullivan sent Cohen a text stating, "Yes, I am good with the terms we discussed and I look forward to joining Team Benco! Ps. Want to confirm that the Benco tooth logo will include a picture of me. :)" (CX6027-027). Both Sullivan and Cohen testified that Sullivan's text message referred to a long-running joke between the two about who was going to work for whom in the event that ongoing merger discussions came to fruition. (Cohen, Tr. 722; 897-98; Sullivan, Tr. 3955-56).

Regarding the ongoing merger discussions between Schein and Benco, a few days earlier Cohen and his brother had finalized arrangements to meet with Schein's CEO, Stanley Bergman, and its head of Business Development, Mark Mlotek, to explore M&A opportunities, the following Monday, April 1, 2013, in New York. (Cohen, Tr. 892-95; Sullivan, Tr. 4185-87; CX1476). Sullivan testified that the ongoing merger discussions between Schein and Benco impacted his interactions with Cohen. He wanted to be cordial and treat Cohen with respect because they might be working with, or for, one another if a merger went through. (Sullivan, Tr. 4260-61).

Sullivan's and Cohen's joke about who would work for whom is consistent with a discussion on the March 25, 2013 call about this upcoming meeting, as are follow-up texts between Cohen and Sullivan that continued to joke. (CX 6026-027). Later that evening on March 25, 2013, Cohen forwarded a link to an article reporting on ADC's financing. (CX 6026-028). In response, Sullivan simply wrote, "unusual." (CX 6026-028). Sullivan

did not provide any information about ADC. Nor did Sullivan reveal Schein's plans about ADC.

The preponderance of the evidence thus does not support the allegation that Schein and Benco reached any agreement concerning ADC or buying groups on the March 25, 2013 call.

1054. At trial, Sullivan testified that during the March 25, 2013 call, he told Cohen that they should not discuss ADC. (Sullivan, Tr. 3946, 3950-3951). Sullivan's testimony is contradicted by Cohen's testimony. (Cohen, Tr. 559).

Schein's Response:

Schein agrees that Mr. Sullivan testified that he told Mr. Cohen that they should not discuss ADC. (Sullivan, Tr. 3946; CX 8025 (Sullivan, Dep. at 344-45, 401-03)). But Mr. Sullivan's testimony was ***not*** contradicted by Mr. Cohen's testimony. Mr. Cohen testified that he did not have a specific recollection of what was said on the March 25, 2013 call. (Cohen, Tr. 547, 721-22, 890; CX 0301 (Cohen, IHT at 273)). Moreover, Mr. Cohen testified that he ***did not recall one way or the other*** whether Mr. Sullivan said that he should not be discussing customers. (Cohen, Tr. 559, 891-92). A lack of recollection is not a contradiction.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness.

1055. Cohen testified at trial that he did not recall Sullivan ever telling Cohen to stop contacting him about buying groups. (Cohen, Tr. 559 (“Q. You don’t recall Mr. Sullivan ever telling you to stop contacting him about buying groups? A. No.”)).

Schein’s Response:

Mr. Cohen testified that he does not recall the substance of the call, and could not say “*one way or the other*” whether Mr. Sullivan had told Mr. Cohen that they should not be discussing ADC. (Cohen, Tr. 559, 891-92). A lack of recollection is not a contradiction. (See SRF 1054).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness.

1056. Cohen also testified that he did not recall Sullivan ever giving Cohen the impression that the he and Sullivan should not be talking about buying groups. (Cohen, Tr. 559 (“Q. You don’t recall Mr. Sullivan ever giving you the impression that you two should not be talking about buying groups. A. No.”)).

Schein’s Response:

Mr. Cohen testified that he does not recall the substance of the call, and could not say “*one way or the other*” whether Mr. Sullivan had told Mr. Cohen that they should not be discussing ADC. (Cohen, Tr. 559, 891-92). A lack of recollection is not a contradiction. (See SRF 1054).

Patterson’s Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness.

1057. Sullivan admitted that shortly after his March 25, 2013, call with Cohen, Cohen sent Sullivan a link via text message to an article about ADC and referred to it as “the press release we discussed.” (Sullivan, Tr. 3956-3957; *see* CX6027 at 027 (Row 243)).

Schein's Response:

This asserted fact relates to the same press release referred to in CCFF 1044-1047. Schein incorporates its responses to those proposed findings here.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

On March 25, 2013, Cohen forwarded a link to an article reporting on ADC's financing. (CX6027-028). The article was publically available on the internet and was not confidential information. (CX6027-028). In response, Sullivan simply wrote, “unusual.” (CX6027-028). Sullivan did not provide any information about ADC. Nor did Sullivan reveal Schein's plans about ADC.

The preponderance of the evidence thus does not support the allegation that Schein and Benco reached any agreement concerning ADC or buying groups on the March 25, 2013 call.

1058. Sullivan admitted that, four minutes after receiving the March 25, 2013 text from Cohen with a link to the article about ADC, Sullivan responded to Cohen's text message, thanking Cohen for the article and commenting on it. (Sullivan, Tr. 3957; *see* CX6027 at 028 (Row 244) ("Thanks for the follow up on that article. Unusual.")).

Schein's Response:

This asserted fact relates to the same press release referred to in CCFF 1044-1047. Schein incorporates its responses to those proposed findings here. In response to receiving a text message from Mr. Cohen containing a link to a public press release, Mr. Sullivan simply wrote, "Thanks for the follow up on that article. Unusual." (CX 6027-028). That was the extent of Mr. Sullivan's "comment" on a public press release.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness.

1059. Sullivan further admitted that the next day, March 26, 2013, Cohen sent him yet another text message about a buying group. (Sullivan, Tr. 3957-3958; *see* CX6027 at 028 (Row 245)).

Schein's Response:

Schein addresses this text message in detail in SRF 679, 994, 997, 1001, 1004, and 1079, and incorporates those responses here. In a nutshell, Mr. Sullivan testified that he did not realize at the time that this text related to a different buying group, as opposed to being additional information about ADC. (Sullivan, Tr. 4198). Regardless, after receiving this text message, Mr. Sullivan attempted to call Mr. Cohen to reiterate in "much stronger" terms that Mr. Cohen should not be discussing specific customers with him. (Sullivan, Tr. 4206, 3966-67, 4198-99). As for the buying group referenced in the text message, Dental

Alliance, the evidence shows that Schein began doing business with Dental Alliance in 2011 and continued to do so well after the text message, through at least the end of 2014. (RX 2349; Sullivan, Tr. 4239-40; Steck, Tr. 3770-71; RX 3076; RX 2753; RX 2612-001-09; RX 2613-001).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness.

1060. The following morning, March 27, 2013, Sullivan attempted to call Cohen, but did not connect. (Sullivan, Tr. 3959; CX6027 at 028 (Row 247)).

Schein's Response:

Schein addresses this telephone call in detail in SRF 998, 1059, 1079, and incorporates its responses here. Mr. Sullivan attempted to call Mr. Cohen to reiterate in “much stronger” terms that Mr. Cohen should not be discussing specific customers with him. (Sullivan, Tr. 4206, 3966-67, 4198-99).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness.

E. Benco Shared Competitively Sensitive Information with Schein to Show It Was Not Deviating From Prior Assurances.

1061. On March 27, 2013, two days after the initial March 25 call between Cohen and Sullivan regarding ADC, Benco had determined that ADC owned all the practices involved, and that it therefore did not qualify as a buying group. (CCFF ¶¶ 1062-1065; Cohen, Tr. 548-549; CX0196 at 010).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Two days later, on March 27, 2017, Cohen sent Sullivan another text, saying that he "[d]id some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all practices. So it's not a buying group, it's a big group. We're going to bid. Thanks." (CX6027-029).

The first part of Cohen's text message – whether ADC is or is not a buying group – is not competitively sensitive information; it simply reflects market research that Benco had performed. (CX6027-029). The last sentence of Cohen's text message – that Benco is going to bid – did reveal Benco's plans. However, it does not evince a pre-existing agreement between the two companies not to do business with buying groups. The text does not reference any pre-existing agreement and does not discuss any information about Schein's plans, policies, or practices. (CX6027-029).

While Complaint Counsel asserts that Cohen's March 27, 2017 text message can be interpreted as an effort to seek clarity as to application of a pre-existing agreement to

ADC, such an assertion would require the fact finder to first assume the existence of a conspiracy. The Court should decline to make such an assumption.

1062. After conferring with outside counsel, retained to analyze ADC's SEC filings and incorporation papers, on March 27, 2013, Ryan had an understanding of ADC's business structure, and concluded that ADC was not a buying group. (Ryan, Tr. 1200-1202, 1270-1272).

Schein's Response:

Complaint Counsel's proposed finding overstates Mr. Ryan's testimony and reliance on outside counsel. Mr. Ryan testified that he took several steps to investigate the structure of ADC, including speaking to regional Benco employees, multiple conversations with ADC's management team, independent research, obtaining and reviewing ADC's incorporation papers, and getting some help to decipher them. (Ryan, Tr. 1198-99, 1201; *see also* Cohen, Tr. 719). Mr. Ryan did not testify that he "conferr[ed] with outside counsel, retained to analyze ADC's SEC filings and incorporation papers" as Complaint Counsel proposes. Instead, Benco's general counsel set up a call for Ryan to speak with an attorney to help him decipher ADC's filings and incorporation papers. (Ryan, Tr. 1201). After this call, Mr. Ryan testified that he understood that the "initial practices involved created a corporation [and] sold their individual practices to the corporation in exchange for shares in it." (Ryan, Tr. 1201-02). ADC's RFP explains:

Atlantic Dental Care, PLC (ADC) was formed in 2012 by a group of general dentists in the Southeastern region of Virginia. These dentists were looking to preserve their autonomy and independent practice and take advantage of the economy of scale that a large group practice enjoys. ADC is not a buying group; it is a unified group practice under one tax identification number. ADC is composed of 53 dentists practicing in 32 separate locations (divisions).

(CX 1150-004; CX 2019-004). In addition, on March 26, 2013, in response to Mr. Zhao's "hounding" concerning ADC, Mr. Ryan agreed to reach out to ADC's Landey Damsey the

following day to understand why ADC is “adamant that they are not a buying group and that ADC owns all the practices involved.” (CX 0021-001).

Schein also received an RFP from ADC on March 22, 2013. Mr. Sullivan continued to view ADC as a buying group and despite holding skepticism of the opportunity, he was “overruled” by his local management team, which submitted a bid. (Sullivan, Tr. 4263; SF 1533-35).¹⁵

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Benco made its own independent decision to bid for the business of ADC. (Cohen, Tr. 724).

On March 27, 2013, after speaking with outside counsel, Ryan was able to determine that ADC had common ownership. Therefore, under Benco’s policy, ADC was a single customer and Benco made the decision to bid on ADC. (Ryan, Tr. 1201-1202).

Benco won the business of ADC and ADC has remained a customer of Benco from that time through the present. (Cohen, Tr. 724). Benco considers ADC a DSO because it

¹⁵ Schein also received an RFP from ADC on March 22, 2013, and its employees were independently engaged in analyzing the request to determine whether Schein would submit a bid. (CX 2019; RX 2458; CX 2051; CX2021; CX 0198). Upon receiving the ADC RFP, a Schein Regional Manager, Bobby Anderson, forwarded the RFP to Zone Manager Michael Porro, asking whether “we want to quote.” (CX 2019-001). Mr. Anderson began doing market research. (RX 2458; CX 2019). On March 29, 2013, Mr. Anderson followed up with Mr. Porro, asking for Mr. Porro’s thoughts on ADC. (CX 2051-002). Mr. Porro indicated that he was going to reach out to ADC to find out more. (CX 2051-001). On March 31, 2013, Mr. Porro reported on his conversation with ADC. ADC represented that “[it is] not a co-op or a buying group,” as it has “1 corporate structure” and is a “unified group of mature practices.” (CX 0198-013-14 (internal quotations omitted)). Mr. Porro concluded that “[i]t does appear that this is more than a buying group,” as all “53 offices are financially tied together in some fashion” and that, as a result, “[p]assing on a bid now has more risk.” (CX 0198-014).

has common ownership and control of its member dental practices. (Cohen, Tr. 724; Ryan, Tr. 1202).

During the five-plus years that ADC has been a Benco customer, the group has performed “excellently.” ADC has delivered on its volume commitments to Benco and purchases almost all of its dental supplies from Benco. (Cohen, Tr. 724-25; Ryan, Tr. 1202). Consistent with DSOs, Benco’s conversion rate with ADC has been 90% plus. Conversion rate means the percentage of customers within a group that are converted to Benco customers. Conversion rate is a measure of the level of compliance exhibited by a DSO or Large Group. (Ryan, Tr. 1203-1205). ADC’s common ownership allowed it to drive compliance among its member practices and has converted new customers to Benco. These new customers were previously Schein and Patterson customers. (Cohen, Tr. 726-28; Ryan, Tr. 1202).

ADC’s performance validates Benco’s determination that ADC was, in fact, a DSO, as ADC’s performance is consistent with a DSO and inconsistent with a buying group. (Cohen, Tr. 726-27; Ryan, Tr. 120-1203). It was worth the effort for Benco to spend the time to properly evaluate ADC under Benco’s policy and it was in Benco’s unilateral economic interest to have taken the time necessary, gathered whatever information was available, to have properly evaluated ADC so that Benco could add ADC to its significant portfolio of DSO accounts. (Cohen, Tr. 726-27; RX1127-500; Ryan, Tr. 1202-1203).

1063. On March 27, 2013, Ryan spoke with outside counsel on the telephone regarding ADC. Following that call, Ryan had the understanding that ADC was not a buying group, but was a corporate dental practice because ADC owned all the practices. (Ryan, Tr. 1201-1202).

Schein's Response:

This is essentially the same as CCFF 1062 and Schein incorporates its response to that proposed finding here. Schein notes that Mr. Ryan's understanding was consistent with the information from ADC's Mr. Damsey who was "adamant that they are not a buying group and that ADC owns all the practices involved." (CX 0021-001; *see also* CX 1150; CX 2019-004 (ADC's RFP explains that "ADC is not a buying group; it is a unified group practice under one tax identification number."))).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Benco made its own independent decision to bid for the business of ADC. (Cohen, Tr. 724).

On March 27, 2013, after speaking with outside counsel, Ryan was able to determine that ADC had common ownership. Therefore, under Benco's policy, ADC was a single customer and Benco made the decision to bid on ADC. (Ryan, Tr. 1201-1202).

Benco won the business of ADC and ADC has remained a customer of Benco from that time through the present. (Cohen, Tr. 724). Benco considers ADC a DSO because it has common ownership and control of its member dental practices. (Cohen, Tr. 724; Ryan, Tr. 1202).

During the five-plus years that ADC has been a Benco customer, the group has performed "excellently." ADC has delivered on its volume commitments to Benco and purchases almost all of its dental supplies from Benco. (Cohen, Tr. 724-25; Ryan, Tr.

1202). Consistent with DSOs, Benco's conversion rate with ADC has been 90% plus. Conversion rate means the percentage of customers within a group that are converted to Benco customers. Conversion rate is a measure of the level of compliance exhibited by a DSO or Large Group. (Ryan, Tr. 1203-1205). ADC's common ownership allowed it to drive compliance among its member practices and has converted new customers to Benco. These new customers were previously Schein and Patterson customers. (Cohen, Tr. 726-28; Ryan, Tr. 1202).

ADC's performance validates Benco's determination that ADC was, in fact, a DSO, as ADC's performance is consistent with a DSO and inconsistent with a buying group. (Cohen, Tr. 726-27; Ryan, Tr. 120-1203). It was worth the effort for Benco to spend the time to properly evaluate ADC under Benco's policy and it was in Benco's unilateral economic interest to have taken the time necessary, gathered whatever information was available, to have properly evaluated ADC so that Benco could add ADC to its significant portfolio of DSO accounts. (Cohen, Tr. 726-27; RX1127-500; Ryan, Tr. 1202-1203).

1064. The contents of Ryan's phone call with outside counsel was confidential information that was not made public. (Ryan, Tr. 1271-1272).

Schein's Response:

Complaint Counsel's proposed finding misstates the testimony. As an initial matter, Mr. Ryan did not disclose the contents of his call with counsel, rendering the proposed finding irrelevant. (Ryan, Tr. 1201 ("Q. Without revealing what you said to counsel or counsel said to you ...")). Nor is Benco's opinion about ADC's business structure confidential information. ADC's structure was publicly disclosed.

Moreover, Mr. Ryan did not testify that the contents of his call with outside counsel were “confidential *information*,” instead he *assumed* that it was a “confidential *communication*.” (Ryan, Tr. 1271-72 (emphasis added)). As noted at trial, this line of questioning was improper for a non-attorney witness. (Ryan, Tr. 1271 (Judge Chappell: “What makes you think he knows this? He’s not the attorney.”)).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Benco made its own independent decision to bid for the business of ADC. (Cohen, Tr. 724).

On March 27, 2013, after speaking with outside counsel, Ryan was able to determine that ADC had common ownership. Therefore, under Benco’s policy, ADC was a single customer and Benco made the decision to bid on ADC. (Ryan, Tr. 1201-1202).

Benco won the business of ADC and ADC has remained a customer of Benco from that time through the present. (Cohen, Tr. 724). Benco considers ADC a DSO because it has common ownership and control of its member dental practices. (Cohen, Tr. 724; Ryan, Tr. 1202).

During the five-plus years that ADC has been a Benco customer, the group has performed “excellently.” ADC has delivered on its volume commitments to Benco and purchases almost all of its dental supplies from Benco. (Cohen, Tr. 724-25; Ryan, Tr. 1202). Consistent with DSOs, Benco’s conversion rate with ADC has been 90% plus. Conversion rate means the percentage of customers within a group that are converted to

Benco customers. Conversion rate is a measure of the level of compliance exhibited by a DSO or Large Group. (Ryan, Tr. 1203-1205). ADC's common ownership allowed it to drive compliance among its member practices and has converted new customers to Benco. These new customers were previously Schein and Patterson customers. (Cohen, Tr. 726-28; Ryan, Tr. 1202).

ADC's performance validates Benco's determination that ADC was, in fact, a DSO, as ADC's performance is consistent with a DSO and inconsistent with a buying group. (Cohen, Tr. 726-27; Ryan, Tr. 120-1203). It was worth the effort for Benco to spend the time to properly evaluate ADC under Benco's policy and it was in Benco's unilateral economic interest to have taken the time necessary, gathered whatever information was available, to have properly evaluated ADC so that Benco could add ADC to its significant portfolio of DSO accounts. (Cohen, Tr. 726-27; RX1127-500; Ryan, Tr. 1202-1203).

1065. Ryan explained what he learned from outside counsel regarding ADC to Cohen. (Ryan, Tr. 1272).

Schein's Response:

Complaint Counsel's proposed finding is vague and unclear as to what information was purportedly conveyed and when, and therefore has no probative value. To be precise, Mr. Ryan testified he explained what he "understood" after the call to Mr. Cohen. (Ryan, Tr. 1271-72).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Benco made its own independent decision to bid for the business of ADC. (Cohen, Tr. 724).

On March 27, 2013, after speaking with outside counsel, Ryan was able to determine that ADC had common ownership. Therefore, under Benco's policy, ADC was a single customer and Benco made the decision to bid on ADC. (Ryan, Tr. 1201-1202).

Benco won the business of ADC and ADC has remained a customer of Benco from that time through the present. (Cohen, Tr. 724). Benco considers ADC a DSO because it has common ownership and control of its member dental practices. (Cohen, Tr. 724; Ryan, Tr. 1202).

During the five-plus years that ADC has been a Benco customer, the group has performed "excellently." ADC has delivered on its volume commitments to Benco and purchases almost all of its dental supplies from Benco. (Cohen, Tr. 724-25; Ryan, Tr. 1202). Consistent with DSOs, Benco's conversion rate with ADC has been 90% plus. Conversion rate means the percentage of customers within a group that are converted to Benco customers. Conversion rate is a measure of the level of compliance exhibited by a DSO or Large Group. (Ryan, Tr. 1203-1205). ADC's common ownership allowed it to drive compliance among its member practices and has converted new customers to Benco. These new customers were previously Schein and Patterson customers. (Cohen, Tr. 726-28; Ryan, Tr. 1202).

ADC's performance validates Benco's determination that ADC was, in fact, a DSO, as ADC's performance is consistent with a DSO and inconsistent with a buying group.

(Cohen, Tr. 726-27; Ryan, Tr. 120-1203). It was worth the effort for Benco to spend the time to properly evaluate ADC under Benco's policy and it was in Benco's unilateral economic interest to have taken the time necessary, gathered whatever information was available, to have properly evaluated ADC so that Benco could add ADC to its significant portfolio of DSO accounts. (Cohen, Tr. 726-27; RX1127-500; Ryan, Tr. 1202-1203).

1066. Benco decided to bid on ADC after concluding it was not a buying group. (Cohen, Tr. 549; CX0196 at 010; CX6027 at 029 (Row 248)).

Schein's Response:

Complaint Counsel cites only to Mr. Cohen's text message that says, "Did some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all practices. So it's not a buying group, it's a big group. We're going to bid. Thanks." (CX 6027-029), and to Mr. Cohen's affirmation that Complaint Counsel read it correctly at trial (Cohen, Tr. 549). The text message speaks for itself.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Benco made its own independent decision to bid for the business of ADC. (Cohen, Tr. 724).

On March 27, 2013, after speaking with outside counsel, Ryan was able to determine that ADC had common ownership. Therefore, under Benco's policy, ADC was a single customer and Benco made the decision to bid on ADC. (Ryan, Tr. 1201-1202).

Benco won the business of ADC and ADC has remained a customer of Benco from that time through the present. (Cohen, Tr. 724). Benco considers ADC a DSO because it has common ownership and control of its member dental practices. (Cohen, Tr. 724; Ryan, Tr. 1202).

During the five-plus years that ADC has been a Benco customer, the group has performed “excellently.” ADC has delivered on its volume commitments to Benco and purchases almost all of its dental supplies from Benco. (Cohen, Tr. 724-25; Ryan, Tr. 1202). Consistent with DSOs, Benco’s conversion rate with ADC has been 90% plus. Conversion rate means the percentage of customers within a group that are converted to Benco customers. Conversion rate is a measure of the level of compliance exhibited by a DSO or Large Group. (Ryan, Tr. 1203-1205). ADC’s common ownership allowed it to drive compliance among its member practices and has converted new customers to Benco. These new customers were previously Schein and Patterson customers. (Cohen, Tr. 726-28; Ryan, Tr. 1202).

ADC’s performance validates Benco’s determination that ADC was, in fact, a DSO, as ADC’s performance is consistent with a DSO and inconsistent with a buying group. (Cohen, Tr. 726-27; Ryan, Tr. 120-1203). It was worth the effort for Benco to spend the time to properly evaluate ADC under Benco’s policy and it was in Benco’s unilateral economic interest to have taken the time necessary, gathered whatever information was available, to have properly evaluated ADC so that Benco could add ADC to its significant portfolio of DSO accounts. (Cohen, Tr. 726-27; RX1127-500; Ryan, Tr. 1202-1203).

1067. Benco decided to bid on ADC after conferring with outside counsel. (Ryan, Tr. 1201-1202; CX0301 (Cohen, IHT at 209-210)).

Schein's Response:

This restates CCFF 1062 and 1063, and Schein incorporates its responses to those findings here. The testimony does not indicate what role, if any, outside counsel played in Benco's decision, other than to help Benco understand ADC's corporate structure.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Benco made its own independent decision to bid for the business of ADC. (Cohen, Tr. 724).

On March 27, 2013, after speaking with outside counsel, Ryan was able to determine that ADC had common ownership. Therefore, under Benco's policy, ADC was a single customer and Benco made the decision to bid on ADC. (Ryan, Tr. 1201-1202).

Benco won the business of ADC and ADC has remained a customer of Benco from that time through the present. (Cohen, Tr. 724). Benco considers ADC a DSO because it has common ownership and control of its member dental practices. (Cohen, Tr. 724; Ryan, Tr. 1202).

During the five-plus years that ADC has been a Benco customer, the group has performed "excellently." ADC has delivered on its volume commitments to Benco and purchases almost all of its dental supplies from Benco. (Cohen, Tr. 724-25; Ryan, Tr. 1202). Consistent with DSOs, Benco's conversion rate with ADC has been 90% plus. Conversion rate means the percentage of customers within a group that are converted to Benco customers. Conversion rate is a measure of the level of compliance exhibited by a

DSO or Large Group. (Ryan, Tr. 1203-1205). ADC's common ownership allowed it to drive compliance among its member practices and has converted new customers to Benco. These new customers were previously Schein and Patterson customers. (Cohen, Tr. 726-28; Ryan, Tr. 1202).

ADC's performance validates Benco's determination that ADC was, in fact, a DSO, as ADC's performance is consistent with a DSO and inconsistent with a buying group. (Cohen, Tr. 726-27; Ryan, Tr. 120-1203). It was worth the effort for Benco to spend the time to properly evaluate ADC under Benco's policy and it was in Benco's unilateral economic interest to have taken the time necessary, gathered whatever information was available, to have properly evaluated ADC so that Benco could add ADC to its significant portfolio of DSO accounts. (Cohen, Tr. 726-27; RX1127-500; Ryan, Tr. 1202-1203).

1068. Shortly after deciding to bid on ADC, Cohen reached out to Sullivan to inform him that Benco would bid on ADC because it was not a buying group. (Cohen, Tr. 549-550).

Schein's Response:

Complaint Counsel mischaracterizes the evidence.

The specific communication was a text message, which says, "Did some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all practices. So it's not a buying group, it's a big group. We're going to bid. Thanks." (CX 6027-029).

There is no evidence that Mr. Cohen's *purpose* in sending this text was to inform Mr. Sullivan of Benco's decision to bid, though he included that information. As Mr. Cohen explained, he reached out to Mr. Sullivan because he had previously spoken with him to see if Mr. Sullivan knew anything about ADC (Mr. Sullivan did not and shut down

the conversation). (Cohen, Tr. 723; Sullivan, Tr. 3946, 3963-64, 3966). Having found out additional information about ADC, Mr. Cohen relayed it to Mr. Sullivan, though Mr. Sullivan never asked for any additional information or any follow-up (and had in fact told Mr. Cohen not to talk about specific customers). (Cohen, Tr. 723 (testifying that he was just “closing the loop”), 899-900; Sullivan, Tr. 3946, 3963-64, 3966).

Importantly, the first part of Mr. Cohen’s text message – whether ADC is or is not a buying group – is not competitively sensitive information; it simply reflects market research that Benco had performed. (CX 6027-029). While Mr. Cohen did reveal Benco’s independent decision to bid, it was a declarative statement, and Mr. Cohen neither asked for Mr. Sullivan’s assent nor suggested that Benco’s decision was contingent on Mr. Sullivan’s views. Nor did Mr. Sullivan respond to Mr. Cohen’s text. Mr. Cohen’s message does not show any pre-existing agreement or assurance between the two companies not to do business with buying groups; it does not discuss any information about Schein’s plans, policies, or practices. (CX 6027-029). Despite Mr. Cohen’s unsolicited text message, Mr. Sullivan believed that ADC was a buying group. (Sullivan, Tr. 4183).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Two days later, on March 27, 2017, Cohen sent Sullivan another text, saying that he “[d]id some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all practices. So it’s not a buying group, it’s a big group. We’re going to bid. Thanks.” (CX6027-029).

The first part of Cohen’s text message – whether ADC is or is not a buying group – is not competitively sensitive information; it simply reflects market research that Benco had performed. (CX6027-029). The last sentence of Cohen’s text message – that Benco is going to bid – did reveal Benco’s plans. However, it does not evince a pre-existing agreement between the two companies not to do business with buying groups. The text does not reference any pre-existing agreement and does not discuss any information about Schein’s plans, policies, or practices. (CX6027-029).

While Complaint Counsel asserts that Cohen’s March 27, 2017 text message can be interpreted as an effort to seek clarity as to application of a pre-existing agreement to ADC, such an assertion would require the fact finder to first assume the existence of a conspiracy. The Court should decline to make such an assumption.

1069. On March 27, 2013, Cohen sent the following text message to Sullivan:

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

(Cohen, Tr. 549; CX0196 at 010; *see also* Sullivan, Tr. 3959; CX6027 at 029, (Row 248). Cohen testified: “Q. And here you wrote to Tim Sullivan, ‘Tim: Did some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all the practices. So it’s not a buying group, it’s a big group. We’re going to bid. Thanks.’ Did I read that correctly? A. Yes.” (Cohen, Tr. 549).

Schein’s Response:

The proposed finding simply quotes the text message and testimony cited in CCFF 1066. Schein does not dispute that Mr. Cohen sent the text message to Mr. Sullivan on March 27, 2013, and when asked if Complaint Counsel read the message correctly, he said, “Yes.” (Cohen, Tr. 549). However, Schein does dispute any implication that Mr. Sullivan was somehow involved in Benco’s decision, or was engaged in sharing information with

Benco about ADC, any buying group, or Schein. The evidence shows he was not. (Sullivan, Tr. 3946, 4289-90; Cohen, Tr. 899-900). Mr. Cohen's text message was an unsolicited declarative statement; Mr. Sullivan never asked Mr. Cohen whether Benco was going to bid, and Mr. Sullivan did not respond to the text message or provide any information to Mr. Cohen. (Cohen, Tr. 900). Despite Mr. Cohen's unsolicited text message, Mr. Sullivan believed that ADC *was* a buying group. (Sullivan, Tr. 4183).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Two days later, on March 27, 2017, Cohen sent Sullivan another text, saying that he "[d]id some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all practices. So it's not a buying group, it's a big group. We're going to bid. Thanks." (CX6027-029).

The first part of Cohen's text message – whether ADC is or is not a buying group – is not competitively sensitive information; it simply reflects market research that Benco had performed. (CX6027-029). The last sentence of Cohen's text message – that Benco is going to bid – did reveal Benco's plans. However, it does not evince a pre-existing agreement between the two companies not to do business with buying groups. The text does not reference any pre-existing agreement and does not discuss any information about Schein's plans, policies, or practices. (CX6027-029).

While Complaint Counsel asserts that Cohen's March 27, 2017 text message can be interpreted as an effort to seek clarity as to application of a pre-existing agreement to

ADC, such an assertion would require the fact finder to first assume the existence of a conspiracy. The Court should decline to make such an assumption.

1070. Cohen's March 27, 2013, text to Sullivan informed Sullivan of Cohen's new understanding that ADC was not a buying group, but was a corporate account. (Cohen, Tr. 549; CX0196 at 010 ("Tim: Did some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all the practices. So it's not a buying group, it's a big group . . ."). Cohen testified: "Q. And you're telling him [Sullivan] that your new understanding was that ADC was not a buying group. A. Yes. Q. But rather a corporate account. Q. Yes." (Cohen, Tr. 549).

Schein's Response:

The term "new understanding" incorrectly suggests that Benco had the opposite understanding earlier. Rather, the evidence shows that, at the time of the March 25, 2013 call, Mr. Cohen did not have an understanding as to whether ADC was a buying group or a corporate account. (SRF 679 (citing CC Br. 33 ("Benco was uncertain whether [ADC] qualified as a buying group"), 1024-25)). The additional research Benco did provided Mr. Cohen with additional information. Despite Mr. Cohen's unsolicited text message, Mr. Sullivan believed that ADC *was* a buying group. (Sullivan, Tr. 4183).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Two days later, on March 27, 2017, Cohen sent Sullivan another text, saying that he "[d]id some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all practices. So it's not a buying group, it's a big group. We're going to bid. Thanks." (CX6027-029).

The first part of Cohen’s text message – whether ADC is or is not a buying group – is not competitively sensitive information; it simply reflects market research that Benco had performed. (CX6027-029). The last sentence of Cohen’s text message – that Benco is going to bid – did reveal Benco’s plans. However, it does not evince a pre-existing agreement between the two companies not to do business with buying groups. The text does not reference any pre-existing agreement and does not discuss any information about Schein’s plans, policies, or practices. (CX6027-029).

While Complaint Counsel asserts that Cohen’s March 27, 2017 text message can be interpreted as an effort to seek clarity as to application of a pre-existing agreement to ADC, such an assertion would require the fact finder to first assume the existence of a conspiracy. The Court should decline to make such an assumption.

1071. Cohen provided Sullivan with the same information regarding ADC that he also provided to Guggenheim of Patterson: “that ADC had merged, and so it was a big group and not a buying group.” (Cohen, Tr. 562) (“Q. And as a side note, you recall that you told Tim Sullivan of Schein the same information, that ADC had merged, and so it was a big group and not a buying group. A. Yes.”).

Schein’s Response:

Complaint Counsel’s proposed finding is ambiguous, false, and misleading. While questioning Mr. Cohen about CX 0062, an email from Mr. Cohen to Mr. Guggenheim dated **June 8, 2013**, Complaint Counsel asked the question: “And as a side note, you recall that you told Tim Sullivan of Schein the *same information....*” (Cohen, Tr. 562 (emphasis added)). While not clear from the question, it appears Complaint Counsel was referring to Mr. Cohen’s **March 27, 2013** text message to Mr. Sullivan. (CX 0196-010; *see* CC Br. 60). The two are different.

CX 0062 is an email from Mr. Cohen to Mr. Guggenheim dated June 8, 2013 and says:

On the Atlantic Dental Care situation, here's our understanding after several in-depth conversations...

1. There are 32 practices that have legally ***merged together***.
2. The new company is owned by the former practice owners.
3. They are in the process of rebranding all the offices Atlantic Dental Care.
4. They have a board of directors made up of some of the stakeholders that makes the decisions.

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

In contrast, Mr. Cohen's text message to Mr. Sullivan dated March 27, 2017

(CX 0196-010), says:

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

(emphasis added).

In their Post-Trial Brief, Complaint Counsel claims that "the communications between Benco and Patterson ***mirrored*** those between Benco and Schein." (CC Br. 58 (emphasis added)). Complaint Counsel's single example of "the ***parallel*** nature of the Benco/Patterson and Benco/Schein communications" with Cohen, as the ringleader, "***shar[ing] the identical information*** about ADC with both Guggenheim and Sullivan" is the CX 0196, March 27, 2017 text message and the CX 0062, June 8, 2013 email. (CC Br. 60). While both communications may relate to ADC, they hardly provide "identical information" and were transmitted ***over two months*** apart.

First, Mr. Cohen’s email to Mr. Guggenheim was not unsolicited – it was in response to Mr. Guggenheim’s question asking whether Mr. Cohen could “shed some light on your business agreement with Atlantic Dental Care?” (CX 0062-002). In contrast, Mr. Cohen’s text message to Mr. Sullivan was entirely unsolicited, as Mr. Sullivan never reached out to Mr. Cohen regarding ADC or about buying groups generally, and in fact had previously admonished Mr. Cohen against discussing ADC or other customers. (SF 1491; Sullivan, Tr. 3946; SRF 1088, 1178).

Second, in response to Mr. Guggenheim’s question, Mr. Cohen noted “we don’t recognize buying groups,” and added four bullet points and a paragraph of explanation as to why ADC was a large group practice. (CX 0062-001). In contrast, Mr. Cohen sent – unsolicited – a three-sentence text message to Mr. Sullivan that did *not* reveal Benco’s no-buying-group policy. (CX 0196-010).

Complaint Counsel’s claim in its Post-Trial Brief that this is evidence of one overarching conspiracy orchestrated by Benco as the ringleader is therefore inaccurate and unfounded. (*See* CC Br. 57).

Patterson’s Response:

Patterson joins Schein and Benco’s responses.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Two days later, on March 27, 2017, Cohen sent Sullivan another text, saying that he “[d]id some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all practices. So it’s not a buying group, it’s a big group. We’re going to bid. Thanks.” (CX6027-029).

The first part of Cohen’s text message – whether ADC is or is not a buying group – is not competitively sensitive information; it simply reflects market research that Benco had performed. (CX6027-029). The last sentence of Cohen’s text message – that Benco is going to bid – did reveal Benco’s plans. However, it does not evince a pre-existing agreement between the two companies not to do business with buying groups. The text does not reference any pre-existing agreement and does not discuss any information about Schein’s plans, policies, or practices. (CX6027-029).

While Complaint Counsel asserts that Cohen’s March 27, 2017 text message can be interpreted as an effort to seek clarity as to application of a pre-existing agreement to ADC, such an assertion would require the fact finder to first assume the existence of a conspiracy. The Court should decline to make such an assumption.

1072. Cohen admitted at trial that it was against Benco’s business interest to tell Sullivan that Benco was going to bid on a corporate group. (Cohen, Tr. 550).

Schein’s Response:

Complaint Counsel’s proposed finding misstates Mr. Cohen’s testimony. When asked if it was “fair to say that at least in the short term it was against your business interest to tell Tim Sullivan that you were going to bid on ADC,” Mr. Cohen testified, “I can’t say whether it was or wasn’t. I can tell you that we did win the deal. ... I can’t say whether it was for or against our business interest. I can say that we won the deal.” (Cohen, Tr. 550-551). Moreover, a response to an “is it fair to say” question is hardly an admission.

Patterson’s Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Two days later, on March 27, 2017, Cohen sent Sullivan another text, saying that he "[d]id some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all practices. So it's not a buying group, it's a big group. We're going to bid. Thanks." (CX6027-029).

The first part of Cohen's text message – whether ADC is or is not a buying group – is not competitively sensitive information; it simply reflects market research that Benco had performed. (CX6027-029). The last sentence of Cohen's text message – that Benco is going to bid – did reveal Benco's plans. However, it does not evince a pre-existing agreement between the two companies not to do business with buying groups. The text does not reference any pre-existing agreement and does not discuss any information about Schein's plans, policies, or practices. (CX6027-029).

While Complaint Counsel asserts that Cohen's March 27, 2017 text message can be interpreted as an effort to seek clarity as to application of a pre-existing agreement to ADC, such an assertion would require the fact finder to first assume the existence of a conspiracy. The Court should decline to make such an assumption.

1073. Cohen admitted that his text message to Tim Sullivan regarding bidding on ADC was an instance of counter-rational conduct. (Cohen, Tr. 552).

Schein's Response:

This is essentially the same as CCFF 1072, and Schein incorporates its response to that proposed finding here. Mr. Cohen testified that he "can't say whether it was for or

against our business interests” to send the text message, especially since Benco did win the deal. (Cohen, Tr. 550-51). Unsatisfied with this response, Complaint Counsel tried to impeach Mr. Cohen with his IHT. But there, Mr. Cohen testified that there were countervailing reasons on both sides of the question. (CX 0301 (Cohen, IHT at 277-79)).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Two days later, on March 27, 2017, Cohen sent Sullivan another text, saying that he “[d]id some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all practices. So it’s not a buying group, it’s a big group. We’re going to bid. Thanks.” (CX6027-029).

The first part of Cohen’s text message – whether ADC is or is not a buying group – is not competitively sensitive information; it simply reflects market research that Benco had performed. (CX6027-029). The last sentence of Cohen’s text message – that Benco is going to bid – did reveal Benco’s plans. However, it does not evince a pre-existing agreement between the two companies not to do business with buying groups. The text does not reference any pre-existing agreement and does not discuss any information about Schein’s plans, policies, or practices. (CX6027-029).

While Complaint Counsel asserts that Cohen’s March 27, 2017 text message can be interpreted as an effort to seek clarity as to application of a pre-existing agreement to ADC, such an assertion would require the fact finder to first assume the existence of a conspiracy. The Court should decline to make such an assumption.

1074. Cohen previously testified under oath that informing Sullivan of Benco's decision to bid was counter to his rational self-interest: "In fact, there's a counter-business reason, which is, I probably, in saying that we're going to bid, I probably, gave more information . . . than a rational business owner would give, which is, hey, we're bidding on it." (CX0301 (Cohen, IHT at 277); Cohen, Tr. 551-52)

Schein's Response:

The asserted fact mischaracterizes the evidence, and fails to cite the very next question and answer. At trial, Mr. Cohen testified that he "can't say whether it was for or against our business interests" to send the text message, especially since Benco did win the deal. (Cohen, Tr. 550-51). Unsatisfied with this response, Complaint Counsel tried to impeach Mr. Cohen with his Investigational Hearing testimony. But there, Mr. Cohen testified that there were countervailing reasons on both sides of the question. (CX 0301 (Cohen, IHT at 277-79)).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Two days later, on March 27, 2017, Cohen sent Sullivan another text, saying that he "[d]id some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all practices. So it's not a buying group, it's a big group. We're going to bid. Thanks." (CX6027-029).

The first part of Cohen's text message – whether ADC is or is not a buying group – is not competitively sensitive information; it simply reflects market research that Benco had performed. (CX6027-029). The last sentence of Cohen's text message – that Benco

is going to bid – did reveal Benco’s plans. However, it does not evince a pre-existing agreement between the two companies not to do business with buying groups. The text does not reference any pre-existing agreement and does not discuss any information about Schein’s plans, policies, or practices. (CX6027-029).

While Complaint Counsel asserts that Cohen’s March 27, 2017 text message can be interpreted as an effort to seek clarity as to application of a pre-existing agreement to ADC, such an assertion would require the fact finder to first assume the existence of a conspiracy. The Court should decline to make such an assumption.

1075. Cohen believed that it was against Benco’s business interest “in the smaller picture” to share its competitive position with its largest rival, but that “in the larger picture” he did so to maintain credibility with Sullivan in the long term. (Cohen, Tr. 551-552; *see also* CX301 (Cohen, IHT at 277-278)).

Schein’s Response:

The testimony Complaint Counsel cites simply reflects one countervailing factor when it comes to providing information. At trial, Mr. Cohen testified that he “can’t say whether it was for or against our business interests” to send the text message, especially since Benco did win the deal. (Cohen, Tr. 550-51). Unsatisfied with this response, Complaint Counsel tried to impeach Mr. Cohen with his IHT. But there, Mr. Cohen testified that there were countervailing reasons on both sides of the question. (CX 0301 (Cohen, IHT at 277-79)).

Patterson’s Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Two days later, on March 27, 2017, Cohen sent Sullivan another text, saying that he "[d]id some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all practices. So it's not a buying group, it's a big group. We're going to bid. Thanks." (CX6027-029).

The first part of Cohen's text message – whether ADC is or is not a buying group – is not competitively sensitive information; it simply reflects market research that Benco had performed. (CX6027-029). The last sentence of Cohen's text message – that Benco is going to bid – did reveal Benco's plans. However, it does not evince a pre-existing agreement between the two companies not to do business with buying groups. The text does not reference any pre-existing agreement and does not discuss any information about Schein's plans, policies, or practices. (CX6027-029).

While Complaint Counsel asserts that Cohen's March 27, 2017 text message can be interpreted as an effort to seek clarity as to application of a pre-existing agreement to ADC, such an assertion would require the fact finder to first assume the existence of a conspiracy. The Court should decline to make such an assumption.

1076. Cohen provided Benco's bidding information to Sullivan because he "did not want [Sullivan] to think I was "duplicitous in his first call and was trying to head-fake them" if he did not follow up. (Cohen, Tr. 723). Cohen testified, "I wanted to be perceived as an honest purveyor of information and maintain a high level of credibility with Tim and others." (Cohen, Tr. 723). Cohen would hate for Tim Sullivan to find out that Cohen had not been fully forthcoming with respect to the ADC situation. (Cohen, Tr. 553).

Schein's Response:

Complaint Counsel's proposed finding is wrong. Mr. Cohen did not provide "bidding information" to Mr. Sullivan. Schein does not dispute that Mr. Cohen sent an unsolicited text message to Mr. Sullivan indicating that Benco was going to bid on ADC, but he provided nothing more. Specifically, he did not provide any "information" on how or what Benco planned to bid. (CX 0196).

Mr. Cohen testified that he sent the message to "clos[e] the loop on the conversation [he] initiated" with Mr. Sullivan. (Cohen, Tr. 723). Mr. Sullivan never engaged in a discussion with Mr. Cohen concerning ADC; he never asked Mr. Cohen whether Benco was going to bid; he did not respond to Mr. Cohen's unsolicited text message; and he did not provide any information whatsoever to Mr. Cohen. (Cohen, Tr. 899-900).

Mr. Cohen's concern about his reputation is irrelevant to the issues in the case, and in any event, is understandable given the ongoing discussions of a potential merger between Benco and Schein. (SRF 1031, 1033, 1051-52; SF 1496-97). No person wants to be viewed by anyone as dishonest. Thus, Complaint Counsel's questions concerning Mr. Cohen's reputation and truthfulness are devoid of substance or relevance. (*See* Cohen, Tr. 553). Mr. Cohen did not testify that he "would hate for Time Sullivan to find out that Cohen had not been fully forthcoming with respect to the ADC situation." Complaint Counsel asked that question, but Mr. Cohen just responded generally about his reputation: "My reputation is important, and I wouldn't like anyone to think I was lying to them." (Cohen, Tr. 553).

Mr. Cohen's natural concern does not suggest some nefarious relationship between Benco and Schein. Moreover, evidence regarding Mr. Cohen's concerns about his perceived reputation constitutes inadmissible character evidence. *See* Fed. R. Evid. 404

(“Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait”).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The Competitive Hiring Agreement required frequent negotiation and regular communications between Benco and Schein. Chuck Cohen and Tim Sullivan were the primary points of contact for the other regarding the Competitive Hiring Agreement. (Cohen, Tr. 736-37; Sullivan, Tr. 4267-68). Chuck Cohen and Tim Sullivan communicated several times a year regarding discrepancies in the way that the two sides were interpreting the Competitive Hiring Agreement and its application to certain employees or employee groups. (Cohen, Tr. 737).

Chuck Cohen believed it to be one of Benco’s highest priorities to maintain the Competitive Hiring Agreement with Schein for as long as possible. (Cohen, Tr. 737). Chuck Cohen wanted to maintain a positive, professional relationship with Tim Sullivan, including maintaining his credibility with Tim Sullivan, for purposes of maintaining the Competitive Hiring Agreement with Schein for as long as possible. (Cohen, Tr. 550; 737-38).

Because Chuck Cohen was frequently negotiating different issues with Tim Sullivan under the Competitive Hiring Agreement, he believed that it was critical for Tim Sullivan to regard him as honest and able to deliver on his word. If not, Chuck Cohen

believes that Tim Sullivan would have cancelled the Competitive Hiring Agreement.
(Cohen, Tr. 738).

1077. Cohen admitted that from time to time he acted irrationally from a business perspective in communicating with Sullivan and Guggenheim. (Cohen, Tr. 552).

Schein's Response:

Mr. Cohen did not “admit[] that from time to time he acted irrationally from a business perspective in communicating with Sullivan and Guggenheim.” The word “irrationally” does not appear in the testimony. While Mr. Cohen responded “yes” when asked an obscure and confusing question – “[w]ould you say that from time to time you were acting in a counter-rational way with respect to Sullivan and Guggenheim from a business perspective?” – Mr. Cohen was consistent that, when exchanging information, there are countervailing factors on both sides of the question. (CX 0301 (Cohen, IHT at 277-78); Cohen, Tr. 551-52 (“I can’t say whether it was for or against our business interests. I can say that we won the deal.”)). Moreover, with respect to the specific March 27, 2013 text, Mr. Cohen did not say that he acted contrary to his overall self-interest. (Cohen, Tr. 550-51).

In any event, the general statement that “from time to time” Mr. Cohen “acted irrationally” – even if true – would be inadmissible character evidence, since the statement by itself is not tied to any specific act, or specific relevant act. Fed. R. Evid. 404.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The Competitive Hiring Agreement required frequent negotiation and regular communications between Benco and Schein. Chuck Cohen and Tim Sullivan were the primary points of contact for the other regarding the Competitive Hiring Agreement. (Cohen, Tr. 736-37; Sullivan, Tr. 4267-68). Chuck Cohen and Tim Sullivan communicated several times a year regarding discrepancies in the way that the two sides were interpreting the Competitive Hiring Agreement and its application to certain employees or employee groups. (Cohen, Tr. 737).

Chuck Cohen believed it to be one of Benco's highest priorities to maintain the Competitive Hiring Agreement with Schein for as long as possible. (Cohen, Tr. 737). Chuck Cohen wanted to maintain a positive, professional relationship with Tim Sullivan, including maintaining his credibility with Tim Sullivan, for purposes of maintaining the Competitive Hiring Agreement with Schein for as long as possible. (Cohen, Tr. 550; 737-38).

Because Chuck Cohen was frequently negotiating different issues with Tim Sullivan under the Competitive Hiring Agreement, he believed that it was critical for Tim Sullivan to regard him as honest and able to deliver on his word. If not, Chuck Cohen believes that Tim Sullivan would have cancelled the Competitive Hiring Agreement. (Cohen, Tr. 738).

1078. Sullivan likewise could not offer any procompetitive justifications. (CX0311 (Sullivan, IHT at 268) ("Q. Can you think of any reason for Mr. Cohen to communicate what he did with you? . . . A. I cannot.")).

Schein's Response:

The asserted fact is not admissible, as it asks a witness to speculate about the reasons another witness may have had for sending an unsolicited text. Complaint Counsel only quotes the last question in the colloquy about Mr. Cohen's motivations. The Q&A starts with Mr. Sullivan's lack of knowledge about Mr. Cohen's motivation:

Q. Why do you think Mr. Cohen called you with that information?

A. That would be a good question for him.

Q. Why do you think Mr. Cohen called you with that information?

A. I don't know....

Q. I guess my question is going to you didn't try to think about the motive behind the call?

A. No.

Q. Did you get the sense that Mr. Cohen was trying to reach some general understanding with you?

A. No.

Q. Why not?

A. I didn't get the sense. I can't tell you why not. No, I didn't. We never would come to an understanding with them to begin with. We didn't engage in that type of discussion with him at all. So if he even attempted to go down that road I would have cut him off immediately.

Q. Can you think of any reason for Mr. Cohen to communicate what he did with you?

A. I cannot.

(CX 0311 (Sullivan, IHT at 267-68)).

Moreover, Complaint Counsel's exclusive reliance on Mr. Sullivan's Investigational Hearing testimony is improper, and the proposed finding is ambiguous and

imprecise. Mr. Sullivan was never asked whether he could offer “procompetitive justifications.” At trial, when asked about the March 25, 2013 call, Mr. Sullivan testified:

At some point, I'm not sure where in the conversation, he mentioned something about ADC, did I know who they were. I told him I did not. He started to go down the road a little. I don't know exactly what he said that raised the red flag for me, but I said to him, ‘Chuck, this is not something you and I should be talking about.’ We quickly switched topics.

(Sullivan, Tr. 4189).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness.

1079. Following the receipt of Cohen’s March 27, 2013, text message regarding bidding on ADC, Sullivan attempted to reach Cohen over the phone but was unable to do so. (Sullivan, Tr. 3959; CX6027 at 029 (Row 250)).

Schein’s Response:

Complaint Counsel’s proposed finding is misleading. Mr. Sullivan’s (unsuccessful) March 27, 2013 attempt to reach Mr. Cohen was not a follow-up to Mr. Cohen’s March 27, 2013 text; it was a follow-up to a *different* unsolicited text Mr. Cohen had sent the prior day. Mr. Sullivan placed a phone call to Mr. Cohen at 7:53am ***before*** receiving Mr. Cohen’s 4:04pm text message that said Benco had determined ADC was a large group, and was going to bid. (CX 6027-028-29).

On March 26, 2013, Mr. Cohen sent an unsolicited text message to Mr. Sullivan about Dental Alliance. Mr. Sullivan testified that when he received this text message, he

did not recognize that it was unrelated to ADC. (Sullivan, Tr. 4198). After receiving this message, Mr. Sullivan attempted to call Mr. Cohen to reiterate, in stronger terms, that Mr. Cohen should not be discussing specific customers with him. (Sullivan, Tr. 3966; 4197-99). On March 27, 2013, a little over three hours after receiving Mr. Cohen's unsolicited text message and follow-up message ("Also, notice you rang me this AM, no message. Call later?"), Mr. Sullivan attempted to reach Mr. Cohen for a second time in order to reiterate, in "much stronger" terms, that Mr. Cohen should not be contacting him about specific customers. (Sullivan, Tr. 3966, 4198-99, 4206; CX 6027-029). Mr. Cohen responded via text message that he was out for dinner, and asked if they could talk the following day. (CX 6027-029). After a little phone tag, Mr. Sullivan was finally able to deliver the message on April 3, 2013. (Sullivan, Tr. 3966, 4197-99, 4205-06; CX 6027-029). The record evidence does not indicate any further communications between Mr. Cohen and Mr. Sullivan about any customer or any buying group following the April 3, 2013 call. (See CX 6027-030-57).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness.

1080. Following the receipt of the March 27, 2013 text message regarding bidding on ADC, Sullivan and Cohen tried to reach each other on the telephone several times. (Sullivan, Tr. 3959, 3963; CX6027 at 029, (Row 250 (Sullivan calls Cohen on March 27), Rows 253 and 254 (Cohen calls Sullivan twice on March 28) and Row 255 (Sullivan calls Cohen on April 3)).

Schein's Response:

This is a reiteration of CCFF 1079, and Schein incorporates its response to that proposed finding here. The referenced phone tag started before Mr. Cohen's unsolicited March 27, 2013 text from Mr. Cohen about ADC. Mr. Sullivan tried to call Mr. Cohen to reiterate in "much stronger" terms that they should not be discussing specific customers. (Sullivan, Tr. 4205-06). After a little phone tag, Mr. Sullivan was finally able to deliver that message on April 3, 2013.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness.

1081. ADC also sought a bid from Schein in 2013. CX8000 (Porro, Dep. at 133, 139-140).

Schein's Response:

Schein received the ADC RFP on March 22, 2013. (CX 2019-002). A Schein Regional Manager, Bobby Anderson, forwarded the RFP to Zone Manager Michael Porro, asking whether "we want to quote." (CX 2019-001).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness regarding Schein's business.

1082. After failing to connect with Cohen by telephone on March 27, 2013, the very next call Sullivan made was to Michael Porro. (Sullivan, Tr. 3968). Michael Porro was the Schein manager in charge of the zone where Atlantic Dental Care was located. (Sullivan, Tr. 3967).

Schein's Response:

No response, other than to note that Mr. Sullivan testified that his call to Mr. Porro was "following up with him" relating to "prior discussions with him" that began before Schein received the ADC RFP. (Sullivan, Tr. 4200-01; CX 0197). As both Mr. Sullivan and Mr. Porro testified, Mr. Sullivan never spoke with Mr. Porro concerning any communications he had with Mr. Cohen. (Sullivan, Tr. 4200-01; CX 8000 (Porro, Dep. at 292)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness regarding Schein's business.

1083. Sullivan reached Porro by telephone on March 25, 2013, and spoke to him. (Sullivan, Tr. 3969).

Schein's Response:

Mr. Sullivan did not speak to Mr. Porro by telephone on March 25, 2013. He did speak with Mr. Porro on March 27, 2013. (*See* SRF 1082).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness regarding Schein's business.

1084. On April 1, 2013, days after receiving the March 27, 2013 text message from Cohen stating that ADC was not a buying group and that Benco would be bidding, Sullivan told Porro and other Schein executives that Schein should bid on ADC. (Sullivan, Tr. 3967-3968; CX2021 at 022 (Sullivan email to Porro and four others, subject: “Re: Atlantic Dental Care – HOT. . . I think we should take a shot at this.”) (emphasis in original)).

Schein’s Response:

Complaint Counsel’s proposed finding is misleading to the extent it suggests that Mr. Sullivan changed course based on information provided by Mr. Cohen. Mr. Sullivan’s April 1, 2013 email was responding to an email from Mr. Porro providing a summary of his communications with ADC and recommending that Schein submit a bid. (CX 2021-022-24). Mr. Sullivan said he “think[s] we should take a shot at this” but should “include full value and not just bid price.” (CX 2021-022). After further discussions with the team and receiving additional information from ADC, however, Mr. Sullivan wrote on April 5, 2013 that “[t]his smells bad,” and that he was returning to the view that Schein has “as much to lose for winning the bid as we do for losing (or not bidding).” (CX 2021-006). This was two days *after* the April 3, 2013 call between Mr. Sullivan and Mr. Cohen, during which Complaint Counsel alleges that “Schein and Benco changed course and submitted a bid for ADC.” (Complaint ¶ 47). Mr. Sullivan’s skepticism about bidding for ADC on April 5, 2013 is inconsistent with any allegation that Mr. Sullivan and Mr. Cohen reached an agreement on bidding for ADC, or that Schein changed course as a result of the April 3, 2013 communication with Benco.

Patterson’s Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness regarding Schein's business.

1085. On April 1, 2013, Sullivan wrote, "I think we should take a shot at this." (CX2021 at 022). Sullivan meant that Schein should take a shot at bidding on Atlantic Dental Care. (Sullivan, Tr. 3968).

Schein's Response:

The proposed fact is duplicative of CCFF 1084. Schein incorporates its response to CCFF 1084 here. In addition, Schein notes that the asserted fact only selectively quotes Mr. Sullivan's email. Mr. Sullivan made it clear that Schein should "not just bid price" and that it should contain a volume commitment of "\$20K per office." (CX 2021-022).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness regarding Schein's business.

1086. On March 31, 2013, Porro wrote in an email that he had talked to Sullivan and "[t]he thinking is that Benco, a decent player in the market and always hungry, will put in a bid." (CX0198 at 013).

Schein's Response:

Complaint Counsel's proposed finding is misleading to the extent it suggests that Mr. Sullivan relayed any information concerning Benco to Mr. Porro. Mr. Sullivan testified that he did not relay this information to Mr. Porro, and believed that Mr. Porro's comment was based on general market intelligence from the field. (Sullivan, Tr. 4200,

4203; *see also* CX 0198-010 (email from Regional Manager Bobby Anderson noting that “Benco is currently going in with a 15% discount to all [Schein] customers” and has “created problems in accounts that have dealt with [Schein] for years.”); CX 0305 (Cavaretta, IHT at 62 (“when ... talking to a group, you can get a good sense from the group of what [the competition] is offering them.”))). Mr. Porro was certain that Mr. Sullivan never shared with him any communications he had with Mr. Cohen. (Sullivan, Tr. 4200-01; CX 8000 (Porro, Dep. at 292)). As Mr. Porro noted in his email, he also “talked to Joe and Jake,” and the first mention of Benco was in his summary of his call with ADC. (CX 0198-013-14).

Regardless of the source of Mr. Porro’s belief about Benco’s bidding intentions, such information just reflects competitive intelligence, not an agreement between Schein and Benco. Indeed, while Mr. Cohen testified that he probably should not have revealed his intention to bid for ADC, Mr. Cohen confirmed there was no mutual exchange of information, no agreement, and no quid pro quo. (Cohen, Tr. 723-24, 899-901).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness regarding Schein’s business.

1087. On March 31, 2013, Porro, in an email to Sullivan and others, identified the risk in not bidding for ADC’s business, and the upside of obtaining new business if Schein won. (CX0198 at 014 (“If we win the upside is the other business we don’t currently get.”)).

Schein's Response:

The asserted fact selectively quotes from the cited document, which identifies both the positives and negatives of bidding. After speaking with ADC, Mr. Porro explained that it “does appear that [ADC] is more than a buying group.” (CX 0198-014). Mr. Porro went on to note that, as a result, “[p]assing on a bid now has more risk.” (CX 0198-014). But Mr. Porro additionally noted, “There is also risk if we bid and lose [...] or win and take a huge hit on margins.” (CX 0198-014). Because there were both potential upsides and downsides to bidding, Mr. Porro suggested further internal deliberations. (CX 0198-014).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness regarding Schein's business.

1088. On April 3, 2013, Cohen and Sullivan finally reached each other by telephone. They spoke for 5 minutes and 36 seconds. (Sullivan, Tr. 3963; CX6027 at 029 (Row 256)).

Schein's Response:

The April 3, 2013 call was the first time Mr. Sullivan and Mr. Cohen actually connected after playing phone tag. (CX 6027-028-29). On March 26, 2013, Mr. Cohen sent an unsolicited text message about Dental Alliance to Mr. Sullivan. Mr. Sullivan testified that when he received this text message, he did not recognize that it was unrelated to ADC. (Sullivan, Tr. 4198). After receiving this message, Mr. Sullivan attempted to call Mr. Cohen to reiterate, in stronger terms, that he should not be discussing specific

customers with him. (Sullivan, Tr. 3966; 4198-99). After a week of phone tag, April 3, 2013 was the first time Mr. Sullivan and Mr. Cohen actually connected. (CX 6027-028).

The record evidence does not indicate any communications between Mr. Cohen and Mr. Sullivan about any customer or any buying group following the April 3, 2013 call. (See CX 6027-030-57). As such, the evidence does not support an inference that the purpose of the April 3, 2013 call was to express assent to Benco's plan to bid for ADC. Rather, the absence of subsequent communications corroborates Mr. Sullivan's testimony that he called Mr. Cohen to more strongly admonish him not to discuss specific customers or business strategies. (Sullivan, Tr. 3963 ("I was -- to remind him again, more sternly, that he should not be contacting me about this, which I told him on the first phone call about it."), 3966, 4197-99, 4205-06; see also CX 8025 (Sullivan, Dep. at 409-11)). Mr. Sullivan recalled his admonishment to Mr. Cohen in an October 16, 2013 email stating: "Chuck has not contacted me nor would he on such a topic." (RX 2362-001; Sullivan, Tr. 4207-08).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Sullivan's April 3, 2013 call was the first time Sullivan and Cohen actually connected after playing phone tag. As such, the evidence does not support an inference that the purpose of the April 3, 2013 call was to discuss express assent to Benco's plan to bid for ADC. (CX6027-028).

The record evidence does not indicate any further communications between Cohen and Sullivan about any customer or any buying group following the April 3, 2013 call. (CX6027).

Complaint Counsel also failed to show that Benco changed course and submitted a bid for ADC following the April 3, 2013 call. Cohen's March 27, 2013 text message states that Benco was going to submit a bid. (CX6027-029). It was a declarative statement, and Cohen neither asked for Sullivan's assent nor suggested that Benco's decision was contingent on Sullivan's views. Thus, Benco cannot be said to have changed course following the April 3, 2013 call.

The evidence also does not support an inference that Sullivan and Cohen reached an agreement during the March 25, 2013 or April 3, 2015 phone calls. Rather, the evidence shows that that Cohen inquired about ADC and that Sullivan revealed no information about Schein's policies, practices, or plans relating to ADC or buying groups generally.

Accordingly, the evidence does not support an inference of a conspiracy among Respondents.

1089. At trial, Sullivan claimed that during the April 3, 2013 call, Sullivan told Cohen that he should "stop sending me information about customers." (Sullivan, Tr. 3966). Sullivan's testimony is contrary to sworn testimony that he provided at his investigational hearing when he was asked about the same April 3, 2013 phone call. At his investigational hearing, Sullivan testified that he did not know what his April 3, 2013 call with Cohen was about, but that he did not believe it was possible that the call related to Atlantic Dental Care. (CX0311 (Sullivan, IHT at 310-311)).

Schein's Response:

There is no contradiction. Rather, there is a clarification and a refreshing of recollection. Mr. Sullivan testified that on the April 3, 2013 phone call he told Mr. Cohen to "stop sending [him] information about any customer-related issues." (Sullivan, Tr.

3966). At his IHT, Mr. Sullivan did not recall the phone call. (CX 0311 (Sullivan, IHT at 310-11)). At his deposition, Mr. Sullivan explained that following his Investigational Hearing, he had the opportunity to review the messages and phone calls in chronological order, which reminded him of how the discussion went. (RX 2941 (Sullivan, Dep. at 478-79)). This process brought “clarity” to the events and testimony. (Sullivan, Tr. 3960; *see also* Sullivan, Tr. 3948-49).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness.

1090. Sullivan’s testimony regarding his April 3, 2013, call with Cohen is also contrary to Cohen’s testimony. Cohen testified at trial that he did not recall Sullivan ever telling Cohen to stop contacting him about buying groups. (Cohen, Tr. 559). Cohen also testified that he did not recall Sullivan ever giving Cohen the impression that the two men should not be talking about buying groups. (Cohen, Tr. 559).

Schein’s Response:

False. Mr. Cohen testified that he does not recall the April 3, 2013 call *at all*, and could not say “one way or the other” whether Mr. Sullivan told him to stop contacting him about specific customers. (Cohen, Tr. 890-92). As Mr. Cohen testified:

Q. Now, you’ve spoken with Mr. Sullivan from time to time.

A. Yes.

Q. And you typically do not discuss particular customers; is that right?

A. We do not.

Q. And you don't recall any instance where Mr. Sullivan shared his business strategies relating to customers or buying groups.

A. No.

Q. Now, Mr. Sullivan previously testified in deposition that he told you that you two should not be discussing ADC. And ... when asked about this by Ms. Kahn, you said you did not recall that happening. Do you recall that?

A. I recall the question, but I don't recall him -- which are you asking if I recall? ...

Q. Do you recall one way or the other whether or not Mr. Sullivan had said to you that you should not be discussing ADC on that call?

A. I do not.

Q. Okay. One way or the other.

A. One way or the other.

(Cohen, Tr. 890-92). The fact that Mr. Cohen lacks recollection is not contrary to the fact that Mr. Sullivan's recollection was refreshed.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness.

1091. On April 5, 2013, Tim Sullivan sent an email to Porro, Muller, Steck, and Foley regarding Benco's bid on ADC, stating, "I'm guessing Benco will approach with a 'no FSC' proposal." (CX2054 at 001 (email from Sullivan, "Subject: Re: Atlantic Dental Care – HOT") (emphasis in original)).

Schein's Response:

Complaint Counsel's proposed finding simply quotes the cited email. While Schein does not dispute that the email states, "I'm guessing Benco will approach with a 'no FSC' proposal," it does dispute any implication or inference that Mr. Sullivan somehow knew how Benco was going to bid as opposed to just "guessing," as he indicated in the email. (CX 2054-002).

This email string begins with a March 31, 2013 email from Michael Porro relaying information he learned about the ADC RFP from Landy Damsey (ADC). Later in the chain, Regional Manager Bobby Anderson provides market intelligence he and his team had gathered. (CX 2054-012). In particular, Mr. Anderson explained in his email to the group (Mr. Sullivan, Mr. Porro, Mr. Steck, and Mr. Chatham), that "Benco is selling totally on price," and he "will need to address several accounts in the VA Beach area [that] are watching to see what happens with" ADC. (CX 2054-012). In response to Mr. Anderson's email, Mr. Sullivan asked, "What is your specific recommendation?" (CX 2054-011). Mr. Porro also testified that, at this point in time, Landy Damsey had indicated to him that "he was going to other competitors," leading Mr. Porro to expect that competitors would be bidding. (CX 8000 (Porro, IHT at 217-18)). Mr. Sullivan's statement is simply a "guess" based on information and market intelligence provided by his team. (CX 2054).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness regarding Schein's business.

1092. Subsequent to the March 2013 communications between Sullivan and Cohen regarding ADC, Benco bid on ADC. (Ryan, Tr. 1093-1095; Sullivan, Tr. 3969; CX1417 at 001-006).

Schein's Response:

Complaint Counsel's proposed finding is misleading to the extent it suggests any connection between the March 2013 communications and Benco's bid on ADC. There is none. In addition, Complaint Counsel improperly cites to Mr. Sullivan's testimony. Mr. Sullivan did not (and cannot) make any statements supporting this proposed finding. (Sullivan, Tr. 3969). While Schein does not dispute that Mr. Cohen sent an unsolicited text message to Mr. Sullivan on March 27, 2013 indicating that Benco was going to bid on ADC, it was a declarative statement, and Mr. Cohen neither asked for Mr. Sullivan's assent nor suggested that Benco's decision was contingent on Mr. Sullivan's views. Mr. Sullivan did not respond to the message, did not engage in any discussion with Mr. Cohen concerning ADC or any potential customer, did not provide any information about Schein, and never asked Mr. Cohen whether Benco was going to bid. The text does not discuss any information about Schein's plans, policies, or practices. Mr. Cohen's message does not show or indicate any pre-existing agreement or assurances between the two companies not to do business with buying groups. (CX 6027-028-29).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Benco made its own independent decision to bid for the business of ADC. (Cohen, Tr. 724).

On March 27, 2013, after speaking with outside counsel, Ryan was able to determine that ADC had common ownership. Therefore, under Benco's policy, ADC was a single customer and Benco made the decision to bid on ADC. (Ryan, Tr. 1201-1202). Benco won the business of ADC and ADC has remained a customer of Benco from that time through the present. (Cohen, Tr. 724). Benco considers ADC a DSO because it has common ownership and control of its member dental practices. (Cohen, Tr. 724; Ryan, Tr. 1202).

During the five-plus years that ADC has been a Benco customer, the group has performed "excellently." ADC has delivered on its volume commitments to Benco and purchases almost all of its dental supplies from Benco. (Cohen, Tr. 724-25; Ryan, Tr. 1202). Consistent with DSOs, Benco's conversion rate with ADC has been 90% plus. Conversion rate means the percentage of customers within a group that are converted to Benco customers. Conversion rate is a measure of the level of compliance exhibited by a DSO or Large Group. (Ryan, Tr. 1203-1205).

ADC's common ownership allowed it to drive compliance among its member practices and has converted new customers to Benco. These new customers were previously Schein and Patterson customers. (Cohen, Tr. 726-28; Ryan, Tr. 1202). ADC's performance validates Benco's determination that ADC was, in fact, a DSO, as ADC's performance is consistent with a DSO and inconsistent with a buying group. (Cohen, Tr. 726-27; Ryan, Tr. 120-1203).

It was worth the effort for Benco to spend the time to properly evaluate ADC under Benco's policy and it was in Benco's unilateral economic interest to have taken the time necessary, gathered whatever information was available, to have properly evaluated ADC

so that Benco could add ADC to its significant portfolio of DSO accounts. (Cohen, Tr. 726-27; RX1127-500; Ryan, Tr. 1202-1203).

1093. Subsequent to the March and April 2013 communications between Sullivan and Cohen regarding ADC, Schein bid on ADC. (Sullivan, Tr. 3969; CX2020 at 001-007).

Schein's Response:

Complaint Counsel's proposed finding is misleading to the extent it suggests any connection between the March and April 2013 communications and Schein's bid on ADC. There is no evidence, or even an indication, that Schein and Benco had communications relating to Schein's bid on ADC, or that Schein's decision to bid on ADC had anything to do with Benco – it did not. While Schein does not dispute that Mr. Cohen sent an unsolicited text message to Mr. Sullivan on March 27, 2013 indicating that Benco was going to bid on ADC, it was a declarative statement, and Mr. Cohen neither asked for Mr. Sullivan's assent nor suggested that Benco's decision was contingent on Mr. Sullivan's views. Mr. Sullivan did not respond to the message, did not engage in any discussion with Mr. Cohen concerning ADC or any potential customer, did not provide any information about Schein, and never asked Mr. Cohen whether Benco was going to bid. The text does not discuss any information about Schein's plans, policies, or practices. Mr. Cohen's message does not show any pre-existing agreement or assurances between the two companies not to do business with buying groups. (CX 6027-028-29). Further, despite Mr. Cohen's unsolicited text message, Mr. Sullivan believed that ADC *was* a buying group, and Schein made a unilateral and independent decision to bid on ADC. (Sullivan, Tr. 4183; *see also* SF 1530-1537).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness regarding Schein's business.

1094. On April 8, 2013, Porro sent Sullivan Schein's planned proposal to Atlantic Dental Care. (CX2021 at 001, 026-029).

Schein's Response:

Schein does not dispute that it submitted a bid to ADC on April 8, 2013.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness regarding Schein's business.

1095. Schein's planned proposal to ADC included language that permitted Schein to terminate the agreement if Schein discovered that ADC was a buying group. (Sullivan, Tr. 3970-3971; CX2021 at 028).

Schein's Response:

Complaint Counsel's proposed finding is imprecise. Schein does not dispute that one of the ways the parties could terminate the agreement with 30-day notice was if "Schein finds out that [ADC] is *purely* a buying group, defined as 'pooling individual volume purely to obtain lower prices from suppliers of goods and services.'" (CX 2021-028 (emphasis added)). The provision does not allow for termination if "Schein discovered that ADC was a buying group" as Complaint Counsel defines it.

As Mr. Porro explained:

[I]f ... they got together solely for the purpose of just getting a discount on supplies from us and not interested in service and the other things we had to offer, that would be problematic for us. Again, we represent more than that, and that's not necessarily our culture. So this bullet calls out the fact that [ADC] didn't represent it[self] as just a group that's going to buy merchandise, represented it [as] more than that. So if we found out different, then it would be problematic.

(CX 8000 (Porro, Dep. at 207); *see also* Sullivan, Tr. 4214-15 (same)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness regarding Schein's business.

1096. Schein's planned proposal to ADC stated, "This agreement can be terminated with 30 day notice if . . . Schein finds out that is purely a buying group, defined as 'pooling individual volume purely to obtain lower prices from suppliers of good and services.'" (CX2021 at 028).

Schein's Response:

This is a restatement of CCFF 1095, and Schein incorporates its response to that proposed finding here.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness regarding Schein's business.

1097. Sullivan initially viewed ADC as nothing more than a buying group and planned to “walk away” from the group. In an April 4, 2013, email to Porro, Muller, Steck, Foley, and others, regarding ADC, Sullivan stated, “Our first reaction to this was it was simply a buying group and we were going to walk away.” (CX2021 at 013; Sullivan, Tr. 3969).

Schein’s Response:

Complaint Counsel’s proposed finding is imprecise. It was Mr. Porro who initially believed ADC was a buying group. As Mr. Porro wrote, “Bobby [a Schein Regional Manager] let me know we were invited to bid.... At first this looked like just a buying group, which led me to initially believe we could do more harm if we bid vs. not submitting a bid.” (CX 2021-013). Mr. Sullivan’s subsequent email, which Complaint Counsel cites in its proposed finding, simply reiterates Mr. Porro’s views in an effort to bring Special Markets up to speed on the situation. (CX 2021-013). Regardless, Mr. Sullivan also believed that ADC was a buying group. (Sullivan, Tr. 4183).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness regarding Schein’s business.

1098. On April 4, 2013, Sullivan also wrote, “However the more MP dug onto this the more of a Comfort Dental group this seems to be. Seeing as this then qualifies as potential Elite DSO just as Comfort is, we probably need Randy involved.” (CX2021 at 013; Sullivan, Tr. 3969).

Schein’s Response:

Schein does not dispute that Mr. Sullivan wrote this email on April 4, 2013.

But to the extent Complaint Counsel tries to imply that Mr. Sullivan's email had anything to do his April 3, 2013 call with Mr. Cohen, the implication is false and finds no support in the record.

Mr. Porro had concluded that ADC was "more than a buying group" on March 31, 2013, after speaking directly with ADC. (CX 2021-023).

On April 4, 2013, after Mr. Porro drafted the outlines of a proposal for ADC, and expressed uncertainty about whether to offer a rebate and how to structure it, Mr. Sullivan, noting a similarity with Comfort Dental, forwarded the email six minutes later to Special Markets and suggested that Mr. Foley review it. (CX 2021-013). Comfort Dental was a buying group served by Special Markets. (SF 263, 499-508). Mr. Sullivan's email had nothing to do with any communication with Mr. Cohen.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness regarding Schein's business.

1099. Comfort Dental is an Elite DSO. (Sullivan, Tr. 3969).

Schein's Response:

Comfort Dental is a buying group that Schein began doing business with in the late 1990s and continues to do so today. (RX 2947 (Cavaretta, Dep. at 35); Foley, Tr. 4633-34; *see also* SF 1627 (identifying Comfort Dental's sales in Schein's sales data from 2009 through 2017)). Comfort Dental describes itself as a "dental franchise," with its locations "independently owned and operated." (RX 2877-001). Its members consist of independent

private practices focused on pediatric dentistry. (Foley, Tr. 4632-33). Comfort Dental is a “franchisee/franchisor-type buying group, similar to Smile Source” and it has agreements with each of its members allowing them to operate as franchisees. (Foley, Tr. 4632-34). It advertises its offerings to members as including “economics [*sic*] of scale, prime locations, mass marketing, and overhead control.” (RX 2877-001). Mr. Sullivan’s testimony concerning Comfort Dental relates to Schein’s categorization of Comfort Dental under Special Markets’ elite DSO model. (Sullivan, Tr. 3969). Schein’s administrative categorization of Comfort Dental for internal accounting purposes with Special Markets does not impact the actual nature and characteristics of Comfort Dental as a group of independent dentists. (*See* RX 2767-002 (explaining that the language Schein used to describe accounts was in part to delineate which groups “should be HSD” and which “should fall into [Special Markets]”)). Dental Gator – a group that Complaint Counsel agrees is a buying group – was also “rolled into the elite DSO” category within Schein for internal accounting purposes. (*See* Meadows, Tr. 2657). Mr. Muller noted that a buying group with “500 offices moving to 1500 clearly fall into the elite-DSO model” even though “they are all individually owned” “like Comfort Dental,” as groups like this were “sophisticated buying group[s] – their goal is to help offices compete with the DSOs....” (CX 2119-001).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness regarding Schein’s business.

1100. Benco won the ADC bid. (Cohen, Tr. 553; Ryan, Tr. 1095).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Benco made its own independent decision to bid for the business of ADC. (Cohen, Tr. 724).

On March 27, 2013, after speaking with outside counsel, Ryan was able to determine that ADC had common ownership. Therefore, under Benco's policy, ADC was a single customer and Benco made the decision to bid on ADC. (Ryan, Tr. 1201-1202). Benco won the business of ADC and ADC has remained a customer of Benco from that time through the present. (Cohen, Tr. 724). Benco considers ADC a DSO because it has common ownership and control of its member dental practices. (Cohen, Tr. 724; Ryan, Tr. 1202).

During the five-plus years that ADC has been a Benco customer, the group has performed "excellently." ADC has delivered on its volume commitments to Benco and purchases almost all of its dental supplies from Benco. (Cohen, Tr. 724-25; Ryan, Tr. 1202). Consistent with DSOs, Benco's conversion rate with ADC has been 90% plus. Conversion rate means the percentage of customers within a group that are converted to Benco customers. Conversion rate is a measure of the level of compliance exhibited by a DSO or Large Group. (Ryan, Tr. 1203-1205).

ADC's common ownership allowed it to drive compliance among its member practices and has converted new customers to Benco. These new customers were previously Schein and Patterson customers. (Cohen, Tr. 726-28; Ryan, Tr. 1202). ADC's performance validates Benco's determination that ADC was, in fact, a DSO, as ADC's performance is consistent with a DSO and inconsistent with a buying group. (Cohen, Tr. 726-27; Ryan, Tr. 120-1203).

It was worth the effort for Benco to spend the time to properly evaluate ADC under Benco's policy and it was in Benco's unilateral economic interest to have taken the time necessary, gathered whatever information was available, to have properly evaluated ADC so that Benco could add ADC to its significant portfolio of DSO accounts. (Cohen, Tr. 726-27; RX1127-500; Ryan, Tr. 1202-1203).

XI. BENCO PLANNED TO SHORE UP THE AGREEMENT WITH SCHEIN AND PATTERSON.

1101. In the fall of 2013, Benco discovered that the fourth largest distributor, Burkhart, was discounting to buying groups. (CCFF ¶¶ 1207, 1201, 1459; *see generally* Section XVI, *infra*). In response, McElaney of Benco spoke with Jeff Reece of Burkhart regarding buying groups. (CCFF ¶¶ 1208, 1209, 1212). Following his call with Reece, McElaney reported to Cohen, his boss, "JEFF [REECE] DOES NOT GET IT!!" (CX0023 at 001 (emphasis in original); CCFF ¶1218).

Schein's Response:

No response, other than to note that it is not clear when Benco discovered that Burkhart was discounting to buying groups, which it had been doing since at least January 2012. (Reece, Tr. 4465-67).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding.

Mike McElaney, a Benco employee, had previously worked at Burkhart with Jeff Reece. McElaney had left Burkhart around 2011. (Reece, Tr. 4376; Cohen, Tr. 828-29). After he left Burkhart, McElaney remained friends with Reece, and they exchanged occasional personal communications. (Reece, Tr. 4376).

In October 2013, McElaney had a conversation with Mr. Reece concerning buying groups, in which Reece claimed that McElaney said that buying groups were “not good for the medical industry” because of “declining margins.” (Reece, Tr. 4378). At the time, Reece believed that Benco was working with buying groups, and when Reece asked McElaney whether Benco was working with buying groups, McElaney declined to answer. (Reece, Tr. 4377-78 (“I said, so you're not working in this space. Is that correct? And he never answered.”). There is no evidence that McElaney discussed Benco's policy, or Schein's or Patterson's view of buying groups, during those calls. (Reece, Tr. 4375-81).

In none of the conversations identified by Reece did Benco ever suggest how Burkhart should conduct its business. (Reece, Tr. 4389 (“ Q. Over the course of those three conversations with Benco about buying groups, was there any suggestion of how Burkhart should conduct its business? A. No.”)). Reece's perception was that Benco was doing business with buying groups at that time or was willing to do business with buying groups. (Reece, Tr. 4445).

Reece was never told that there was any agreement between Benco and any other company not to do business with buying groups or dentist groups, and was not invited to

join such an agreement. (Reece, Tr. 4445-46). Burkhart did not change or modify any policy, including any policy to do business with buying groups, as a result of any communication with Benco. (Reece, Tr. 4446).

1102. In response to news that Burkhart was discounting to buying groups, Ryan asked Cohen to contact Tim Sullivan and Paul Guggenheim to shore up the agreement. (CCFF 1103, 1105, 1106).

Schein's Response:

Complaint Counsel cites no record evidence to support this finding. It only cites to other proposed findings, which – as set forth in Schein's specific replies – also fail to support its characterization of the evidence. (SRF 1103, 1105-06).

As an initial matter, the proposed fact assumes the existence of “the agreement.” No document, email, or testimony establishes any agreement between Schein and Benco, let alone a three-way agreement involving all three Respondents.

Moreover, whatever Mr. Ryan suggested to Mr. Cohen, the evidence is unequivocal that no such communication between Mr. Cohen and Mr. Sullivan ever occurred. Mr. Cohen never indicated that he would follow Mr. Ryan's suggestion; Mr. Cohen denied that any such call occurred; Mr. Ryan testified that he never learned of any such call; and the communications log prepared by Complaint Counsel shows no such communication. (SF 1555; Cohen, Tr. 901-02; Ryan, Tr. 1263; CX 6027).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding.

1103. On September 16, 2013, Ryan wrote to Cohen in response to concern that Burkhart was selling to buying groups: "CHUCK --- maybe what you should do is make sure you tell Tim [Sullivan] and Paul [Guggenheim] to hold their positions as we are[.]" (CX0023 at 001 (emphasis in original); Ryan, Tr. 1114-1115; Cohen, Tr. 581).

Schein's Response:

This is essentially the same proposed fact as CCFF 1101-1102, and Schein incorporates its responses to those proposed findings here.

Whatever Mr. Ryan suggested to Mr. Cohen, the evidence is unequivocal that no such communication between Mr. Cohen and Mr. Sullivan occurred. Mr. Cohen never indicated that he would follow Mr. Ryan's suggestion; Mr. Cohen denied that any such call occurred; Mr. Ryan testified that he never learned of any such call; and the communications log prepared by Complaint Counsel shows no such communication. (SF 1555; Cohen, Tr. 901-02; Ryan, Tr. 1263; CX 6027).

Moreover, Mr. Ryan's speculation as to Schein's "position" cannot be taken for its truth. Mr. Ryan "had no knowledge of" what Mr. Sullivan and Mr. Guggenheim's "actual positions were" and "only know[s] what [he] can see in the street." (Ryan, Tr. 1114-15).

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, Pat Ryan testified that on September 16, 2013 – the date of the cited exhibit – he “had no knowledge of what their [Sullivan's and Guggenheim's] actual positions were.” (Ryan, Tr. 1114). He continued: “I had no knowledge of what their position actually was. I only know what I can see in the street.” (Ryan, Tr. 1114-15). Ryan even reiterated his testimony a third time. (Ryan, Tr. 1205-1206 (acknowledging that he was just “speculating.”)).

Second, Chuck Cohen never did anything in response to Pat Ryan e-mail. (Cohen, Tr. 843). Cohen never even spoke to Sullivan or Guggenheim about buying groups at any time after the date of the cited exhibit. (Cohen, Tr. 842-43).

1104. At trial, Ryan testified that his September 16, 2013, email referred to telling Tim Sullivan and Paul Guggenheim to hold their “position” of not working with buying groups, just as Benco was holding its position of not working with buying groups. (Ryan, Tr. 1114-1115; *see also* Cohen, Tr. 581-582).

Schein's Response:

Complaint Counsel's proposed finding misstates the testimony. In fact, the asserted fact is based on Complaint Counsel's *question*, which is not evidence, and not the witness's actual answer, which is evidence.

Mr. Ryan testified that he “had no knowledge of” what Mr. Sullivan and Mr. Guggenheim's “actual positions were” and “only know[s] what [he] can see in the street.” (Ryan, Tr. 1114-15). Thus, Mr. Ryan's testimony cannot be relied upon for the assertion

that Schein was “not working with buying groups, just as Benco was.” The evidence of Schein’s actual practices with buying groups shows the opposite.

As noted, whatever Mr. Ryan suggested to Mr. Cohen, the evidence is unequivocal that no such communication between Mr. Cohen and Mr. Sullivan occurred. Mr. Cohen never indicated that he would follow Mr. Ryan’s suggestion; Mr. Cohen denied that any such call occurred; Mr. Ryan testified that he never learned of any such call; and the communications log prepared by Complaint Counsel shows no such communication. (SF 1555; Cohen, Tr. 901-02; Ryan, Tr. 1263; CX 6027).

Patterson’s Response:

Patterson joins Schein and Benco’s responses.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, Pat Ryan testified that on September 16, 2013 – the date of the cited exhibit – he “had no knowledge of what their [Sullivan’s and Guggenheim’s] actual positions were.” (Ryan, Tr. 1114). He continued: “I had no knowledge of what their position actually was. I only know what I can see in the street.” (Ryan, Tr. 1114-15). Ryan even reiterated his testimony a third time. (Ryan, Tr. 1205-1206 (acknowledging that he was just “speculating.”)).

Second, Chuck Cohen never did anything in response to Pat Ryan e-mail. (Cohen, Tr. 843). Cohen never even spoke to Sullivan or Guggenheim about buying groups at any time after the date of the cited exhibit. (Cohen, Tr. 842-43).

1105. Cohen believed that Ryan was suggesting Cohen reach out and reiterate Benco's no buying group policy to Sullivan and Guggenheim. (Cohen, Tr. 581-582).

Schein's Response:

Mr. Cohen did not testify as to his belief at the time he received this email. Instead he testified, "***Looking at it today***, that is I believe what Patrick was trying to suggest that I do." (Cohen, Tr. 582 (emphasis added)). Regardless, whatever Mr. Cohen believed Mr. Ryan was suggesting, the evidence is unequivocal that no such communication between Mr. Cohen and Mr. Sullivan occurred. Mr. Cohen never indicated that he would follow Mr. Ryan's suggestion; Mr. Cohen denied that any such call occurred; Mr. Ryan testified that he never learned of any such call; and the communications log prepared by Complaint Counsel shows no such communication. (SF 1555; Cohen, Tr. 901-02; Ryan, Tr. 1263; CX 6027). Additionally, there is no evidence that Mr. Cohen had *ever* communicated Benco's buying group policy to Mr. Sullivan. (SRF 662-64). As such, the proposed fact's characterization that Cohen would "reiterate Benco's no buying group policy to Sullivan" is misleading and unsupported.

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, Pat Ryan testified that on September 16, 2013 – the date of the cited exhibit – he "had no knowledge of what their [Sullivan's and Guggenheim's] actual positions were." (Ryan, Tr. 1114). He continued: "I had no knowledge of what their position actually was. I only know what I can see in the street." (Ryan, Tr. 1114-15). Ryan even

reiterated his testimony a third time. (Ryan, Tr. 1205-1206 (acknowledging that he was just “speculating.”)).

Second, Chuck Cohen never did anything in response to Pat Ryan e-mail. (Cohen, Tr. 843). Cohen never even spoke to Sullivan or Guggenheim about buying groups at any time after the date of the cited exhibit. (Cohen, Tr. 842-43).

1106. At the time of Ryan’s September 16, 2013, email, Benco had a no buying group policy (Cohen, Tr. 444-445), and Cohen understood that Benco, Schein, and Patterson all had a similar policy with respect to buying groups. (Cohen, Tr. 582, 590; CX0301 (Cohen, IHT at 310)).

Schein’s Response:

There is no basis for the assertion regarding Mr. Cohen’s understanding.

At trial, Mr. Cohen noted that “it’s hard to know from the perspective of today what I understood Tim Sullivan and/or Schein’s perspective on buying groups to be on September 16, 2013.” (Cohen, Tr. 583). So, Complaint Counsel turned to Mr. Cohen’s IHT. But at his Investigational Hearing, Mr. Cohen made clear that he did not have any “communications with Mr. Sullivan that gave [him] the impression that Schein does not sell to GPOs.” (SRF 677-78; CX 0301 (Cohen, IHT at 225)). Mr. Cohen was also clear that he had no knowledge of Schein’s policies or practices. (SRF 677-78; CX 0301 (Cohen, IHT at 216 (testifying that, it is “not ... fair to say” that he had an “understanding that Schein was not selling to GPOs” because “[a]s far as their overall policy, I don’t know.”))). After Ms. Kahn acknowledged that “I know you have no recollection,” she insisted the he give his interpretation about “the way that you [would] read these text messages.” (CX 0301 (Cohen, IHT at 280)). Another twenty pages of testimony later – which included testimony about Mr. Guggenheim’s email to Mr. Cohen about ADC and an *internal* Benco document containing competitive intelligence suggesting that Schein

was not working with buying groups – Ms. Kahn returned to the well and tried to press Mr. Cohen again about his “understand[ing]” of “Mr. Sullivan’s position ... on buying groups.” (CX 0301 (Cohen, IHT at 310)). At that point, Mr. Cohen simply speculated that he “think[s] that the policy that Henry Schein had was that they do not recognize GPOs,” basing his speculation on the same text messages that he already said he could not recall.¹⁶ (CX 0301 (Cohen, IHT at 310)).

Patterson’s Response:

Patterson joins Schein and Benco’s responses.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, Pat Ryan testified that on September 16, 2013 – the date of the cited exhibit – he “had no knowledge of what their [Sullivan’s and Guggenheim’s] actual positions were.” (Ryan, Tr. 1114). He continued: “I had no knowledge of what their position actually was. I only know what I can see in the street.” (Ryan, Tr. 1114-15). Ryan even reiterated his testimony a third time. (Ryan, Tr. 1205-1206 (acknowledging that he was just “speculating.”)).

Second, Chuck Cohen never did anything in response to Pat Ryan e-mail. (Cohen, Tr. 843). Cohen never even spoke to Sullivan or Guggenheim about buying groups at any time after the date of the cited exhibit. (Cohen, Tr. 842-43).

¹⁶ Complaint Counsel does not contend that the text messages Mr. Cohen referred to actually disclosed Schein’s policies or practices, or otherwise suggest that Schein had a no-buying-group policy. They do not.

1107. Around the time of this exchange, Cohen approached Burkhart about joining the conspiracy. (CCFF ¶¶ 1226, 1227, 1228, 1230, 1231, 1233, 1234, and 1237).

Schein's Response:

No response, other than to note that the use of the phrase “the conspiracy” *assumes* a single-overarching conspiracy, rather than separate *alleged* conspiracies or attempted conspiracies. Complaint Counsel introduced *no evidence* of any communications between or among Schein, Patterson, or Burkhart; only communications from Benco, which were unsolicited, at least as to Schein and Burkhart. Nor did Complaint Counsel introduce any evidence that Schein (or Patterson or Burkhart) was aware of communications that Benco was having with the others. As such, Complaint Counsel’s hub-and-spokes single conspiracy claim fails as a matter of law because they have not established the existence of the “rim” of the conspiratorial wheel. *See, e.g., Dickson v. Microsoft Corp.*, 309 F.3d 193 (4th Cir. 2002) (“allegations of single ‘rimless wheel’ conspiracy did not assert viable conspiracy under Sherman Act’s restraint-of-trade provision.”); *United States v. Bustamante*, 493 F.3d 879, 885 (7th Cir. 2007) (“For a hub and spoke conspiracy to function as a single unit, a rim must connect the spokes together....”).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding.

1108. In February of 2014, Paul Jackson of Benco emailed Cohen and McElaney about Burkhart’s business with buying groups. (CX0040 at 001). Twice in the email chain (once in a

February 10, 2014, email, and once in a February 11, 2014, email) Jackson asks McElaney to contact Burkhart about buying groups being harmful to dental companies. The February 11 email states, “Mike, please talk some cents [*sic*] into them”; the February 10 email states, “Mike, maybe you can give someone at Burkhart a call to help them understand most GPO contacts have to be able to install equipment nationwide. Last I checked there is no hope of Burkhart being nationwide.” (CX0040 at 001).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Mike McElaney, a Benco employee, had previously worked at Burkhart with Jeff Reece. McElaney had left Burkhart around 2011. (Reece, Tr. 4376; Cohen, Tr. 828-29). After he left Burkhart, McElaney remained friends with Reece, and they exchanged occasional personal communications. (Reece, Tr. 4376).

In October 2013, McElaney had a conversation with Mr. Reece concerning buying groups, in which Reece claimed that McElaney said that buying groups were “not good for the medical industry” because of “declining margins.” (Reece, Tr. 4378). At the time, Reece believed that Benco was working with buying groups, and when Reece asked McElaney whether Benco was working with buying groups, McElaney declined to answer. (Reece, Tr. 4377-78 (“I said, so you’re not working in this space. Is that correct? And he never answered.”)). There is no evidence that McElaney discussed Benco’s policy, or Schein’s or Patterson’s view of buying groups, during those calls. (Reece, Tr. 4375-81).

In none of the conversations identified by Reece did Benco ever suggest how Burkhart should conduct its business. (Reece, Tr. 4389 (“ Q. Over the course of those three conversations with Benco about buying groups, was there any suggestion of how Burkhart should conduct its business? A. No.”)). Reece’s perception was that Benco was doing business with buying groups at that time or was willing to do business with buying groups. (Reece, Tr. 4445).

Reece was never told that there was any agreement between Benco and any other company not to do business with buying groups or dentist groups, and was not invited to join such an agreement. (Reece, Tr. 4445-46). Burkhart did not change or modify any policy, including any policy to do business with buying groups, as a result of any communication with Benco. (Reece, Tr. 4446).

XII. THE BIG THREE COMMUNICATED ABOUT THE TDA BUYING GROUP.

A. Background on TDA Perks

1109. The Texas Dental Association, also known as “TDA,” holds a meeting for its members annually. (Rogan, Tr. 3561-3562; Steck, Tr. 3691).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1110. In October 2013, TDA launched a buying group referred to as TDA Perks. (Cohen, Tr. 576; Rogan, Tr. 3562). The buying group was supplied by SourceOne. CX2616 at 001-002; CX9024 (Osio (SourceOne), Dep. at 80-82).

Schein's Response:

Complaint Counsel's proposed finding is wrong. TDA Perks is not a buying group, it is simply a website that is operated under a marketing/endorsement agreement with SourceOne. Dentists do **not** become members of the webportal. They simply shop on the site like any dentists would shop on any other online site.

Specifically, in September 2013, the Texas Dental Association ("TDA") entered into an agreement with SourceOne, an operator of a website that offered discounts on dental supplies. (CX 9024 (Osio, Dep. at 365-66, 378-79)). Pursuant to that agreement, SourceOne agreed to operate a website under the name TDA Perks Supplies, and the TDA agreed to endorse or promote this website. (CX 9024 (Osio, Dep. at 378-79)). Mr. Donovan Osio, the General Manager of TDA Financial Services, Inc. (the for-profit subsidiary of the TDA) explained that "TDA Perks Supplies is a white label marketing name that we put together in -- with SourceOne Dental in order to market SourceOne Dental." (CX 9024 (Osio, Dep. at 62)). Neither SourceOne, nor the TDA, was the actual seller of the supplies that TDA members purchased through the TDAPerks Supplies portal. Rather, SourceOne had one or more traditional distributors who shipped the products to customers. (CX 9024 (Osio, Dep. at 403-04, 428-29)).

Nor did Mr. Rogan testify that TDA launched a buying group. Indeed, he referred to the TDA Perks Supplies portal as a "competitor" to Patterson. (Rogan, Tr. 3562-63).

It is also important to note that TDA Perks, even if it were considered a buying group, would fall outside Complaint Counsel's relevant market definition. Since the TDA Perks Supplies program does not offer full-service distribution, neither it, nor the suppliers

to the program, fit within the relevant market definition. The fact that Complaint Counsel asserts that Respondents were still concerned about TDA Perks shows that Complaint Counsel's relevant market definition is flawed.

The asserted fact is also irrelevant, as Complaint Counsel "do[es] not allege a group boycott of the [TDA] trade show." (Kahn, Tr. 52; *see also* Fed. R. Evid. 404).

Patterson's Response:

The TDA launched TDA Perks Supplies on October 1, 2013 without any notice to distributors or manufacturers. (CX9024 (Osio, Dep. at 559 ("Q. In fact, Patterson wouldn't have had any knowledge about TDA Perks Supplies until you started to roll it out to your member dentists; is that correct? A. Yes.))). The rollout of TDAPerksSupplies "caused mass confusion" in the vendor world concerning what the source of the product was. (CX9024 (Osio, Dep. at 395–96)). Manufacturers whose products were listed for sale on the TDAPerksSupplies website did not know what TDAPerksSupplies was and did not know from what source TDAPerksSupplies was getting its products. (RX0146 at 1 (Clint Edens wrote on October 23, 2013 "I have contacted [4 manufacturers]...and asked them for perspective on them selling through the TDA site. None approved and only Sybron was aware."); RX0135 at 1 (dental supplies manufacturer Ivoclar "had never heard of this website nor was [it] aware."); RX0139 at 1 (dental supplies manufacturer Kerr wrote "this is not an authorized Kerr dealer and in order for them to get these prices...they are buying either gray market or potentially counterfeit products."); RX0180 at 1 (dental supplies manufacturer Hu-Friedy wrote "This is the first time that Joy or I have heard about this company. We reached out to a number of people at Hu-Friedy but no one has heard of them either. What we do know is they are not an authorized Hu-Friedy dealer and are not supported in any way by our company.))). One manufacturer sent a cease and desist

letter to SourceOne in September 2013, before any distributor had knowledge of TDAPerksSupplies. (RX0173 at 1 (“Heraeus sent SourceOne a cease and desist order a couple of months ago...”).

Products were ordered through Source One Dental Supply, which operated a website tdaperkssupplies.com. SourceOne “did not actually buy or sell product.” (CX9024 (Osio, Dep. at 363–64 (“Q. You learned that that was not true at some point, that they did not actually buy and sell product? A. Yes. That is correct. I learned at some point that that is not how they worked. Q. In fact, they don't -- they don't actually carry any product. They don't hold any product in inventory. They don't buy it. They don't sell it. They don't actually touch the product; is that right? A. Yes, that's correct.”) (objection omitted))). The products were supplied by several small distributors, primarily from New Jersey and Washington state, whose products were listed on the TDAPerksSupplies website and sold and shipped by those small distributors, whose identity was not disclosed on the website. SourceOne took a commission on sale of those products by the small distributors. (CX9024 (Osio, Dep at 363, 435, 626)). At trial, Complaint Counsel’s expert, Dr. Marshall, did not even know that TDAPerks already had a distributor, SourceOne Dental. (Marshall, Tr. 3299–3300).

TDA Perks Supplies was not a buying group as defined by Complaint Counsel. It is not an “organization of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately managed dental practices,” Compl. ¶ 3, but rather an entity of a state dental association provided as a benefit to its members. Dr. Marshall did not identify the TDA or TDAPerksSupplies as a “buying group.” (Marshall, Tr. 323-24).

Benco's Response:

Benco has no specific response to the proposed finding.

1111. Benco viewed TDA Perks as a buying group. (Cohen, Tr. 576 (Cohen saw TDA Perks as a buying group); Ryan, Tr. 1104-1105).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1112. Schein viewed TDA Perks as a buying group. (Sullivan, Tr. 4011-4013 (Sullivan viewed TDA Perks as a buying group); CX2746 at 003 (With respect to TDA creating the TDA Perks program, Sullivan writes in an April 28, 2014 email: "I don't believe that creating a Buying Group mentality with State Associations is a good long term strategy."); CX2616 at 003-004; CX2747 at 001).

Schein's Response:

Complaint Counsel's proposed finding is misleading, and the cited testimony and documents are taken out of context. When asked if he "viewed the TDA Perks Program as a buying group," Mr. Sullivan testified, "I don't know if I would put them in that category. They -- they *could be*, yes." (Sullivan, Tr. 4011-12 (emphasis added)). Mr. Sullivan explained:

[W]hat I'm stating here is that the state association, which is the TDA, we view them as a neutral party. Their members are our customers. So we go to their meeting and their convention to -- we pay them to be at their meeting, to be at -- to have a booth, have a presence as a sales force there. And then they switched their independent to now say when their members, our customers, showed up at the meeting, they're pointing them

somewhere else and saying, welcome in, ignore the Schein booth, we want you to buy through their -- through their organization. For us, that crossed the independence that we want to have with our partnership with our trade associations, the state associations.

(Sullivan, Tr. 4011-12). This is what Mr. Sullivan relayed in his April 28, 2014 email as well: “We can and do support the associations in MANY ways and continue to have strong relationships with them, but there are a few that are starting to dip their toes into competing with us” (CX 2746-003-04). Indeed, Mr. Sullivan’s email specifically highlights the difference in Schein’s response from that of Benco and Patterson: “[TDA] actually thanked us for our approach vs. that of both PDCO and Benco ... we already have plans to meet with them on how we ‘fix’ this for next year.” (CX 2746-001-02).

Complaint Counsel also relies on Regional Manager Randall McLemore’s October 11, 2013 email providing additional information to his team. Mr. McLemore did not call TDA Perks a buying group. He explained, “TDA now has a website where a ‘member’ can fill many of their supply needs. ... They are using a company called Sourceonedental.com....” (CX 2616-002). Likewise, CX 2747 does not say anything about buying groups.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1113. Patterson viewed TDA Perks as a buying group. (Misiak, Tr. 1403 (TDA Perks is “a program to buy supplies at a discount through the TDA”); CX0316 (Misiak, IHT at 298-299) (TDA Perks Supply program is “a buying group put together by the Texas Dental Association”); Misiak, Tr. 1407 (Misiak previously stated under oath that TDA Perks was a buying group)).

Schein's Response:

No response.

Patterson's Response:

No Patterson witness testified that TDA Perks was a “buying group” after having been informed of how Complaint Counsel defines that term. Misiak described TDAPerksSupplies at trial “as a program to buy dental supplies at a discount from TDA,” and Complaint Counsel attempted to refresh his recollection (not to impeach) using Misiak’s prior deposition testimony in which he had described TDA Perks as a “buying group put together by the Texas Dental Association.” (Misiak, Tr. 1403–07). But Complaint Counsel then simply moved on with her examination and never asked Misiak whether his recollection was refreshed by the prior testimony. (Misiak, Tr. 1403–07). Thus, the cited authority does not support the proposition.

Regardless, other Patterson witnesses did not consider TDA Perks a buying group. Paul Guggenheim testified that the TDA “created an organization to sell dental supplies to their members.” (CX0314 (Guggenheim, IHT at 330, 336)). He testified “I’m not sure they called it a buying group” (CX0314 (Guggenheim, IHT at 329)), “and it may not in fact be a buying group, technically.” (CX0314 (Guggenheim, IHT at 329); *see also* CX0314 (Guggenheim, IHT at 329) (general confusion over meaning of the term “buying group” as it is used with respect to TDAPerksSupplies)). Rogan testified “I don’t know if it was a buying group.” (CX0317 (Rogan, IHT at 289); *see also* CX0317 (Rogan, IHT at 289 (twice testifying “I don’t know if it was a buying group”))).

In any event, TDA Perks was not a buying group as defined by Complaint Counsel, because it is not an “organization of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately managed

dental practices,” Compl. ¶ 3, but rather is an entity of a state dental association provided as a benefit to its members. (CX9024 (Osio, Dep. at 574)).

Benco’s Response:

Benco has no specific response to the proposed finding.

1114. The TDA Perks program was a threat to Respondents because it was a buying group—and because TDA planned to facilitate the state association buying group model in other states as well. (Steck, Tr. 3697; *see also* CX9024 (Osio, SourceOne Dep. at 118-121, 123); CX2746 at 003-004).

Schein’s Response:

The asserted fact is not supported by the cited evidence.

Mr. Steck did not state that TDA Perks was a “threat,” that it was “a buying group,” or that he was concerned because the “TDA planned to facilitate” similar programs in other states. Mr. Steck simply noted that he was concerned because the TDA program represented a “change in [the TDA’s] operating model.” (Steck, Tr. 3697). Complaint Counsel did not ask what concerned Mr. Steck about the change in the model, or whether his concerns had anything to do with buying groups, the TDA’s refusal to work with Schein, or the TDA’s decision to promote a competitor and abandon its neutral marketing position at annual trade shows. Complaint Counsel’s attempt to fill the void by speculating about Mr. Steck’s concerns is, thus, improper.

Complaint Counsel’s citation to Mr. Osio’s deposition transcript in another case is also inappropriate. Mr. Osio had no personal knowledge of the effects of the TDA program on Respondents, or how Respondents viewed such programs. While Mr. Osio’s testimony establishes that Mr. Osio had conversations with other state associations, there is no evidence that any Respondent was aware of them, or of the kickbacks that the TDA would receive from SourceOne if such discussions were successful.

Complaint Counsel's citation to CX 2746 is also inapposite. As noted in response to CCFF 1112, Mr. Sullivan was simply providing an update about what happened after the TDA refused to work with Schein. (SRF 1112). Mr. Sullivan noted that he had plans to meet with the TDA again to try address the situation "for next year" and hoped to be in a "mutually better position with the TDA very soon." (CX 2746-001-02). This shows the opposite of a boycott. To the extent Mr. Sullivan expressed any concern, it was simply that, by endorsing a competitor (which Complaint Counsel excludes from the relevant market because it does not offer full-service distribution), the concern was simply that the association was starting "to dip their toes into competing with us," and he thought it was improper that a partner would do so, "[j]ust as they would not want us owning or sponsoring specific dentists or large groups." (CX 2746-004).

Patterson's Response:

The cited authorities do not relate to Patterson and thus do not support application of this proposed finding to Patterson. There is no evidence that Patterson, Schein or Benco knew of the TDA's expansion plans. (CX9024 (Osio, Dep. at 160–61 ("I am not sure if they knew about the expansion plan.")))).

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the evidence adduced at trial. Benco was not threatened by TDA Perks because Benco believes that buying groups "are a failed business model in dentistry." (CX0301 (Cohen, IHT at 377); see also CX0303 (McElaney, IHT 80-81 ("I've never seen a [buying group] model that works."))). Contrary to Complaint Counsel's assertion, Chuck Cohen testified, of the buying group model, "I don't view it as a threat to our business or a driver in [sic] any change in our business." (CX0301 (Cohen, IHT at 377)).

Moreover, Complaint Counsel's allegation that Benco was in some way "threatened" by TDA Perks because it was a buying group ignores the fact that Benco viewed TDA Perks not primarily as a buying group, but as a direct competitor.

1115. TDA planned to facilitate the opening of the state dental association buying group model in Arizona, Florida, Illinois, Louisiana, South Carolina, North Carolina, Pennsylvania, Michigan, and Virginia. (CX9024 (Osio, SourceOne Dep. at 118-121, 123)).

Schein's Response:

The cited testimony does not support the proposed finding.

As an initial matter, for reasons stated in response to CCFF 1110, SourceOne is a competing online distributor of dental supplies – not a buying group. (SRF 1110). State dental association programs are also not buying groups; they simply endorse online websites through which dentists can buy supplies. For example, no one would consider Amazon to be a buying group, any more so than Walmart is. A state dental association that has a marketing arrangement with an online portal is also not a "buying group." In fact, the term "buying group" does not appear once in Mr. Osio's testimony. (CX 9024 (Osio, Dep. at 1-684)).

In addition, the TDA did not facilitate the opening of state dental association programs. Mr. Osio testified that he had discussions with SourceOne about expanding SourceOne's platform and "the goal was to *facilitate introductions*." (CX9024 (Osio, Dep. at 118, 123) (emphasis added)). Moreover, most of the states listed were not interested in developing such a program.

Patterson's Response:

TDA Perks was not a buying group as defined by Complaint Counsel, because it is not an "organization of independent dentists that seek to aggregate and leverage the

collective purchasing power of separately-owned and separately managed dental practices,” Compl. ¶ 3, but rather is an entity of a state dental association provided as a benefit to its members, so it could not facilitate the opening of a buying group model. Otherwise, Patterson has no specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1116. Schein, Patterson, and Benco viewed the TDA buying group as a threat. (Steck, Tr. 3697; CX1062 (new competitor); CX2746 at 003-004 (viewed as competition); CX2616 at 002-003 (fear of losing customers); CX0108 at 002 (viewed as competition)).

Schein’s Response:

There is no support for the assertion that Schein, Patterson, and Benco shared a position or view on TDA Perks. Complaint Counsel only cites to Schein testimony and documents, and one Patterson document.

As noted in SRF 1112 and 1114, incorporated by reference here, Schein did not view the “TDA buying group as a “threat.” Instead, Schein was concerned that the TDA decided to endorse one of its competitors, SourceOne.

To the extent there was a concern about the TDA competing with Schein, it was not because it was a buying group, but because the TDA was selling supplies through SourceOne in competition with Schein.

Patterson’s Response:

Patterson’s concern about TDAPerksSupplies was that the TDA had transformed from a partner into a competitor, not that it posed a competitive threat. (RX0125 at 1 (“very disturbing that we support the TDA in multiple ways and this is going on.”); CX0109 at 1 (Rogan writes “Partnering and competing in the same paragraph? That is an oxymoron.”)).

As Donovan Osio of the TDA opined, “I think they did not like the idea that the states would begin to endorse a distributor.” (CX9024 (Osio, Dep. at 115)). Rogan explained at his investigational hearing, “We compete with people all the time. It is that the TDA is made up of our customers, so it started to compete against us, and we don’t need to give money, donate money to a dental show that supports our competitors.” (CX0317 (Rogan, IHT at 317)).

TDA Perks was not a buying group as defined by Complaint Counsel, because it is not an “organization of independent dentists that seek to aggregate and leverage the collective purchasing power of separately-owned and separately managed dental practices,” Compl. ¶ 3, but rather is an entity of a state dental association provided as a benefit to its members. (CX9024 (Osio, Dep. at 62)).

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the evidence adduced at trial. Benco believes that buying groups “are a failed business model in dentistry.” (CX0301 (Cohen, IHT at 377); *see also* CX0303 (McElaney, IHT 80-81 (“I’ve never seen a [buying group] model that works.”))). Contrary to Complaint Counsel’s assertion, Chuck Cohen testified, of the buying group model, “I don’t view it as a threat to our business or a driver in [sic] any change in our business.” (CX0301 (Cohen, IHT at 377)).

1117. For years, Schein, Patterson, and Benco provided financial support for the TDA by paying to attend its annual meetings and trade shows. Schein paid the Texas Dental Association to attend its annual TDA Trade Show. (CX0305 (Cavaretta, IHT at 207); CX0311 (Sullivan, IHT at 358-359)). Patterson also paid for its booth at the TDA annual trade show, and provided other monetary support to the TDA apart from paying for its booth. (CX0317 (Rogan, IHT at 323)). Benco paid for its booth at the 2014 TDA trade show, prior to withdrawing. (CX0301 (Cohen, IHT at 337)).

Schein's Response:

Schein did not “provide[] financial support for the TDA”; Schein paid for exhibition space at a trade show that had been a neutral provider of exhibition space and did not promote one distributor over another, until 2014.

Patterson's Response:

This proposed finding is vague in that it lacks a timeframe. Patterson provided extensive monetary and other support to the TDA, which included paying to exhibit at the TDA Annual Meeting with fees totaling over \$1 million from 2005 through 2013. (CX9024 (Osio, Dep. at 583-584)). Patterson did not send in a deposit in October 2013 for the 2014 Annual Meeting, and on November 6, 2013 the TDA canceled Patterson's exhibit space for the 2014 Annual Meeting. (CX9024 (Osio, Dep. at 185, 482); RX0166 at 1 (“On Wednesday, November 6, I have released the reserve status on the Patterson Dental Booth space and it has now been assigned to other vendors.”)). Conversely, both Schein and Benco sent in their deposits, and paid in full for exhibit space at the 2014 Annual meeting. (CX9024 (Osio, Dep. at 203, 204, 566, 567, 583-584)). Benco and Schein each forfeited those payments in April 2014 when they decided at that time not to attend the 2014 TDA Annual Meeting, 6 months after Patterson's space had been released. (CX9024 (Osio, Dep. at 480-482)).

Benco's Response:

Benco has no specific response to the proposed finding.

B. Cohen Instructed Regional Manager to Contact Competitors Regarding TDA.

1118. On October 14, 2013, Cohen instructed his Regional Manager in Texas, Ron Fernandez, to contact Schein and Patterson to discuss cutting back support for TDA's meetings and programs

because TDA was starting a buying group. (CX1057 at 001; CX8015 (Cohen, Dep. at 362)). On October 14, 2013, Cohen wrote, “Suggest that we make it clear to the TDA that we will be cutting back our support of their meetings & programs, but that’s your call. Also, give a heads up to our friends from Patterson, Schein, Midwest, etc. . . .” (CX1057 at 001).

Schein’s Response:

The cited evidence does not support the asserted fact, or Complaint Counsel’s characterization.

Mr. Cohen’s October 14, 2013 email contains two separate sentences, one in which Mr. Cohen relays his suggestion about Benco’s response to the TDA, and a second sentence, in which he suggests that Mr. Fernandez reach out to multiple distributors, including Midwest Dental, Patterson, and Schein. But in the portion of the sentence Complaint Counsel omits through the strategic use of ellipses, Mr. Cohen specifically advises Mr. Fernandez that each distributor “can/should/will make their own decisions.” Mr. Cohen simply suggested that other distributors should “understand what’s going on here.” (CX 1057). Mr. Cohen did *not* tell Mr. Fernandez to “discuss cutting back support for TDA’s meeting and programs.”

The message that was actually conveyed by Mr. Fernandez to Schein was also memorialized in Mr. Showgren’s October 15, 2013 email. (CX 0178). Because Complaint Counsel did not call Mr. Fernandez to testify at trial, and no testimony was elicited at trial concerning this document or the alleged instruction, any assertion about what was conveyed beyond what is reflected in Mr. Showgren’s October 15, 2013 email is pure speculation.

Moreover, as detailed below in response to CCFF 1120, Schein acted appropriately in response to Mr. Fernandez’s unsolicited call. In a nutshell, Mr. Showgren made it clear to Mr. Fernandez that he would “NOT discuss a pricing response and any action would

have to be cleared by my Legal Team,” and reported the conversation to Mr. Sullivan and others. (SRF 1120; CX 0178-003). Mr. Sullivan reiterated in even stronger terms that “we should NOT be having these discussions w[ith] Benco.” (SRF 998, 1088; CX 0178-002).

Patterson’s Response:

Complaint counsel’s quote of CX1057 is incomplete and stops mid-sentence. Complaint Counsel quotes Cohen as stating “also give a heads up to our friends from Patterson, Schein, Midwest, etc...” but omits that the sentence continues “*they can/should/will make their own decision on how to respond*, but they should at least understand what is going on here.” (CX1057 at 1 (*emphasis added*)).

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the evidence. The very document that Complaint Counsel cites makes clear that Chuck Cohen did not direct action be taken with respect to the TDA, but merely made suggestions, specifically writing to Ron Fernandez “that’s your call.” (CX1057 at 001). Moreover, Complaint Counsel mischaracterizes Respondent’s reasons for cutting their support of the TDA. Respondents did not react to the TDA forming a buying group. Indeed, buying groups in and of themselves are not competitors of Respondents, and do not typically succeed in the dental industry. (CX0301 (Cohen, IHT at 377 (stating that buying groups “are a failed business model in dentistry” and are not a threat to Benco); *see also* CX0303 (McElaney, IHT 80-81 (“I’ve never seen a [buying group] model that works.”))). Rather, Respondents’ reactions were primarily due to the TDA—an organization that Respondents had supported financially—was transforming itself into a *distributor* to directly compete with Respondents. (CX2746 at 004 (TDA was “starting to dip their toes into competing with us”); CX1062 at 001 “Not only [is TDA] our new

competitor, but they basically tell their members that dental distributors rip off the dentists.”)).

Finally, Complaint Counsel’s selective quotation of Mr. Cohen’s e-mail distorts its true meaning. Mr. Cohen actually wrote to Mr. Fernandez, “Suggest that we make it clear to the TDA that we will be cutting back our support of their meetings & programs, but that’s your call. Also, give a heads up to our friends from Patterson, Schein, Midwest, etc.; *they can/should/will make their own decision on how to respond*, but they should at least understand what’s going on here.” (CX1057 at 001 (emphasis added)). Complaint Counsel, of course, ignores the exculpatory portion of Mr. Cohen’s statement.

1119. The Regional Manager (Ron Fernandez) followed that direction and contacted Patterson and Schein employees to coordinate “taking a stand together” against TDA. (CX1278 (Excel worksheet “Chats” tab at row 9) (“I have been talking to the directors of Schein and Patterson. We are going to be taking a stand together against [TDA].”); CX1328 at 007 (Benco’s Response to RFA ¶8) (Benco’s Ron Fernandez spoke with Schein’s Glenn Showgren by telephone about TDA Perks Supplies on October 15, 2013); *see also* CX0178 at 002-003; CX1289 at 001; CX0108 at 001 (“As for Patterson, we have briefly discussed this TDAPerks site . . . with our dealer competitors at the local San Antonio & Houston level . . . ”)).

Schein’s Response:

The asserted fact is misleading, as it inappropriately lumps Patterson and Schein together.

As to Schein, there is only evidence of a single communication between Mr. Fernandez and Schein. There is no evidence that Mr. Showgren solicited the call from Mr. Fernandez and there is no evidence that Mr. Showgren agreed to coordinate with Benco concerning the TDA. That communication occurred on October 15, 2013, and was memorialized by Mr. Showgren in a contemporaneous email. On the call, Mr. Showgren expressly “laid out ground rules that I will NOT discuss a pricing response and any action

will have to be cleared by my Legal Team before communicating with the TDA.” (CX 0178-003). Upon learning of the communication, Mr. Sullivan immediately instructed his team they “should NOT be having these discussions w[ith] Benco.” (CX 0178-002). There is no evidence of any further communication concerning the TDA.

Complaint Counsel’s cite to Mr. Fernandez’s internal Benco chat log is not reliable evidence of his communications with Schein. First, the chat log suggests that Benco was going to go to attend the TDA trade show in 2014. (CX 1278-005 (“We will have [the booth] in 2014 because we jumped the gun and paid for it.”)). Second, the chat does not specifically state what Schein said. As such, the chat is unreliable hearsay of Schein’s position at the time, or its communications with Mr. Fernandez.

Patterson’s Response:

No specific response other than that Complaint Counsel presented no evidence, including the citations in this proposed finding, relevant to this assertion at trial.

Benco’s Response:

As demonstrated in Benco’s response to Complaint Counsel’s proposed finding of fact in ¶ 1118, Mr. Cohen did not “direct” Mr. Fernandez to take any action implied here. Rather, Mr. Cohen suggested that Mr. Fernandez make Schein and Patterson aware that the TDA was entering the dental distribution market and should now be considered a competitor. Mr. Fernandez’s statement to Barrett Spencer that Benco was going to be “taking a stand together” against the TDA does not at all demonstrate that the Respondents entered into concerted action to boycott the TDA because the TDA became a buying group, as Complaint Counsel alleges. Rather, Schein, Patterson, and Benco each decided independently and in their own best interests that they will not continue to support dental associations, or other trade associations, which seek to transform themselves into

competitors. This is consistent with Mr. Cohen's direction that Mr. Fernandez "give a heads up to" Patterson and Schein about TDA becoming a competitor, so that those companies "can/should/will make their own decision on how to respond," and "understand what's going on here." (CX1057 at 001).

1120. On October 16, 2013, Schein Regional Manager (Glenn Showgren) provided a detailed report of a call he had with Benco's Ron Fernandez to his supervisor, Joe Cavaretta. He wrote in an email to Joe Cavaretta:

Call was mostly about the TDA Merch Program. The bullet points for Joe are below.

- Benco considering suspending all activities with the TDA including pulling out of the state show.
- Chuck Cohen will be reaching out to, or has reached out to, Tim Sullivan to see if HSD would do the same thing.
- Ron wanted to know if I have a relationship with local [Patterson Regional Manager] to see if they would consider pulling out as well.
- I will be having lunch with Ron week after next to discuss concerns and share what we have found out about the program.
- I laid out ground rules that I will NOT discuss a pricing response and any action would have to be cleared by my Legal Team before communicating with the TDA.

(CX0178 at 002-003).

Schein's Response:

As Mr. Showgren's email demonstrates, he acted entirely appropriately and in compliance with the antitrust laws in response to an unsolicited call from a competitor. In the cited document, Mr. Showgren relayed the contents of the unsolicited call internally at Schein, and appropriately noted the potential for antitrust concerns. (RX 2362-002). Mr. Showgren made it clear to Mr. Fernandez that he "[would] NOT discuss a pricing response and any action would have to be cleared by my Legal Team," and reported the conversation to Mr. Sullivan and others. (CX 0178-003). Mr. Sullivan reiterated in even stronger terms that "we should NOT be having these discussions w[ith] Benco" and that Mr. Cohen had

“not contacted me nor would he on such a topic.” (SRF 998, 1088; CX 0178-002). Mr. Cohen never did discuss the TDA with Mr. Sullivan. (Sullivan, Tr. 4246-47, 4250, 4285; CX 8015 (Cohen, Dep. at 364-65); CX 6027).

This email chain shows that Mr. Sullivan was aware of antitrust concerns relating to competitor communications and that he took appropriate steps to ensure that he and his team complied with the antitrust laws. (RX 2362-001; Sullivan, Tr. 4207-08, 4340-41). RX 2362 does not reflect any agreement by Schein to not attend the TDA trade show or otherwise coordinate with Benco concerning the TDA. The document also does not show that Schein disclosed any confidential information about its business plans or strategies with respect to TDA attendance.

Patterson’s Response:

No specific response, other than that Complaint Counsel presented no evidence at trial, including the citations in this proposed finding, relevant to this assertion.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete and mischaracterizes the cited exhibit. As the rest of the e-mail chain cited by Complaint Counsel makes clear, top-level executives did not discuss a concerted effort to pull out of the TDA. (CX0178 at 002 (“Agree that we should NOT be having these discussions w Benco. Chuck has not contacted me nor would he on such a topic.”)).

1121. In late 2013, Benco’s Regional Manager Ron Fernandez communicated with Patterson’s John Hyden by telephone about the 2014 TDA Annual Meeting. (CX1328 at 007-008 (Benco’s Response to RFA. ¶11); CX3365 at 003 (Patterson’s Response RFA ¶3)). In that call, Hyden told Fernandez that Patterson would not be attending the 2014 TDA Annual Meeting. (CX3365 at 003 (Patterson’s Response RFA ¶3)).

Schein's Response:

No response.

Patterson's Response:

No specific response, other than that Complaint Counsel presented no evidence at trial relevant to this assertion at trial, including the citations contained in this proposed finding.

Benco's Response:

Each Respondent made its own unilateral decision regarding attendance at the 2014 TDA Trade Show. (RX0198; RX1028; Cavaretta, Tr. 5613-18). On December 18, 2013, Patterson unilaterally decided that it would not attend the 2014 TDA Trade Show. (RX0198).

1122. In December 2013, a Schein regional manager in Texas visited a Patterson branch manager. (CX3113 at 007 (Answer of Patterson ¶71(b))). On December 13, 2013, Schein zone manager passed this information along to his boss, stating, "FYI Patterson pulled out of the [TDA] Convention. I firmly believe they made the move expecting us to follow suit." (CX0179 at 002).

Schein's Response:

The asserted fact is irrelevant.

As an initial matter, the fact that a Regional Manager visited a Patterson branch in December 2013 is irrelevant, as there is no evidence that any confidential information was exchanged during that visit, or that any agreement or understanding was reached.

Indeed, the fact that Patterson had pulled out of the TDA convention was public knowledge at the time. (RX 0166; CX 9024 (Osio, Dep. at 185)). On November 6, 2013, Paula Tait Lerash, Texas Dental Association Exhibit Manager, "released the reserve status on the Patterson Dental booth space and assigned [it] to other vendors." (RX 0166-

001). Schein also learned from individuals associated with the TDA that Patterson had “threatened to pull out” of the TDA back in November 2013. (RX 2112-001).

The December 13, 2013 email from Zone Manager Dean Kyle simply reports that Patterson pulled out of the TDA. (CX 0179-002). It does not indicate where the information came from, and for the same reasons, there is no basis for any inference that Schein had access to confidential information. Mr. Kyle’s speculation that Patterson “made the move expecting us to follow suit” simply reflects oligopolistic interdependence, not any agreement or understanding between the firms. (CX 0179-002). Indeed, there is no indication that Mr. Kyle had any communications with Patterson or Benco. As Mr. Kyle testified, his comment was “just my hunch. It was just an intuition that I had.” (CX 0307 (Kyle, IHT at 302-03)).

Patterson’s Response:

No specific response, other than that Complaint Counsel presented no evidence at trial relevant to this assertion at trial, including the citations contained in this proposed finding.

Benco’s Response:

Benco has no specific response to the proposed finding.

C. Patterson and Schein Communicated About TDA Buying Group.

1123. High-ranking executives at Schein and Patterson communicated about a response to TDA Perks. (Steck, Tr. 3697; CCF ¶¶ 1124-1126, 1128-1132).

Schein’s Response:

False. Complaint Counsel cites Mr. Steck’s hearing transcript, which does not support the assertion, along with other proposed findings, which – as set forth in Schein’s

specific replies – also fail to support Complaint Counsel’s characterization of the evidence. (SRF 1124-26, 1128-32).

At trial, Complaint Counsel asked, “Mr. Steck, you communicated with one of Schein’s competitors *about the TDA Meeting* in January of 2014, correct?” Mr. Steck answered, “One of our competitors *called me* on the phone.” (Steck, Tr. 3697 (emphasis added)). There is no evidence that the phone call was about “a response to TDA Perks.”

The unsolicited January 2014 call from Patterson’s Mr. Misiak was *two months after* Patterson made its decision not to attend the 2014 TDA show. (CX 6027-036; Steck, Tr. 3697, 3701; *see also* Misiak, Tr. 1410-11). The fact that Patterson pulled out of the TDA convention was publically available in early November 2013. (RX 0166; CX 9024 (Osio, Dep. at 185)).

Mr. Misiak and Mr. Steck both testified about the phone call. Mr. Steck denied reaching any agreement or understanding concerning whether to attend the TDA trade show, and Mr. Misiak had no recollection of the call. (Steck, Tr. 3715; Misiak, Tr. 1410-11; CX 0316 (Misiak, IHT at 307); CX 8038 (Misiak, Dep. at 283)). Mr. Steck did not relay Schein’s plans about attendance at the TDA meeting on the call (it had not yet made a decision), nor did he follow up with Patterson once Schein made its decision. (SF 1575; Steck, Tr. 3702, 3704, 3716; Cavaretta, Tr. 5617 (Mr. Steck was not “involved in any way regarding whether or not Schein was going to attend the TDA trade show in 2014”)).

Patterson’s Response:

There was no communication “about a response to TDA” by “high-ranking executives” of Patterson with Benco or Schein. The only discussion of the TDA between “high-ranking executives at Schein and Patterson” was the communication between Steck and Misiak on January 6, 2014 and Steck’s e-mail of January 21, 2014. (Steck, Tr. 3822;

CX0112 at 1). Steck and Misiak did not “communicate about a response to TDA Perks” but rather the full extent of the phone conversation was Misiak telling Steck that Patterson had told the TDA it was not attending the May 2014 Annual meeting and Steck telling Misiak that Schein had not yet decided. (Steck, Tr. 3822). The sole topic of that call was TDA attendance. (Steck, Tr. 3822). (*See also* PF ¶¶ 317–21). Moreover, Complaint Counsel’s own expert, Dr. Marshall, conceded at trial that the interfirm communications about TDAPerks were about attending a trade show, not engaging with or selling to TDAPerks. (Marshall, Tr. 3300-3301).

Benco’s Response:

Benco has no specific response to the proposed finding.

1124. On January 6, 2014, Patterson’s Misiak called Schein’s Steck. (CX6027 at 036 (Row 298)). The two spoke for 14 minutes. (CX6027 at 036 (Row 298)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1125. On that January 6, 2014 telephone call, Patterson’s Misiak informed his counterpart at Schein, Steck, that Patterson was planning to pull out of the TDA meeting. (Steck, Tr. 3701-3702; CX6027 at 036 (Row 298); *see also* CX2801 at 015 (Schein’s Response RFA ¶23 (at some point between December 2013 and January 2014, Patterson’s Dave Misiak and Schein’s Dave Steck communicated; one topic that was discussed concerned the TDA trade show)); CX3113 at 007 (Answer of Patterson ¶71(c) (TDA was mentioned in January 2014 phone call between Patterson and Schein))).

Schein's Response:

By the time of Mr. Misiak's unsolicited call, Patterson had already decided *two months prior* not to attend the 2014 TDA show. (CX 6027-036; Steck, Tr. 3697, 3701; *see also* Misiak, Tr. 1410-11). Patterson's decision was made public in early November 2013. (RX 0166; CX 9024 (Osio, Dep. at 185)).

In any event, the asserted fact is not relevant, as Complaint Counsel "do[es] not allege a group boycott of the [TDA] trade show." (Kahn, Tr. 52; *see also* Fed. R. Evid. 404).

Patterson's Response:

Misiak did not inform Steck "that Patterson was planning to pull out of the TDA meeting," but rather Misiak told Steck that Patterson already had informed the TDA it would not be attending the TDA Meeting in May. (Steck, Tr. 3822 ("What I'd like to ask you about this morning is that January 6th call that you had with Mr. Misiak, and the only discussion you ever had with anyone at Patterson about the TDA meeting was that January 6th phone call with Mr. Misiak, correct? A. Correct. Q. And the sole topic of that call with Mr. Misiak was attendance at the TDA annual meeting. A. Yes. Q. Okay. *And in that call, Mr. Misiak told you that Patterson had already told the TDA that Patterson would not be attending the 2014 annual meeting.* A. He did.") (emphasis added)).

Benco's Response:

Benco has no specific response to the proposed finding.

1126. According to Steck, on that January 6, 2014 call, Steck told Patterson that Schein had not made a decision on attending the 2014 TDA. (Steck, Tr. 3702). Steck promised to get back to Misiak with Schein's final decision. (Steck, Tr. 3702-3703).

Schein's Response:

Complaint Counsel's proposed finding is misleading to the extent that it suggests that Mr. Steck "promised" to get back to Mr. Misiak with Schein's final decision. Mr. Steck testified that he did not specifically recall the entire phone call, but he believed he told Mr. Misiak as a matter of courtesy that he would let him know once Schein had made its decision. (Steck, Tr. 3702, 3704). Mr. Steck, however, never followed up with Mr. Misiak, and never informed Mr. Misiak of Schein's decision. (Steck, Tr. 3716).

Patterson's Response:

Misiak did not encourage Schein or Steck to take any action concerning TDA or the TDA meeting. (Steck, Tr. 3822-3823 ("Q. Okay. In that call, Mr. Misiak did not encourage you or Schein to take any action concerning the TDA or the meeting of the TDA. A. He did not.")). Otherwise, no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1127. On January 7, 2014, the day after Misiak spoke with Steck, Misiak received information about the TDA Perks program from Clint Edens, a Patterson regional manager for the Texas region. (Misiak, Tr. 1411-1412; CX0157 at 001). Edens sent Misiak information about the TDA Perks program, stating "Dave, let me now if you need anything else." (CX0157 at 001; Misiak, Tr. 1411-1412).

Schein's Response:

No response.

Patterson's Response:

Edens kept Misiak advised through a series of emails of what he was doing regarding the TDA Annual Meeting from the first point in time Edens learned of TDAPerksSupplies in October 2013. (RX0128 at 001 (October 11, 2013 email); RX0146

at 1 (October 23, 2013 email); RX0050 at 001 (October 25, 2013 e mail); RX0161 at 001 (November 7, 2013 e mail)). The materials Edens sent to Misiak on January 4, 2014 were materials he had already sent to Misiak in late 2013. (RX0150 at 002–003 (sending Misiak the TDA’s October 23 statement on October 25, 2013); RX0179 at 001 (sending Misiak the November 2013 TDA journal article on TDAPerksSupplies and the advertisement on November 26, 2013)).

Benco’s Response:

Benco has no specific response to the proposed finding.

1128. Steck reported his conversation with Patterson’s Misiak to Schein’s President, Tim Sullivan and to Joe Cavaretta. (Steck, Tr. 3703). Steck informed Sullivan that he would follow up with Misiak as to Schein’s decision regarding the TDA buying group. (Steck, Tr. 3703).

Schein’s Response:

Mr. Steck was not “involved in any way regarding whether or not Schein was going to attend the TDA trade show in 2014,” and Mr. Steck never followed up with Mr. Misiak, and never informed him of Schein’s decision. (Cavaretta, Tr. 5617; Steck, Tr. 3702, 3716).

In any event, the asserted fact is not relevant, as Complaint Counsel “do[es] not allege a group boycott of the [TDA] trade show.” (Kahn, Tr. 52; *see also* Fed. R. Evid. 404).

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1129. On January 21, 2014, Steck sent an internal email to three Schein managers, stating “Guys, I have to get back to PDCO on whether or not we are attending the TDA.” (CX0205 at 002; Steck, Tr. 3705).

Schein’s Response:

Mr. Steck’s email continues to say, “My understanding is that we are [attending].” (CX 0205-002). Mr. Steck was not “involved in any way regarding whether or not Schein was going to attend the TDA trade show in 2014” and Mr. Steck never followed up with Mr. Misiak, and never informed him of Schein’s decision. (Cavaretta, Tr. 5617; Steck, Tr. 3702, 3716).

In any event, the asserted fact is not relevant, as Complaint Counsel “do[es] not allege a group boycott of the [TDA] trade show.” (Kahn, Tr. 52; see also Fed. R. Evid. 404). Furthermore, given that Mr. Steck’s email written soon after his conversation with Mr. Misiak indicates that Schein would be attending the TDA show, Mr. Steck could not have reached any agreement with Mr. Misiak not to attend the show during the January 6, 2014 phone call.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1130. On the same day, January 21, 2014, but after Steck had sent his internal email to Schein managers, Steck emailed Misiak at Patterson under the subject matter “Texas,” saying, “Hi Dave, I’ll be calling you to let you know about our decision on the matter we recently discussed in the next couple days.” (CX0112 at 001; Misiak, Tr. 1413-1414; Steck, Tr. 3704).

Schein's Response:

Mr. Steck was not “involved in any way regarding whether or not Schein was going to attend the TDA trade show in 2014,” never called Mr. Misiak, and never informed Mr. Misiak of Schein’s decision. (Cavaretta, Tr. 5617; Steck, Tr. 3702, 3716).

In any event, the asserted fact is not relevant, as Complaint Counsel “do[es] not allege a group boycott of the [TDA] trade show.” (Kahn, Tr. 52; *see also* Fed. R. Evid. 404).

Patterson's Response:

Prior to sending this email, Steck contacted Joe Cavaretta and learned that Schein planned to meet with the TDA “most likely” the day before or the first day of the meeting and that if TDA did not change its position, “this will be [Schein’s] last year of attending the TDA.” (Steck, Tr. 3826–28; CX0205 at 1). Steck did not share any of this information he learned from Cavaretta with Misiak. (Steck, Tr. 3828–29 (“Q. So all the information that you reached out to get from Mr. Cavaretta in CX 205 you did not share with Mr. Misiak when you wrote back to him. A. I did not.”)). *See also* F ¶ 323. CX0112 was Steck’s last communication with Misiak and Steck never followed up with Misiak or anyone at Patterson concerning Schein’s plan, or decision, concerning the TDA meeting. (Stec, Tr., 3829 (“Q. And you never wrote to Mr. Misiak again concerning Schein's plans with the TDA, did you? A. No. Q. And you never had a conversation with Mr. Misiak again about Schein's plans with respect to the 2014 TDA annual meeting. A. I did not.”)). *See also* FOF ¶ 324.

Benco's Response:

Benco has no specific response to the proposed finding.

1131. Misiak forwarded Steck's January 21, 2014 email to his colleague, Tim Rogan, Patterson's VP for Merchandise Marketing, stating, "[Steck] already told me they were out. Full blown!" (CX0112 at 001; Misiak, Tr. 1413-1414). Rogan responded, "That sucks. You should call him. 'Thought I could trust you' type of conversation." (CX0112 at 001).

Schein's Response:

CX 0112 starts with an email from Mr. Steck indicating, as he testified, that Schein had not yet made a decision whether to attend the TDA meeting. At the time Mr. Misiak called Mr. Steck, Schein had not, in fact, made a decision about whether to attend the TDA show. (Cavaretta, Tr. 5617 (Mr. Steck was not "involved in any way regarding whether or not Schein was going to attend the TDA trade show in 2014"); Steck, Tr. 3702). There is no evidence supporting Mr. Misiak's claim that "he already told me they were out." (CX 0316 (Misiak, IHT at 316 ("I don't remember ... if I knew they were out."))). Indeed, the evidence shows that Mr. Steck never informed Mr. Misiak of Schein's decision. (Steck, Tr. 3716). Mr. Misiak's email is inconsistent with Mr. Steck's own internal email indicating that Schein would be attending the show, showing why Mr. Misiak's hearsay email cannot be relied on.

In any event, the asserted fact is not relevant, as Complaint Counsel "do[es] not allege a group boycott of the [TDA] trade show." (Kahn, Tr. 52; *see also* Fed. R. Evid. 404).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1132. Misiak could think of no other way to read this email other than to mean that Steck had communicated that Schein had pulled out of the TDA Annual Meeting. (Misiak, Tr. 1414; CX8038 (Misiak, Dep. at 290-293)).

Schein's Response:

The proposed finding adds nothing of evidentiary value to the email quoted in CCFF 1131, and Schein incorporates its response to that proposed finding here. (SRF 1131). In a nutshell, there is no evidence supporting Mr. Misiak's statement that Mr. Steck "already told me they were out." (SRF 1131; CX 0316 (Misiak, IHT at 316 ("I don't remember ... if I knew they were out."))). Indeed, the evidence shows that Mr. Steck never informed Mr. Misiak of Schein's decision. (Steck, Tr. 3716). Mr. Steck denied reaching any agreement or understanding concerning whether to attend the TDA trade show, and Mr. Misiak had no recollection of the call. (Steck, Tr. 3715; Misiak, Tr. 1410-11).

In any event, the asserted fact is not relevant, as Complaint Counsel "do[es] not allege a group boycott of the [TDA] trade show." (Kahn, Tr. 52; *see also* Fed. R. Evid. 404). Moreover, Mr. Steck's subsequent internal email indicated that he understood Schein would be attending, dispelling any notion that an agreement was reached with Mr. Misiak. (CX 0205-002).

Patterson's Response:

Misiak's testimony was as follows: "Q. And the 'they' in that sentence, 'He already told me they were out,' who's the 'they'? A. I would assume that means Schein. Q. Is there any way -- any other way to read that? A. No. Q. And what did you mean by "they were out"? A. That, I don't know. Q. Can you think of anything that that means? A. I can't. Q. Did this mean that Mr. Steck told you that they were out of the TDA trade show? A. I don't remember if that's what it means specifically." (Misiak, Tr. 1414).

Benco's Response:

Benco has no specific response to the proposed finding.

D. Benco Communicated With Both Schein and Patterson About TDA Buying Group.

1133. On April 16, 2014, Cohen emailed Sullivan and Guggenheim on the same email chain about the TDA buying group; Cohen forwarded an article promoting the TDA Perks program. (Cohen, Tr. 577; CX1062 at 001). Cohen wrote, “Tim & Paul. . . Thought you’d be interested in this ‘essay’ from our friends at the TDA.” (CX1062 at 001; Cohen, Tr. 577).

Schein's Response:

Complaint Counsel’s proposed finding is misleading to the extent that it suggests that Mr. Cohen was communicating with Mr. Sullivan and Mr. Guggenheim concerning the TDA. The email is dated on ***April 16, 2014*** – after each Respondent had publicly announced its independent decision not to attend the TDA show. (CX 1062; SF 1560-63). The email simply passes along a public promotional piece that the TDA sent to its members approximately six months prior, in ***November 2013***, discussing the TDA Perks Supplies program. It does not mention the TDA tradeshow or any Respondent’s plans concerning attendance at the show. (Sullivan, Tr. 4245-46; Guggenheim, Tr. 1693-94; Cohen, Tr. 831).

Patterson's Response:

The article Cohen forwarded was the November 2013 issue of the TDA Journal, which had come out and Guggenheim had previously seen, six months before Cohen sent it to Sullivan and Guggenheim. (Guggenheim, Tr. 1680–81). Edens had sent this article to Misiak and Rogan in November 2013, almost six months prior to Cohen’s email. (RX0179; see also CX0314 (Guggenheim, IHT at 333)). In an internal email, Guggenheim joked about Cohen’s email, “I wonder if he’s [Benco] buying a booth! I bet yes!!!”

(Guggenheim, Tr. 1866–67; CX0100 at 1). Benco had already decided not to attend the 2014 TDA Annual Meeting as of this email, (Cohen, Tr. 831), and Patterson had informed the TDA almost 4 months earlier, on December 18, 2013, that it was not attending the 2014 TDA Meeting. Patterson’s Clint Edens met with the TDA on December 18, 2013. (CX9024 (Osio, Dep. at 574)).

Benco’s Response:

The April 16, 2014 e-mail referenced by Complaint Counsel here is dated a full week after Benco made its unilateral decision not to attend the 2014 TDA Trade Show on April 9, 2014. (CX1062; RX1028). Mr. Cohen’s April 16, 2014 e-mail is also dated after Schein and Patterson both made their own unilateral decisions not to attend the 2014 TDA Trade Show. (CX1062; Cavaretta, Tr. 5613-18; RX0198).

Mr. Cohen’s April 16, 2014 e-mail simply passes along an article that the TDA sent to its members approximately six months prior, in November 2013, discussing the TDA Perks Supplies program. It does not mention the TDA tradeshow or the Respondents’ plans concerning attendance at the show. The e-mail reflects a lawful exchange of public information, and is not suggestive of a conspiracy to boycott the TDA. (CX1062). The April 16, 2014 e-mail is not evidence of any agreement, or any conscious commitment, among Respondents.

1134. The article discussed TDA Perks leveraging the volume purchasing power of TDA members formerly only available to corporate practices to level the playing field between independent dentists and corporate dental practices. (CX1062 at 003).\

Schein's Response:

The article was ghost-written by SourceOne, whose opinions about the benefits its online portal are not probative of any material fact in the case. (CX 9024 (Osio, Dep. at 578)).

Patterson's Response:

The TDA's Donovan Osio testified that what this leveraging claim actually meant was that the TDA was getting a 4.3% discount off of what SourceOne charged on its website to non-TDA members, not that there were volume based deals in place that would result in 35% savings. (CX9024 (Osio, Dep. at 628-632)). Mr. Edens took issue with a number of the claims in the November 2013 TDA Journal article and Mr Osio of the TDA responded "that the article must not be accurate with respect to Patterson." (CX9024 (Osio, Dep. at 579–80)).

Benco's Response:

By way of response, Benco directs to the Court to its response to ¶ 1133.

1135. Sullivan and Cohen spoke by telephone on April 16, 2014, for nine minutes and 16 seconds. (CX6027 at 042 (Row 344)). Sullivan initiated the telephone call. (CX6027 at 042 (Row 344)).

Schein's Response:

Irrelevant and incorrect as to who initiated the call. The exchange was initiated on April 16, 2014 when Mr. Cohen sent a text message to Mr. Sullivan saying: "Got a minute?" (CX 6027-041 (line 343)). Mr. Sullivan called Mr. Cohen twenty minutes later. (CX 6027-041 (line 346)). There is no evidence that the call had anything to do with the TDA, any trade show, or any buying group. (Sullivan, Tr. 4015, 4246-47). Indeed, by this point, each of the Respondents had (separately and independently) told the TDA that it did

not plan to attend that year's trade show. Indeed, Complaint Counsel does not claim that the call was in furtherance of any alleged conspiracy. (CC Br. 25 n.213).

Patterson's Response:

No specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. Moreover, communications regarding the TDA are not evidence of a conspiracy regarding buying groups.

1136. After receiving Cohen's email regarding the TDA buying group, Guggenheim made himself a calendar entry task to call Cohen about the TDA Perks letter. (CX0101 at 001). The task "Percent Complete" is 100%. (CX0101 at 001).

Schein's Response:

No response.

Patterson's Response:

There is no record of such a call (see CX6027), and no such call occurred. (CX0314 (Guggenheim, IHT at 341)). Moreover, all three Respondents had taken conclusive action concerning attendance at the TDA meeting well prior to April 16, 2014. Patterson had declined to send in its deposit in fall 2013 and the TDA had released its reserved space on November 6, 2013, assigning it to other exhibitors. (CX9024 (Osio, Dep. at 185); RX0161 (On November, 2013 Edens reports "we have not paid for the booth."); RX0166 at 1 (the TDA employee in charge of the Annual Meeting wrote "on Wednesday, November 6, I have released there reserved booth space and it has now been reassigned to other vendors.")). Patterson had informed the TDA four months prior (on December 18, 2013) that it was not attending the TDA meeting. (CX9024 (Osio, Dep. at 574)).

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. Moreover, communications regarding the TDA are not evidence of a conspiracy regarding buying groups.

1137. Guggenheim is not aware of any business reasons why he planned to call Cohen, the managing director of his competitor Benco, about the TDA Perks letter. (Guggenheim, Tr. 1684).

Schein's Response:

No response.

Patterson's Response:

No specific response other than that the call never occurred. (CX0314 (Guggenheim, IHT at 341)).

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. Moreover, communications regarding the TDA are not evidence of a conspiracy regarding buying groups.

E. Following Inter-Firm Communications, the Big Three Did Not Attend TDA's Annual Meeting.

1138. Following these communications, Schein's Randy Foley explained that the Big Three were on the same page regarding TDA. On March 5, 2014, Foley wrote to Chad Thompson of Heartland: "The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott." (CX2106 at 001; Foley, Tr. 4596-4598).

Schein's Response:

Vague, misleading, and irrelevant. It is unclear what "these communications" refers to. Assuming Complaint Counsel refers to the communications cited in CCFF 1133-

1137, many of them postdate Mr. Foley's email. Additionally, as indicated in CCFF 1133-1137 and Schein's responses to them (SRF 1133-37), Mr. Foley had no involvement in any of the communications or decision-making regarding the TDA meeting. Therefore, Mr. Foley's email was not "[f]ollowing these communications," his email had nothing to do with "these communications," and there is no foundation for his speculation as to what "page" Patterson and Benco are on. Indeed, Mr. Foley never discussed the TDA with anyone at Benco or Patterson, and he had no interaction with the TDA on behalf of Schein. (Foley, Tr. 4710).

Mr. Foley explained the email at trial. It began with a message from Mr. Thompson of Heartland Dental – one of Schein's largest DSO customers. (Foley, Tr. 4708). "As a DSO, [Mr. Thompson was] concerned that [Schein was] offering deeply discounted pricing to TDA members" that would undermine the discounts Heartland received as "one of the largest DSOs in the country." (Foley, Tr. 4709).

In any event, the asserted fact is not relevant, as Complaint Counsel "do[es] not allege a group boycott of the [TDA] trade show." (Kahn, Tr. 52; *see also* Fed. R. Evid. 404).

Patterson's Response:

The communication alleged in this proposed finding did not follow the communications discussed in Complaint Counsel's proposed findings 1133-1137, but rather occurred 40 days *prior* (as March 5 is 40 days before April 16). Foley was with Schein's special markets division and had no involvement with Schein's decision not to attend the TDA or with the TDA itself. (Foley, Tr. 4710 ("Q. Did you have any interaction with the TDA on behalf of Schein? A. No. They're focused on private dentist, and Special markets has nothing to do with the TDA.")).

The term “boycott” was used by Foley because it was the word his customer, Mr. Thompson, had used and Foley “viewed it as not going to the meeting . . . like Patterson was not going.” (Foley, Tr. 4710). Foley never discussed TDA with Patterson or Benco and did not even know what the TDA program was when he wrote the quoted portion of CX2106. (Foley, Tr. 4709–10). Foley’s email on its face confirms that Schein had not yet decided as of March 5, 2014 whether or not it would attend the TDA Meeting. (CX2106 at 1). Patterson had informed the TDA on December 18, 2013, that it was not attending the TDA meeting. (CX9024 (Osio, Dep. at 574)).

Benco’s Response:

Each of the Respondents made its decision not to attend the TDA meeting—a marketing event for a competitor—independently and at different times. Patterson unilaterally decided that it would not attend the 2014 TDA Trade Show. (RX0198). On April 8, 2014, the TDA removed Schein from the public floorplan for the 2014 TDA Trade Show, thus effectively making the decision for Schein that it would not be attending the 2014 TDA Trade Show. (Cavaretta, Tr. 5613-18). And, on April 9, 2014, Benco unilaterally decided that it would not attend the 2014 TDA Trade Show. (RX1028).

1139. The following day, on March 6, 2014, Foley wrote by email to Schein employees regarding Texas Dental Association: “We should join pdco and boycott.” (CX2668 at 002). On a later email in the same email chain, dated March 7, 2014, Steck wrote to Foley regarding Texas Dental Association: “Pretty sure we are going to boycott as well.” (CX2668 at 001).

Schein’s Response:

Complaint Counsel’s proposed finding is irrelevant and the citation to it in Complaint Counsel’s Post-Trial Brief is improper. Complaint Counsel relies on this finding as evidence that “the presidents and CEO of the Big Three engaged in . . . communicating

about strategic, non-public information ... by exchanging their internal policies against discounting to buying groups ... an action contrary to self-interest that would not occur absent an agreement.” (CC Br. 62 & n.505).

As an initial matter, Complaint Counsel cites to the proposed finding as “other acts” evidence, which is irrelevant and inadmissible to prove a conspiracy to boycott buying groups. Fed. R. Evid. 404(a) (“Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or character trait), 404(b) (“Evidence of a[n] ... other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.”).

The cited document is an *internal* Schein email between a few Special Markets employees exchanging public, online information sources about TDA’s efforts to become a competitor by endorsing SourceOne. (CX 2668). Mr. Foley forwarded the exchange to Mr. Steck and asked him if he knew that PDCO would not be attending the TDA meeting (information Mr. Foley had learned from Heartland Dental). (CX 2668; CX 2106). Mr. Steck, expressing frustration about the prospect of supporting an organization that is competing with Schein, indicated that Schein might not attend the TDA meeting. (CX 2668). As noted, neither Mr. Steck nor Mr. Foley had any involvement in Schein’s decision-making around the TDA meeting. (Foley, Tr. 4710; Cavaretta, Tr. 5617 (Mr. Steck was not “involved in any way regarding whether or not Schein was going to attend the TDA trade show in 2014”)).

Contrary to Complaint Counsel’s assertion, CX 2668 does not contain or reflect communications with any competitor about strategic, non-public information, nor does it

relate to discounting to buying groups. As Complaint Counsel “do[es] not allege a group boycott of the [TDA] trade show,” the proposed finding is entirely irrelevant. (Kahn, Tr. 52; *see also* Fed. R. Evid. 404).

Patterson’s Response:

Despite having Mr. Foley testify for the better part of a day, Complaint Counsel did not use CX2668 at trial. Otherwise, Patterson has no specific response.

Benco’s Response:

By way of response, Benco directs to the Court to its response to ¶ 1138.

1140. On October 25, 2013, Patterson’s VP for Marketing, Tim Rogan, responded to an email from Clint Edens, Patterson’s South Central Regional Manager, who asked Rogan for guidance in responding to TDA about its TDA Perks Program. (CX0109 at 001-002). Rogan instructed Edens that he should “tell them [Patterson is] seriously considering pulling out,” and added that “just PDCO or HSIC pulling out of their annual meeting will mitigate any profits” TDA would make from sales. (CX0109 at 001).

Schein’s Response:

Complaint Counsel’s proposed finding is irrelevant and the citation to it in Complaint Counsel’s Post-Trial Brief is improper.

The cited document details an *internal* Patterson email discussing a message it received indirectly from TDA, which “[b]asically says, ‘even though we are competing, this will not have an effect on you. Continue to support the TDA.’” (CX 0109-002). As Mr. Rogan testified, his email was simply discussing a hypothetical. (CX 0317 (Rogan, IHT at 330 (“[I]t was a hypothetical, if two big companies pull out, that would more than – would mitigate any type of profits I thought that they were going to make on their TDA Perk site, but, again, this is just my general opinion.”))). Mr. Rogan had no idea of Schein’s

actual plans regarding the TDA meeting. (CX0317 (Rogan, IHT at 331 (“We didn’t have any information related to Henry Schein.”))).

Thus, contrary to Complaint Counsel’s assertion, this email does not contain or reflect communications with any competitor about strategic, non-public information, nor does it relate to discounting to buying groups. As such, Complaint Counsel’s reliance on this irrelevant document is improper, particularly as Complaint Counsel “do[es] not allege a group boycott of the [TDA] trade show.” (Kahn, Tr. 52; *see also* Fed. R. Evid. 404).

Complaint Counsel relies on this proposed finding as evidence that “the presidents and CEO of the Big Three engaged in ... communicating about strategic, non-public information ... by exchanging their internal policies against discounting to buying groups ... an action contrary to self-interest that would not occur absent an agreement.” (CC Br. 62 & n.505). Such “other acts” evidence, however, is irrelevant and inadmissible to prove a conspiracy to boycott buying groups. Fed. R. Evid. 404(a) (“Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or character trait), 404(b) (“Evidence of a[n] ... other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.”). To the extent Complaint Counsel seeks to use this email as evidence of a habit, pattern, or practice, it would only evidence Schein’s, and Mr. Sullivan’s, pattern of studiously avoiding antitrust issues. (SF 1330, 1461-63, 1491-92, 1509, 1565).

Patterson’s Response:

Clint Edens did not “ask for guidance” from Rogan but stated “I’d like to briefly review response and action at a camp fire or over a drink/breakfast next week.” (CX0109 at 2). Edens was forwarding an October 25, 2013 statement from the TDA which he

described as “Basically says ‘even though we are competing, this will not have an effect on you. Continue to support the TDA.’” (CX0109 at 2). Rogan’s response to Edens was “I would call the top of the TDA and ask for a formal meeting. Partnering and competing in the same paragraph? That is an oxymoron.” (CX0109 at 1).

Benco’s Response:

By way of response, Benco directs to the Court to its response to ¶ 1138.

1141. In December of 2013, Schein’s VP of Sales Dave Steck suggested to Tim Sullivan by email that “we should get together with a group of other dealers and manufacturers and send them a petition.” (CX0179 at 001; CX0310 (Steck, IHT at 201-202)). Steck received and/or shared information from manufacturers, Ivoclar, Planmeca, and Dentsply, about participation with the TDA. (CX0310 (Steck, IHT at 236-238, 242, 276); CX0208 at 001; CX0209; CX0210 at 001).

Schein’s Response:

Complaint Counsel’s *selective* quotation from CX 0179 is incomplete and misleading.

Importantly, Mr. Steck’s boss, Mr. Sullivan, immediately rejected Mr. Steck’s idea: “Don’t think we can do the petition idea ... lawyers call that collusion.” (CX 0179-001). Mr. Sullivan also made this point in relation to the manufacturer information Mr. Steck passed along: “just to be clear ... we are NOT contacting other Exhibitors and asking them to pull out of any shows. This is totally up to them who/what/where/ they decide to show. ... Just clarifying what i believe you stated below.” (CX 0210). This shows that Schein, and Mr. Sullivan, were well aware of the requirements of the antitrust laws and abided by them. (*See also* SF 1330, 1461-63, 1491-92, 1509, 1565).

Moreover, CX 0179 is an internal Schein document and does not contain or reflect communications with any competitor about strategic, non-public information, nor does it relate to discounting to buying groups. As such, Complaint Counsel’s reliance on this

irrelevant document is improper, particularly as Complaint Counsel “do[es] not allege a group boycott of the [TDA] trade show.” (Kahn, Tr. 52; *see also* Fed. R. Evid. 404). This also renders Mr. Steck’s information from manufacturers entirely irrelevant. Complaint Counsel does not claim that any such communications were improper in any way.

Patterson’s Response:

The first sentence of Complaint Counsel’s proposed finding ignores Tim Sullivan’s response of “Don’t think we can do the petition idea . . . lawyers call that collusion.” (CX0179 at 1). In the investigational testimony cited by Complaint Counsel, Steck testified: “I regret writing it the way I did . . . Because we were never going to get together with a group of other distributors and manufacturers, we would have sent our own letter...” (CX0310 (Steck, IHT at 202)). Complaint Counsel presented no evidence at trial relevant to this assertion at trial, including the citations contained in this proposed finding.

Benco’s Response:

By way of response, Benco directs to the Court to its response to ¶ 1138.

1142. Schein withdrew from the TDA meeting in early April under Tim Sullivan’s approval. (Steck, Tr. 3706; CX2306 at 001-002; CX0310 (Steck, IHT at 186)). This was the first time Schein had not attended the TDA for nearly two decades. (Steck, Tr. 3692).

Schein’s Response:

The asserted fact omits important context, and as stated is incorrect.

On April 3, 2014, Schein’s Dean Kyle and Joe Cavaretta met with representatives of the TDA. (Cavaretta, Tr. 5614-15; RX 2361). They requested that the TDA switch partners from SourceOne to Schein. (RX 2361-002 (“Proposed we work together instead of against each other”)). They also told the TDA at this meeting that, if it continued to endorse SourceOne, Schein would not attend the TDA show in 2014. (RX 2361). As such,

Schein did not withdraw from the TDA trade show, but gave them an option to work with Schein. To the extent the TDA is a buying group, as Complaint Counsel claims, this meeting, therefore, disproves the central allegation against Schein in the case, that Schein refused to do business with buying groups.

The TDA informed Schein that it intended to continue its partnership with SourceOne, and on April 8, 2014, the TDA removed Schein from the public floorplan of the 2014 TDA tradeshow. (RX 0232; CX 2306). Thus, the TDA removed Schein – Schein did not “withdraw” – from the trade show. Indeed, Schein only learned that it had been removed when a Schein employee saw the map of the exhibition space and Schein’s name was no longer on it. (RX 0232-001 (“not only did [the TDA] contact me to try to work something out and then not call me back after I tried to call him twice ... we found out from our conventions team that they had already sold our booth space.”)).

Because Schein never “withdrew” from the TDA, Mr. Sullivan did not “approve” of the withdrawal. Complaint Counsel’s citation to Mr. Steck’s testimony is not to the contrary:

- Q. Okay. And *do you know* -- strike that. The decision to withdraw was made by Tim Sullivan. Is that right?
- A. *It was made after a long meeting with the TDA, and the TDA gave our booth space away.*
- Q. And who at -- it’s fair to say that at Schein, Tim Sullivan made the decision not to attend the 2014 TDA Meeting?
- A. Tim would approve the decision. I can't say that he actually made the decision. It was -- kind of came up from the group that met with the TDA.

(Steck, Tr. 3706 (emphasis added)).

In any event, the asserted fact is not relevant, as Complaint Counsel “do[es] not allege a group boycott of the [TDA] trade show.” (Kahn, Tr. 52). Moreover, the evidence shows that Schein acted unilaterally regarding the TDA trade show. (SF 1557-78).

Patterson’s Response:

This withdrawal was 3 ½ months after Patterson informed the TDA it would not attend. (CX9024 (Osio, Dep. at 587)). The last communication of any type between Patterson and Schein concerning attendance at the TDA annual meeting was January 21, 2014 – more than 2 ½ months before Schein’s decision not to attend. PF ¶¶ 324-325. Complaint Counsel presented no evidence at trial relevant to this assertion at trial, including the citations contained in this proposed finding.

Benco’s Response:

By way of response, Benco directs to the Court to its response to ¶ 1138.

1143. Schein’s former Director of Sales, Michael Porro believed Schein withdrawing along with other distributors and vendors “sends a clear message.” (CX2049 at 001).

Schein’s Response:

The asserted fact is irrelevant, as Mr. Porro was not involved in the TDA decision. It is a random opinion from a random employee. It is not probative of anything. Indeed, at the time, Mr. Porro was Zone Manager for the Atlantic Coast, a zone that does not include Texas or the TDA. (CX 2049).

In any event, the asserted fact is not relevant, as Complaint Counsel “do[es] not allege a group boycott of the [TDA] trade show.” (Kahn, Tr. 52; Fed. R. Evid. 404). Moreover, the evidence shows that Schein acted unilaterally regarding the TDA trade show. (SF 1557-78; *see also, e.g.*, SRF 1142).

Patterson's Response:

No specific response, other than that Complaint Counsel presented no evidence at trial relevant to this assertion at trial, including the citations contained in this finding.

Benco's Response:

By way of response, Benco directs to the Court to its response to ¶ 1138.

1144. Benco pulled out of the 2014 TDA Annual Meeting in early April, too, because “Schein & Patterson are as well.” (CX0063 at 001). Benco did not attend TDA’s annual trade show in 2014, which was the first time Benco did not attend since beginning operations in Texas. (Cohen, Tr. 576).

Schein's Response:

The asserted fact is not relevant, as Complaint Counsel “do[es] not allege a group boycott of the [TDA] trade show.” (Kahn, Tr. 52; Fed. R. Evid. 404). Moreover, the evidence shows that Schein acted unilaterally regarding the TDA trade show. (SF 1557-78).

Nor is there any evidence that Benco declined to attend “because” of any decision by Schein or Patterson. At most, Mr. Cohen’s note, “if Schein & Patterson are as well,” indicates an oligopolistic follow-the-leader strategy. (CX 0063-001). There is no evidence that Schein communicated its decision to Benco.

Patterson's Response:

This withdrawal was 3 ½ months after Patterson informed the TDA it would not attend. (CX9024 (Osio, Dep. at 587)). The last communication between anyone at Patterson and anyone at Benco was mid-December, 3 ½ months before Benco made its decision. See CCFF ¶ 2121. Complaint Counsel did not address CX0063 at trial.

Benco's Response:

Mr. Cohen's statements, and the entirety of the cited exhibit, demonstrate that the three Respondents made their decisions to pull out of the TDA independently, unilaterally, and at different times. Indeed, Mr. Cohen's statement demonstrates clearly that Schein and Paterson had already pulled out of the TDA convention by the time Benco decided to do so as well.

1145. Patterson did not attend the TDA Annual Meeting in 2014. (Misiak, Tr. 1408-1409).

Schein's Response:

The asserted fact is not relevant, as Complaint Counsel "do[es] not allege a group boycott of the [TDA] trade show." (Kahn, Tr. 52).

Patterson's Response:

Unlike paragraphs 1142 (Schein) and 1144 (Benco), paragraph 1145 does not state when Patterson decided, and announced, it was not attending the 2014 TDA Meeting – **it was months before Schein and/or Benco made their decisions.** Patterson's Clint Edens met with the TDA on December 18, 2013. (CX9024 (Osio, Dep. at 165, 568)). At that meeting, Edens informed the TDA Patterson would not be attending the May 2014 TDA Annual Meeting, stating "it was hard for [Patterson] to support the meeting, if they were going to be in direct competition" with the TDA. (CX9024 (Osio, Dep. at 574)). Two months earlier, Patterson had not sent in its deposit for the TDA meeting and on November 6, the TDA released that space. (CX9024 (Osio, Dep. at 185, 482)).

Benco's Response:

By way of response, Benco directs to the Court to its response to ¶ 1138.

1146. One of the reasons Patterson did not attend the 2014 TDA Annual Meeting was TDA's decision to create TDA Perks Supplies. (CX3365 at 003 (Patterson's Response to RFA ¶2); Rogan, Tr. 3563-3564).

Schein's Response:

No response, other than to note the asserted fact is not relevant, as Complaint Counsel "do[es] not allege a group boycott of the [TDA] trade show." (Kahn, Tr. 52).

Patterson's Response:

Patterson did not believe that it should financially support an entity that had turned itself into a competitor. (CX0317 (Rogan, Dep. at 317)). *See also* F ¶ 315.

Benco's Response:

By way of response, Benco directs to the Court to its response to ¶ 1138.

1147. Schein began attending the TDA trade show again in 2016. (Sullivan, Tr. 4016).

Schein's Response:

No response, other than to note the asserted fact is not relevant, as Complaint Counsel "do[es] not allege a group boycott of the [TDA] trade show." (Kahn, Tr. 52).

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco directs to the Court to its response to ¶ 1138.

F. The Big Three Previously Attended the TDA Meeting but Wanted to Send a Strong Message.

1148. Schein, Patterson, and Benco knew that TDA relied on fees paid by distributors to exhibit at its annual show. (CX0178 at 001 (October 2013 email from Schein's Cavaretta to Sullivan regarding pulling out of 2014 TDA meeting: "They need our money from these shows and it is our biggest leverage opportunity."); CX2049 (April 2014 email from Schein's Porro to Kyle: "Love the backing out of TDA move. That sends a clear message! They need that \$\$\$"); CX0109 at 001

(October 2013 email from Patterson's Rogan to Region Manager: "State Associations fear we'll pull out all the time. . . just [Patterson] or [Henry Schein] pulling out of their annual meeting will mitigate any profits they will make from the mail orders sales."); *see also* CX1057 at 001).

Schein's Response:

The asserted fact is irrelevant.

Mr. Cavaretta's comment was in response to Mr. Sullivan's view that "pulling from show completely would be a mistake short term ... I'm not opposed ... but want to be sure we've exhausted all other options," such as "address[ing] directly with" the TDA. (CX 0178-001-02). Mr. Cavaretta simply noted that the fees Schein paid were a source of leverage to get TDA to the negotiating table. In any event, in 2014, even though it did not attend, Schein paid the Texas Dental Association fees to exhibit and attend its annual TDA Trade Show. (CX 0305 (Cavaretta, IHT at 207); CX 0311 (Sullivan, IHT at 358-59)).

As to the other emails cited, they are simply a collection of emails quoted in other proposed findings. Schein incorporates its responses to those proposed findings here. (SRF 1118, 1140, 1143).

Patterson's Response:

Patterson's decision not to attend the 2014 TDA Meeting was made locally in Texas by the Region Manager, Clint Edens. (CX0314 (Guggenheim, IHT at 335-336); CX0316 (Misiak, IHT at 299-300)). Edens decided not to attend the 2014 TDA meeting because the TDA had decided to establish TDAPerksSupplies to compete against distributors like Patterson in the sale of dental supplies and was making defamatory statements "about Patterson...and the prices we charge." (Rogan, Tr. 3562-3563). Edens chose not to attend the TDA meeting because "going to the TDA meeting is a way to raise money for the Texas Dental Association, so it doesn't make sense to raise money for somebody that's competing against you." (Rogan, Tr. 3563; *see also* CX0317 (Rogan, IHT at 296, 297 (Edens decided

not to attend 2014 TDA meeting because TDA was “competing directly against us.”)); CX0316 (Misiak, IHT at 300 (the TDA decided to compete with Patterson, made some slanderous statements about Patterson and the pricing structures, and we had a growing concern about supporting a competitor and making strategic investments, which is what a trade show is.”))).

No evidence supports the statement that the TDA “relied on fees paid by distributors to exhibit at its annual show,” or if such a statement were true, that Patterson knew of this reliance. Complaint Counsel did not address at trial CX0178, CX2049, or CX1057, upon which it relies in support of this proposed finding.

Benco’s Response:

By way of response, Benco directs to the Court to its response to ¶ 1138.

1149. Schein’s Sullivan wanted to send a “strong” message to TDA and other trade associations that they risked losing distributor support if they continued to offer buying group programs. (CX2746 at 002-004 (April 2014 email from Schein’s Sullivan: “I don’t believe that creating a Buying Group mentality with State Associations is a good long term strategy. . . there are a few that are starting to dip their toes into competing with us and I support sending a strong message in return.”); *see also* CX2049 at 001 (April 2014 email from Porro to Kyle: “Love the backing out of TDA move. That sends a clear message!”)).

Schein’s Response:

The cited statements are taken out of context.

As noted in response to CCFF 1143, the email from Mr. Porro is irrelevant as Mr. Porro had no involvement or responsibility for TDA, Texas, trade shows, or anything relevant to the issue. It is simply a random opinion from a random employee.

As for Mr. Sullivan’s statement, he was simply providing an update on various items, explaining why he supported the decision to “pull from [the TDA] annual meeting” after they chose not to work with Schein. (CX 2746-003). Mr. Sullivan was not averse to

working with buying groups – and indeed, Schein tried to work with the TDA but was rebuffed. He instead was concerned about state associations “competing with us.” (CX 2746-004) Mr. Sullivan further noted that the TDA appreciated Schein’s efforts to try to work with the TDA. As he noted, the TDA “actually thanked us for our approach vs. that of both PDCO [Patterson] and Benco.” (CX 2746-001). Mr. Sullivan also noted that he already had “plans to meet” with the TDA to address the issue so that Schein and the TDA could “be in a mutually better position with the TDA very soon.” (CX 2746-001).

Patterson’s Response:

No specific response other than that Complaint Counsel did not address CX2049 at trial.

Benco’s Response:

By way of response, Benco directs to the Court to its response to ¶ 1138. By way of further response, Benco states that the statements set forth in Complaint Counsel’s proposed finding do not at all demonstrate that the Respondents entered into concerted action to boycott the TDA because the TDA became a buying group. Rather, Schein, Patterson, and Benco each decided independently and in their own best interests that they will not continue to support dental associations, or other trade associations, which seek to transform themselves into competitors.

1150. Patterson’s Rogan testified that, by Patterson pulling out of the TDA show, TDA would lose money. (CX0317 (Rogan, IHT at 303) (“Q. You stated that Mr. Edens was trying to send a message and making the business decision to pull out of the TDA trade show; right? A. Yes. Q. What do you understand that message was? A. Well, we spend a lot of money, and that goes to the trade association for us being able to exhibit at that meeting . . . So by pulling out . . . they would lose that money.”)).

Schein's Response:

No response.

Patterson's Response:

Rogan's response is specifically limited to Patterson ("would lose that money"). (CX0317 (Rogan, IHT at 303). It is obvious that, if Patterson did not pay a fee to attend a TDA tradeshow, the TDA would lose that fee.

Benco's Response:

The statements set forth in Complaint Counsel's proposed finding do not at all demonstrate that the Respondents entered into concerted action to boycott the TDA because the TDA became a buying group. Rather, Schein, Patterson, and Benco each decided independently and in their own best interests that they will not continue to support dental associations, or other trade associations, which seek to transform themselves into competitors.

1151. Schein's Sullivan understood that pulling out of the TDA Annual Meeting was a "major move." (CX0178 at 001 (October 2013 email from Schein's Sullivan)). Sullivan understood it could cost them customers because TDA's membership was made up of customers. (CX0178 at 001, October 2013 email from Schein's Sullivan to Cavaretta, "[TDA] also represent[s] out [sic] customers. Their membership is made up of customers. They vote with their dollars too.")). Patterson's Rogan testified that pulling out of the TDA meeting was a disservice to Patterson's salespeople because they sell and meeting with customers at trade shows. (CX0317 (Rogan, IHT at 319) ("Q. And why would pulling out of the TDA been a disservice to Patterson Salespeople? A. Because they sell things at these trade shows and meet with customers at these trade shows.")).

Schein's Response:

Complaint Counsel takes Mr. Sullivan's email out of context.

Mr. Sullivan was just noting the pros and cons of attending the TDA annual show.

Mr. Cavaretta noted that they needed to "discuss our reaction to the TDA positioning

themselves as a competitor,” adding, the TDA “need[s] our money.” (CX 0178-001). Mr. Sullivan responded that, on the other hand, their members are customers.

This does not suggest that not attending the TDA trade show would have any particular net effect on Schein. In fact, Complaint Counsel crops the part of Mr. Sullivan’s email in which he says “[p]ulling from the show is a major move.” (CX 0178-001). In the portion of the sentence omitted by Complaint Counsel, Mr. Sullivan goes on to note, “I’m not opposed” to pulling from the show, “but want to be sure we’ve exhausted all other options.” (CX 0178-001). The option Schein came up with – unique among all distributors – was to offer to supply the TDA directly, which the TDA ultimately rejected.

Patterson’s Response:

No specific response to the allegations concerning Schein, other than that Complaint Counsel did not address CX0178 at trial.

With respect to Patterson, Complaint Counsel chose not to question Mr. Rogan on this statement or exhibit at trial. Moreover, this proposed finding misconstrues, and takes entirely out of context, Mr. Rogan’s IH testimony concerning a “disservice to Patterson’s salespeople.” Rogan cautioned Mr. Edens that “before you pull the trigger on not going to the TDA let’s make sure we don’t do a disservice to our people.” (CX0108 at 1). At his investigational hearing, Rogan was asked to explain what he meant. (CX0317 (Rogan, IHT at 317)). Rogan testified that he wanted to make sure that Patterson was “thinking about both sides of it” so that the sales people would not be hurt. (CX0317 (Rogan, IHT at 317–18.)) He did not testify that by not attending the TDA Annual Meeting, Patterson had actually done a disservice to its salespeople. (CX0317 (Rogan, IHT at 317–19.)).

Benco's Response:

The statements set forth in Complaint Counsel's proposed finding do not at all demonstrate that the Respondents entered into concerted action to boycott the TDA because the TDA became a buying group. Rather, Schein, Patterson, and Benco each decided independently and in their own best interests that they will not continue to support dental associations, or other trade associations, which seek to transform themselves into competitors.

1152. Presence at trade shows is an element of competition with other full-service distributors. (Steck, Tr. 3800-3801; CX0302 (Jackson, IHT at 102); *see also* CCFF ¶ 1154).

Schein's Response:

The asserted fact is vague. Attendance at trade shows is an opportunity to meet with customers, but there are many such opportunities. The vast majority of sales are through FSC-customer interactions, which occur in dental practices' offices, not at trade shows.

Patterson's Response:

No specific response, other than that Complaint Counsel presented no evidence at trial relevant to this assertion at trial, including the citations contained in this proposed finding.

Benco's Response:

Benco has no specific response to the proposed finding.

1153. Schein, Patterson, and Benco did not attend the TDA meeting following the creation of the TDA Perks buying group. (CCFF ¶¶ 1142, 1145, 1144).

Schein's Response:

No response, other than to note that (i) the TDA removed Schein from the public floorplan, Schein did not withdraw (RX 0232; CX 2306; SRF 1142); (ii) the TDA was not a “buying group,” but rather was endorsing a competitor, and thus, competing against Schein rather than offering a neutral exhibition space; and (iii) this case is not about any alleged boycott of the TDA, but an alleged conspiracy to refuse to do business with buying groups.

Patterson's Response:

TDA Perks Supplies is not a buying group. See Patterson's response to CCFF ¶ 1113. Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1154. The absence of the largest dental distributors limited competition at the 2014 TDA meeting. (RX1135 (Reece, Dep. at 11)). Burkhart, the largest full-service distributor in attendance at the TDA meeting, gained sales as a result of the non-participation of Schein, Patterson, and Benco. (RX1135 (Reece, Dep. at 11); CX4276 at 001 (June 2014 email from Burkhart's Lout to Sundheimer: “The TDA situation, with PDS, HS and Benco not showing up, has given [Burkhart] a nice burst in the last month on new clients. This... will really help in the coming months”); CX4275 at 001 (June 2014 email from Burkhart's Inman to Reece “New Clients from the TDA” reflecting \$9K in new sales from a single Burkhart branch following the 2014 TDA meeting)).

Schein's Response:

False.

There is no evidence supporting the asserted fact that “competition” was “limited” at the 2014 TDA meeting. Mr. Reece's deposition testimony is pure speculation and inadmissible lay opinion. He did not conduct any studies or analyses of competition at the TDA meeting. Regardless, Complaint Counsel “do[es] not allege a group boycott of the

[TDA] trade show.” (Kahn, Tr. 52). And the evidence shows that Schein acted unilaterally regarding the TDA trade show. (SF 1557-78).

Patterson’s Response:

Complaint Counsel presented no evidence at trial relevant to this assertion at trial and did not mention the exhibits cited in this proposed finding. The cited testimony of Burkhart’s Jeff Reece shows that another competitor, Burkhart, benefited from the absence of Patterson, Benco and Schein, which would have had a pro-competitive effect. (RX1135 (Reece, Dep. at 11)). Donovan Osio of the TDA testified in his SourceOne deposition that SourceOne and the other distributors all benefitted from the absence of Schein, Patterson, and Benco. (CX9024 (Osio, Dep. at 507–08)). There is no evidence in the record that dentists paid higher prices or suffered any harm as a result of Patterson, Schein and Benco not attending a trade show.

Benco’s Response:

Complaint Counsel’s proposed finding that the Respondents’ absence limited competition is not a finding of fact, but rather is Complaint Counsel’s economic theory. As Complaint Counsel’s proposed finding demonstrates, the absence of Respondents strengthened the business of Burkhart, the largest full-service distributor in attendance. (RX1135 (Reece, Dep. at 11); CX4276 at 001).

1155. State dental associations that had planned to launch a dental supplies buying group program similar to TDA Perks were discouraged from doing so because of the withdrawal from the 2014 TDA Annual Meeting by Schein, Patterson and Benco. (CX9024 (Osio, SourceOne Dep. at 142-145, 233) (Question to Donovan Osio, Managing Director of TDA Financial, “Q. Can you list for me the associations that told you that they were deferred from endorsing SourceOne by the boycott of the 2014 Texas meeting? A. I believe it was South Carolina, Virginia, Louisiana, and Colorado, I believe.”); CX9051 (Blackwell, SourceOne Dep. at 423-424 exh. 211) (April 11, 2015, Minutes of the Board of Directors of the Louisiana Dental Association: “Dr. Maginnis was informed by representatives of Patterson and Henry Schein that if the LDA/LDS proceeds with the endorsement

of SourceOne, Schein and Patterson would not exhibit at future [New Orleans Dental Conference] events and the other suppliers they bring with them would also pull out . . . RESOVLED, that the board delay the decision on the endorsement of SourceOne Dental”); CX9052 (Brockhaus, SourceOne Dep. at 156-158, 105, exh. 243) (January 2015 email from Associate Executive Director of the Colorado Dental Association to SourceOne executive: “Our Finance Council met over the weekend to discuss joining into the GPO with Texas and Arizona. The group is a little concerned about the major dental suppliers in our area, Schein, Patterson and others pulling their support to the CDA and our largest component society . . .”); CX9071 (Trotter, SourceOne Dep. at 41-42) (Assistant Executive Director of Washington State Dental Association testified that information about a “boycott potentially happening with the Texas Dental Association . . . that major suppliers decided not to exhibit at the Texas Dental Association annual conference” was a negative factor in the dental association’s consideration of using SourceOne))).

Schein’s Response:

The asserted fact is not supported by reliable evidence. Mr. Osio’s deposition testimony about what other state associations may have told him is double hearsay, and not reliable for the true of the matter asserted. The cited evidence concerning Louisiana, Washington, and Colorado also does not establish that such associations would have contracted with SourceOne had Schein attended the TDA show in 2014. Indeed, Schein has attended the TDA show since 2016, and none of those states have contracted with SourceOne since. In any event, the asserted fact is irrelevant since Complaint Counsel “do[es] not allege a group boycott of the [TDA] trade show” or any other dental association trade show. (Kahn, Tr. 52).

Patterson’s Response:

No specific response, other than that Complaint Counsel presented no evidence at trial relevant to this assertion at trial, and did not mention the exhibits cited in this proposed finding.

Benco’s Response:

Benco has no specific response to the proposed finding.

G. The Big Three Followed the Same Pattern of Inter-firm Communications With Respect to the Arizona Dental Association Meeting.

1156. Schein, Patterson, and Benco employees communicated regarding the Arizona Dental Association (AzDA) after the AzDA created a buying group program. (CX1378 at 001 (June 18, 2014, email in which Benco's Mike Wade reporting that he is communicating with Schein and Patterson regarding the Arizona Dental Association (AZDA) annual meeting and buying group); CX2756 at 001 (July 10, 2014, email with Schein's Kevin Upchurch describing a call from Benco's Evans discussing AZDA); CX2757 at 001 (July 18, 2014, internal Schein email indicating advance knowledge of Benco's plans to pull out of the AZDA meeting); *see also* CX2801 at 010 (Schein's Response to RFA ¶8) (on or about April 9, 2014, Schein's Upchurch received a phone call from Benco's Fernandez concerning AzDA)); CX2801 at 011 (Schein's Response to RFA ¶9) (on or about June 18, 2014, Benco's Wade left a voicemail message for Schein's Upchurch regarding AzDA)); CX2801 at 011 (Schein's Response to RFA ¶10) (on or about July 10, 2014, Schein's Upchurch received a phone call from Benco's Evans regarding AzDA)); CX2801 at 011 (Schein's Response to RFA ¶¶11, 12 (on or about July 14, 2014, Schein's Upchurch left a voicemail message for Benco's Mike Wade regarding AzDA; after missing a return call from Wade, Upchurch left another voicemail message on July 18, 2014)); CX1331 at 001 (July 30, 2014, Benco internal email reporting that Schein, Patterson, and Benco have all exchanged assurances that they will not support the Arizona Dental Association meeting in response to AzDA's buying group program); CX1328 at 006 (Benco's Response to RFA ¶5 (Benco did not attend the 2015 AzDA Annual Meeting)); CX2801 at 009 (Schein's Response to RFA ¶5 (Schein was not an exhibitor at the Arizona Dental Association's Annual Meeting in 2015)).

Schein's Response:

Irrelevant. Complaint Counsel "do[es] not allege a group boycott of the [AzDA] trade show" or any other dental association trade show. (Kahn, Tr. 52). Nor does Complaint Counsel claim any of the cited communications were in furtherance of the alleged conspiracy against buying groups. (CC Br. 25 n.213). The proposed finding is further inadmissible, as it is nothing but "other acts" prohibited by Fed. R. Evid. 404.

Moreover, the evidence shows that Schein acted unilaterally regarding the AZDA trade show. (CX 0305 (Cavaretta, IHT at 243-44)).

Patterson's Response:

The AzDA perks program is mentioned on only two pages of the 5669 page transcript in this case. (Ryan, Tr. 1259; Guggenheim, Tr. 1855). Exhibits CX1378, CX2756, CX2757, CX2801, CX1331, CX1328 were not mentioned at trial. Patterson had

no communications with Schein concerning attendance at the 2015 AzDA annual meeting. The only communication Patterson had with Benco concerning the AzDA annual meeting was its response to an unsolicited email from Mike Wade of Benco on July 21, 2014. (CX3300 at 1). This communication was **nine** months before the 2015 AzDA Meeting. (RX0347 at 1; RX1122 (Wade, Dep. at 304)).

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. Moreover, communications regarding the TDA are not evidence of a conspiracy regarding buying groups.

1157. Patterson's Southwest Regional Manager, Dan Reinhardt, received a copy of a Patterson communication with Benco, and rather than stopping the communication merely cautioned his branch manager, "Please discuss live and no further emails." (CX3300 at 001).

Schein's Response:

No response.

Patterson's Response:

No specific response, other than that the AzDA perks program is mentioned on only two pages of the 5669 page transcript in this case. (Ryan, Tr. 1259; Guggenheim, Tr. 1855). CX3300 was not mentioned at trial.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. Moreover, communications regarding the TDA are not evidence of a conspiracy regarding buying groups.

1158. On July 21, 2014, Benco's Arizona Manager sent an email to Patterson's Arizona branch manager about AzDA Perks, stating, "I know that Patterson, Schein and Benco boycotted the Texas Dental Association meeting this year after the TDA did the same thing and wanted to see if we could create the same message here in [Arizona]." (CX3300 at 002). Patterson's Arizona Branch Manager responded to Benco's Manager that it would also withdraw its sponsorship and attendance at the AzDA annual meeting if information that Benco provided about AzDA Perks was true. (CX3300 at 001; CX1112 at 034 (Answer of Benco ¶73) (admission that email containing the quoted language was sent by Benco's Arizona regional manager)).

Schein's Response:

No response, other than to note the proposed finding is irrelevant, as Complaint Counsel "do[es] not allege a group boycott of the [AzDA] trade show" or any other dental association trade show. (Kahn, Tr. 52; Fed. R. Evid. 404).

Patterson's Response:

The AzDA perks program is mentioned on only two pages of the 5669-page transcript in this case (Ryan, Tr. 1259; Guggenheim, Tr. 1855), and Complaint Counsel did not mention the citations contained in this proposed finding. Otherwise, Patterson had no specific response.

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. Moreover, communications regarding the TDA are not evidence of a conspiracy regarding buying groups.

Contrary to the implication of Complaint Counsel's proposed finding, each of the Respondents made its decision not to attend the TDA meeting—a marketing event for a competitor—independently and at different times. Patterson unilaterally decided that it would not attend the 2014 TDA Trade Show. (RX0198). On April 8, 2014, the TDA removed Schein from the public floorplan for the 2014 TDA Trade Show, thus effectively making the decision for Schein that it would not be attending the 2014 TDA Trade Show.

(Cavaretta, Tr. 5613-18). And, on April 9, 2014, Benco unilaterally decided that it would not attend the 2014 TDA Trade Show. (RX1028).

XIII. THE BIG THREE BEGAN COMPETING FOR BUYING GROUPS IN LATE 2015.

1159. In April 2015, Benco settled an antitrust investigation into its refusal to attend the TDA annual meeting by entering an Agreed Final Judgment and Stipulated Injunction with the Texas Attorney General's Office on April 9, 2015 (the "2015 Benco Final Judgment"). (CX6021; CX1328 at 013 (Benco's Response to RFA ¶29)). Exhibit CX6021 contains the State of Texas Original Petition and the Agreed Final Judgment and Stipulated Injunction with the Office of the Texas Attorney General.

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The cited exhibit speaks for itself.

1160. The 2015 Benco Final Judgment required Benco to submit a detailed log of its officers, directors, or sales employees' communications, whether written or oral, with any distributor competitor for a three-year period. (CX6021 at 012 ¶J). Specifically, it required Benco to: "[f]or a period of three (3) years, maintain and furnish to the State on a twice yearly basis, a log of all oral and written communication, relating in whole or in part to the distribution or sale of dental supplies in the United States, between or among (1) any of Benco's officers, directors, or sales employees, and (2) any person employed by or associated with any dental supply distributor." (CX6021 at 012 ¶J). It also required Benco to provide detailed information about any such communications, and to identify (by name, employer, and job title) the author and recipients of all participants in the communications, the date, time, and a good faith estimate of the duration of the communication, the medium of the communication, and a description of the subject matter of the communication. (CX6021 at 012 ¶J).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The cited exhibit speaks for itself.

1161. The 2015 Benco Final Judgment required Cohen to log and submit any communications with Sullivan or Guggenheim about buying groups to the Texas Attorney General's Office. (CX6021 at 012 ¶J).

Schein's Response:

Complaint Counsel's proposed finding is imprecise, as the Final Judgment does not mention "buying groups." As a practical matter, however, it is likely that any such communication would need to be logged.

Patterson's Response:

No specific response.

Benco's Response:

The cited exhibit speaks for itself.

1162. The 2015 Benco Final Judgment also permanently enjoined Benco from communicating with, or agreeing with, competitors about refusing to sell dental supplies to any third party. Specifically, it enjoined Benco from "[a]dvising in writing, declaring, announcing, providing notice, or otherwise intentionally communicating a message to any dental supply distributor that Benco will or may ... Contract with or terminate a contract with any other dental supply distributor or discounter." (CX6021 at 009 ¶E). It also, among other things, enjoined Benco from "[c]ontinuing, maintaining, entering into, or attempting to enter into any agreement or understanding with any manufacturer or distributor to limit supply or refuse to sell dental supplies to any third party, or through or by means of any distribution channel." (CX6021 at 009 ¶A).

Schein's Response:

Complaint Counsel's proposed finding is inaccurate. Complaint Counsel cites to

¶E of the Final Judgment which states:

Advising in writing, declaring, announcing, providing notice, or otherwise intentionally communicating a message to any dental supply distributor that Benco will or may 1. Contract with or terminate a contract with any dental supply manufacturer; 2. Contract with or terminate a contract with any other dental supply distributor or discounter; or 3. Not participate in any charity or marketing event, such as a trade association exhibition....

(CX 6021-009). The Final Judgment does not include: “refusing to sell dental supplies to any third party.”

Patterson’s Response:

No specific response.

Benco’s Response:

The cited exhibit speaks for itself.

1163. Schein entered into a similar Agreed Final Judgment and Stipulated Injunction with the Office of the Texas Attorney General on August 3, 2017 (the “2017 Schein Final Judgment”). (CX6023). The 2017 Schein Final Judgment required Schein to submit a detailed log of certain executives’ communications (including Sullivan), whether written or oral, with any distributor competitor for a two-year period. (CX6023 at 006 ¶I). Specifically, it required Schein to: “[f]or a period of two (2) years, maintain and furnish to the State on a twice yearly basis, a log of all oral or written communications, relating in whole or in part to the distribution or sale of dental supplies in the United States, between or among (1) the HSD employees with the following titles as of the date of third Order and their successors or functional equivalents: President; General Manager; Area Vice President, Sales – West; and Zone and Regional Managers, Sales covering Texas; and Vice President for Merchandise Marketing, Dental; and (2) any person employed by or associated with another dental supply distributor.” (CX6023 at 006 ¶I).

Schein’s Response:

The asserted fact is irrelevant. Moreover, the proposed fact is vague as to the term “similar,” and in fact is incorrect, as there are several material differences between the Schein order and the Benco order. With respect to the logging requirement, there are also a number of exclusions under Schein’s order that are not in Benco’s. (CX 6021; CX 6023).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1164. Patterson entered into a similar Agreed Final Judgment and Stipulated Injunction with the Office of the Texas Attorney General on April 19, 2018 (the "2018 Patterson Final Judgment"). (CX6024). The 2018 Patterson Final Judgment required Patterson to submit a detailed log of certain executives' communications (including Guggenheim), whether written or oral, with any distributor competitor for a one-year period. (CX6024 at 005 ¶I). Specifically, it required Patterson to: "[f]or a period of one (1) year, maintain and furnish to the State on a twice yearly basis, a log of all oral or written communications relating in whole or in part to the distribution or sale of dental supplies in the United States, between or among (1) the Patterson employees with the following titles as of the date of this Order and their successors or functional equivalents: CEO, President (currently Dave Misiak), Vice President and General Manager, (currently Tim Rogan), Vice President of Marketing, (currently Josh Killian), Paul Guggenheim, Clint Edens, and Chad Bushman; and (2) any person employed by or associated with another dental supply distributor." (CX6024 at 005 ¶I).

Schein's Response:

No response.

Patterson's Response:

The 2019 Patterson Final Judgment requires Patterson to keep a log of all "oral *and* written communications." (CX6024 at 5 ¶ I) (emphasis added). Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

1165. In a July 18, 2015 email to Cohen about the Elite Dental Alliance buying group, Julie Radzyninski expressed concern about Schein or Patterson signing with the Elite Dental Alliance. She stated: “if we don’t agree, they will sign with either Schein or Patterson.” (CX1079 at 001). Julie Radzyninski was a Benco executive responsible for Benco’s relationship with the Elite Dental Alliance and Cain Watters. (Cohen, Tr. 480).

Schein’s Response:

Complaint Counsel’s proposed finding is incomplete. Mr. Cohen responded to Ms. Radzyninski: “We can discuss, but I’m not sure I agree....” (CX 1079-001).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, Elite Dental Alliance (“EDA”) was formed as a joint venture between Benco and Cain Watters. (Cohen, Tr. 451, 814). EDA did not exist until Benco formed it by entering into it agreement with Cain Watters. Therefore, it is a factual impossibility that Schein or Patterson “would sign up with” EDA.

Second, Complaint Counsel asked Chuck Cohen at trial a series of questions regarding Benco’s alleged concern “that Schein or Patterson would sign up with EDA.” (Cohen, Tr. 469-71). Since EDA did not exist until Benco formed EDA with Cain Watters, Cohen was not concerned that Schein or Patterson would sign up with EDA. Since the mid-2000’s, long before the formation of EDA, Cain Watters had been one of Benco’s Success Partners. (BFF 235; Cohen, Tr. 815-16). Cohen’s concern then, as he clearly explained at trial, was that Benco did not want to lose its relationship with Cain Watters. (Cohen, Tr. 470 (“I was concerned that Cain Watters, who had been a longtime partner of ours, would choose to take their partnership elsewhere.”)).

1166. By October 2016, Sullivan was concerned about Benco and Patterson partnering with buying groups. In October 2016, Sullivan responded to an internal Schein questionnaire concerning buying group strategy, entitled “Project Rockstar Pre-Workshop Questionnaire”. (CX2487 at 001). The questionnaire concerned Schein’s strategy relating to buying groups, customer consolidation, and other industry dynamics, and asked the recipient to identify key issues, outcomes, and players. (CX2487 at 002). Sullivan identified the impact that buying group organizations would have on the full-service segment of the industry as a “key question” to be answered. (CX2487 at 003). Sullivan further identified Patterson and Benco as key “players,” and identified their partnering with buying groups as one of the most important items in relation to buying group strategy. (CX2487 at 004).

Schein’s Response:

This is the same document quoted in CCFF 129, and Schein incorporates its response to that proposed finding here. (SRF 129).

In short, the cited document is not reliable evidence of anything. Schein was not the author of the questionnaire. It was prepared by Open Options, a third party Schein engaged to facilitate the “Project Rockstar” workshop. It is a *hypothetical* used as the basis for engaging in a workshop focusing on the use of “game theory” in predicting behavior. Based on this hypothetical, participants were supposed to brainstorm about the actions of Schein and other competitors.

Complaint Counsel also mischaracterizes the document. Mr. Sullivan’s “key question” was not just the impact of buying groups, but “[w]hat impact will companies such as Amazon and other ‘Buying Group’ organizations have on the full-service segment of our industry?” (CX 2487-003). Complaint Counsel also fails to note that Mr. Sullivan answered that question by noting that the “[e]xpected [o]utcome” is these “organizations gain no more than roughly 10% market share only replacing that of the current ‘Mail Order’ segment of the industry.” (CX 2487-003).

Mr. Sullivan did not list Patterson/Benco as one of the most important key players. Under the hypothetical exercise laid out by Open Options, Mr. Sullivan was required to list 5 categories of key players in which to conduct the game theory exercise, and to identify the possible options each play has. Mr. Sullivan listed buying groups third, Darby (which supposedly is not even part of the alleged relevant market according to Complaint Counsel) fourth, and Patterson/Benco last. (CX 2487-004). This hardly establishes that they are a key player, or that their role somehow changed after the end of the alleged conspiracy period. Mr. Sullivan also did not list Benco and Patterson “partnering with buying groups as one of the most important items in relation to buying group strategy” as Complaint Counsel represents. Instead, he listed “partner with Buying Groups” as an “option” for Benco and Patterson, just as he did for Darby. (CX 2487-004).

Patterson’s Response:

The first sentence of this finding is not “supported by specific references to the evidentiary record” in violation of the Court’s February 21, 2019 Order on Post-Trial Briefs. Further, none of the cited documents support the assertion that Sullivan was concerned about Benco and Patterson partnering with buying groups in October 2016. Finally, Sullivan identified Patterson and Benco partnering with buying groups as “an action that a player can take that has importance in how the issue will develop and the choices made by the players.” (CX2487 at 4). Otherwise, Patterson has no specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

XIV. THE BIG THREE HAVE NOT OFFERED A PROCOMPETITIVE EXPLANATION FOR THESE INTER-FIRM COMMUNICATIONS REGARDING A CUSTOMER SEGMENT.

1167. Benco's Chuck Cohen could not identify any procompetitive or business justifications for his February 2013 communications with Patterson's Paul Guggenheim about Benco's no buying group policy. (CX0301 (Cohen, IHT at 243); *see also* CX1112 (Answer of Benco ¶¶77-79) (summarily denying the allegations and failing to identify any efficiencies that can be balanced against anticompetitive effects)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony. Yet again, Complaint Counsel ignores the actual evidentiary record in the case.

First, Chuck Cohen clearly testified at trial that one of the reasons for his e-mail to Paul Guggenheim was to gather market intelligence. (Cohen, Tr. 712-14 (“[b]ecause it helps me gather market intelligence and it helps me compete better in the marketplace.”)).

Second, Benco has a business justification for keeping open the dialogue with Schein and Patterson regarding an acquisition. (Cohen, Tr. 835).

During Chuck Cohen's tenure as managing director of Benco, both Schein and Patterson made multiple attempts to acquire Benco. (Cohen, Tr. 834-36). As a privately-held, family business, Benco and Chuck Cohen “regularly” think about potential exit strategies. (Cohen, Tr. 835 (“As a private business owner, thinking about an exit strategy is always important.”)). A sale of Benco to Schein or Patterson is a potential exit strategy that Chuck Cohen has evaluated. (Cohen, Tr. 835).

Third, Chuck Cohen has testified at length about the importance of, and reasons for, maintaining credibility in his relationship with both Paul Guggenheim and Tim Sullivan. (Cohen, Tr. 550, 722-23, 738, 988; Cohen, IHT at 278-79). When asked at trial to explain the justification and the importance of maintaining credibility with Tim Sullivan, Cohen testified that it was due to the Competitive Hiring Agreement. (Cohen, Tr. 738 (“if Tim did not view me as honest and as able to deliver on my word, I don’t believe he would have kept the agreement for the long term and I believe he would have canceled it.”)). As Cohen explained at trial, the Competitive Hiring Agreement was integral and essential to Becon’s rapid national expansion. (Cohen, Tr. 643-44). Maintaining the Competitive Hiring Agreement over the long-term was critical to Benco’s growth and success from 1998 through 2016. (Cohen, Tr. 735).

Finally, the only communications that Chuck Cohen ever had with Paul Guggenheim about buying groups is limited to two brief e-mail exchanges that never came close to forming any type of agreement. (Cohen, Tr. 705; Guggenheim, Tr. 1867-68).

1168. Guggenheim could not identify any business rationale or procompetitive justifications for his February 2013 communications with Benco’s Chuck Cohen. (Guggenheim, Tr. 1605-1606, 1612; CX0314 (Guggenheim, IHT at 234, 235, 248); *see also* CX3113 (Answer of Patterson ¶¶77-79 (summarily denying the allegations and failing to identify any efficiencies that can be balanced against anticompetitive effects)).

Schein’s Response:

No response.

Patterson’s Response:

The proposed finding is misleading, and the cited testimony does not support the proposition cited. In the IH testimony cited by Complaint Counsel, Guggenheim stated that he was not aware of any reason that *Benco* would share information with *him*.

(Guggenheim, Tr. 1605-1606; CX0314 (Guggenheim, IHT at 234, 235)). Moreover, at trial, Guggenheim testified that he dashed off an “eight-second” response in an effort to be “cordial.” (Guggenheim, Tr. 1612-13 (Q. There was no business reason for you to tell Benco's Chuck Cohen that Patterson felt the same way about these; right? A. No particular business reason, just a cordial response in an eight-second e-mail that I didn't really think that much about. Clearly not an agreement to any decisions that we were going to jointly make about this space. I just replied to an e-mail, yeah, I feel the same way.)).

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Guggenheim testified that he had sent the e-mail to gain business intelligence. (CX0314 (Guggenheim, IHT at 299, 300–03)). He did this because he had been approached by the Patterson local branch manager, Devon Nease, at the end of May 2013 concerning Benco winning the ADC bid. (Guggenheim, Tr. 1622; CX0094 at 1). Guggenheim's purpose was to see what he “could learn in terms of field intelligence about what we might be missing here.” (CX0314 (Guggenheim, IHT at 285)). Guggenheim was attempting to gain information that would better allow Nease to compete for this business. (CX0314 (Guggenheim, IHT at 287) (“I wanted to see what intelligence I could find out to help Devon get back in there and compete.”)).

1169. Guggenheim cannot provide any procompetitive justification for his June 2013 communications with Chuck Cohen regarding ADC. (CX0314 (Guggenheim, IHT at 297-299)).

Schein's Response:

No response.

Patterson's Response:

The proposed finding is misleading, and the cited testimony does not support the proposition cited. In the IH testimony cited by Complaint Counsel, Guggenheim stated that he emailed Cohen because he “wanted to just glean any kind of competitive information we could gather about the circumstances here to help [a Patterson branch manager]” “go compete with this account.” (CX0314 (Guggenheim, IHT at 293, 296)). As Guggenheim testified at trial that, he simply asked Cohen two questions. (Guggenheim, Tr. 1695-97 (Q. And in this e-mail, you asked Mr. Cohen two questions - A. Correct. Q. -- is that right? The first question is can you shed some light on the business agreement Benco already had with Atlantic Dental Care. Do I have that right? A. Correct. Q. And then the second question is, you were wondering if his position on buying groups is still as you articulated back in February. A. Correct. Q. And that's it, you asked two questions; is that right? A. Right. Q. Did you tell him about your bid or not to bid for Atlantic Dental Care? A. I did not. Q. Did you commit to him about anything you and your company were going to do with regard to Atlantic Dental Care going forward? A. Never. Q. Did you commit to him anything you or Patterson Dental were going to do with regard to any buying group going forward? A. Absolutely not. Q. You just asked two questions. A. Correct. Q. After -- now, Mr. Cohen responded, and Ms. Kahn showed you that. After that, did you change the company's strategy? A. No.)).

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Guggenheim testified that he had sent the e-mail to gain business intelligence. (CX0314 (Guggenheim, IHT at 299, 300-03)). He did this because he had been approached

by the Patterson local branch manager, Devon Nease, at the end of May 2013 concerning Benco winning the ADC bid. (Guggenheim, Tr. 1622; CX0094 at 1). Guggenheim's purpose was to see what he "could learn in terms of field intelligence about what we might be missing here." (CX0314 (Guggenheim, IHT at 285)). Guggenheim was attempting to gain information that would better allow Nease to compete for this business. (CX0314 (Guggenheim, IHT at 287) ("I wanted to see what intelligence I could find out to help Devon get back in there and compete.")).

1170. Chuck Cohen could not provide any business justification for his June 2013 communications with Patterson's Paul Guggenheim explaining Benco's policies about doing business with a customer segment to a competitor. (CX0301 (Cohen, IHT at 292-298, 105)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony. Yet again, Complaint Counsel ignores the actual evidentiary record in the case.

First, Chuck Cohen clearly testified at trial that one of the reasons for his e-mail to Paul Guggenheim was to gather market intelligence. (Cohen, Tr. 712-14 ("[b]ecause it helps me gather market intelligence and it helps me compete better in the marketplace.")).

Second, Benco has a business justification for keeping open the dialogue with Schein and Patterson regarding an acquisition. (Cohen, Tr. 835). During Chuck Cohen's tenure as managing director of Benco, both Schein and Patterson made multiple attempts

to acquire Benco. (Cohen, Tr. 834-36). As a privately-held, family business, Benco and Chuck Cohen “regularly” think about potential exit strategies. (Cohen, Tr. 835 (“As a private business owner, thinking about an exit strategy is always important.”)). A sale of Benco to Schein or Patterson is a potential exit strategy that Chuck Cohen has evaluated. (Cohen, Tr. 835).

Third, Chuck Cohen has testified at length about the importance of, and reasons for, maintaining credibility in his relationship with both Paul Guggenheim and Tim Sullivan. (Cohen, Tr. 550, 722-23, 738, 988; Cohen, IHT at 278-79). When asked at trial to explain the justification and the importance of maintaining credibility with Tim Sullivan, Cohen testified that it was due to the Competitive Hiring Agreement. (Cohen, Tr. 738 (“if Tim did not view me as honest and as able to deliver on my word, I don’t believe he would have kept the agreement for the long term and I believe he would have canceled it.”)). As Cohen explained at trial, the Competitive Hiring Agreement was integral and essential to Becon’s rapid national expansion. (Cohen, Tr. 643-44). Maintaining the Competitive Hiring Agreement over the long-term was critical to Benco’s growth and success from 1998 through 2016. (Cohen, Tr. 735).

Finally, the only communications that Chuck Cohen ever had with Paul Guggenheim about buying groups is limited to two brief e-mail exchanges that never came close to forming any type of agreement. (Cohen, Tr. 705; Guggenheim, Tr. 1867-68).

1171. Cohen could not provide any business justification for communications with Schein’s Tim Sullivan about ADC. At trial, Cohen testified that he communicated with Sullivan about buying groups to “gather[] market intelligence.” (Cohen, Tr. 553). But, Cohen’s prior sworn testimony in this matter contradicts his trial testimony. Cohen previously described the communication was “counter-business” or “more information than [] a rational business owner would give” and testified that he could not provide any legitimate business justification for these communications

that he described as potentially “improper” and “counter-business.” (CX0301 (Cohen, IHT at 277); CX8015 (Cohen, Dep. at 239) (“Q. Sitting here today, can you think of any reason for you to talk to Mr. Sullivan about buying groups? . . . A. Sitting here today, I cannot recall any specific reason I would talk to Tim about buying groups.”); CX0301 (Cohen, IHT at 287) (“Q. And why . . . were you and Mr. Sullivan discussing buying groups? We’ve now seen a couple of examples of that. A. Why we were? . . . I can’t imagine any specific reasons why we were or why we weren’t. I suppose it looks like the topic came up in this conversation.”)).

Schein’s Response:

This is a restatement of CCFF 1072-1077, and Schein incorporates its responses to those proposed findings here. (SRF 1072-77). In short, Complaint Counsel misstates Mr. Cohen’s testimony and fails to include the very next question and answer in the quoted testimony. At trial, Mr. Cohen testified that he “can’t say whether it was for or against our business interests” to send the text message, especially since Benco did win the deal. (Cohen, Tr. 550-51). Unsatisfied with this response, Complaint Counsel tried to impeach Mr. Cohen with his IHT. But there, Mr. Cohen testified that there were countervailing reasons on both sides of the question. (CX 0301 (Cohen, IHT at 227-28)).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony. Yet again, Complaint Counsel ignores the actual evidentiary record in the case.

First, Chuck Cohen clearly testified at trial that one of the reasons for his e-mail to Tim Sullivan was to gather market intelligence. (Cohen, Tr. 553; see also Cohen, Tr. 712-14 (“[b]ecause it helps me gather market intelligence and it helps me compete better in the marketplace.”)).

Moreover, the record surrounding Cohen's call to Sullivan regarding ADC is clear as to Cohen's specific rationale. (BFF ¶¶ 459-532). Benco's evaluation of ADC was the most difficult and longest evaluation of a group that Benco had ever conducted. (Cohen, Tr. 718-19; Ryan, Tr. 1199). Benco was confused by ADC's ownership structure because it was a collection of 35-50 independent dental practices that had merged together to form a single entity. (Cohen, Tr. 716-19). Benco had never before seen an ownership structure like ADC. (Cohen, Tr. 719). Pat Ryan and Benco's Strategic Markets team spent months assessing ADC. (Cohen, Tr. 719; Ryan, Tr. 1199). Benco tried several sources to obtain additional information regarding ADC, including asking ADC itself for documentation, consulting with Benco's local sales team, conducting independent research, and ultimately consulting with others in the dental industry. (Cohen, Tr. 719-20). Chuck Cohen eventually reached out to Tim Sullivan to see if Mr. Sullivan had any additional information on the structure of ADC that Benco might be able to use in its independent evaluation of ADC. (Cohen, Tr. 719-20). Chuck Cohen's intent in reaching out to Tim Sullivan regarding ADC was to gather facts that might help Benco make its own independent evaluation of ADC. Chuck Cohen did not intend to make any collective decision with Tim Sullivan about ADC. (Cohen, Tr. 719-20).

Second, Benco has a business justification for keeping open the dialogue with Schein and Patterson regarding an acquisition. (Cohen, Tr. 835). During Chuck Cohen's tenure as managing director of Benco, both Schein and Patterson made multiple attempts to acquire Benco. (Cohen, Tr. 834-36). As a privately-held, family business, Benco and Chuck Cohen "regularly" think about potential exit strategies. (Cohen, Tr. 835 ("As a private business owner, thinking about an exit strategy is always important.")). A sale of

Benco to Schein or Patterson is a potential exit strategy that Chuck Cohen has evaluated. (Cohen, Tr. 835). Third, Chuck Cohen has testified at length about the importance of, and reasons for, maintaining credibility in his relationship with both Paul Guggenheim and Tim Sullivan. (Cohen, Tr. 550, 722-23, 738, 988; Cohen, IHT at 278-79). When asked at trial to explain the justification and the importance of maintaining credibility with Tim Sullivan, Cohen testified that it was due to the Competitive Hiring Agreement. (Cohen, Tr. 738 (“if Tim did not view me as honest and as able to deliver on my word, I don’t believe he would have kept the agreement for the long term and I believe he would have canceled it.”)). As Cohen explained at trial, the Competitive Hiring Agreement was integral and essential to Becon’s rapid national expansion. (Cohen, Tr. 643-44). Maintaining the Competitive Hiring Agreement over the long-term was critical to Benco’s growth and success from 1998 through 2016. (Cohen, Tr. 735).

Finally, The only communications that Chuck Cohen has ever even had with anyone at Schein about buying groups is limited to one exchange with Tim Sullivan about Atlantic Dental Care (“ADC”), which was not actually a buying group. (Cohen, Tr. 715).

1172. Schein’s Tim Sullivan could not provide any legitimate business justification for communications with Chuck Cohen about ADC. (CX0311 (Sullivan, IHT at 268)).

Schein’s Response:

This is the same as CCFF 1078, and Schein incorporates its response to that proposed finding here. (SRF 1078).

In short, the asserted fact is not admissible, as it asks a witness to speculate about the reasons another witness may have had for sending an unsolicited text, and Mr. Sullivan testified that he did not engage in communications with Mr. Cohen concerning ADC.

Moreover, Complaint Counsel's exclusive reliance on Mr. Sullivan's Investigational Hearing testimony is improper, and the proposed finding is ambiguous and imprecise. Mr. Sullivan was never asked whether he could offer a "legitimate business justification."

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness discussing Schein's business.

1173. Respondents' executives testified that these communications with their competitors made them feel "uneasy," were "against our company rules," or "crazy," and may have been "improper." (CX0306 (Foley, IHT at 177-178) ("I remember being uneasy on the call" and "it's against our company, you know, rules for me to discuss customers and trades secrets and what we're dealing with customers."); (CX0311 (Sullivan, IHT at 268) ("I thought it was crazy that [Cohen] called."); (CX0301 (Cohen, IHT at 277) ("maybe [calling Sullivan] was an improper thing to do.")).

Schein's Response:

Schein notes that the party feeling "uneasy" was Schein. And the calls deemed "crazy" or "improper" were Benco's unsolicited communications to Schein. Schein acted just as it should in response to such communications. Mr. Foley testified that he was uneasy when Mr. Ryan brought up Smile Source. (CX0306 (Foley, IHT at 177-78); Foley, Tr. 4585-86). As soon as Mr. Ryan began talking about Smile Source, Mr. Foley ended the call. (Foley, Tr. 4579; 4585-86). Mr. Foley never engaged in a discussion with Mr. Ryan about Smile Source. (Foley, Tr. 4585-86).

Mr. Sullivan described Mr. Cohen's call as "crazy," and noted that when Mr. Cohen raised ADC, "a red flag went up." (Sullivan, Tr. 3947-48, 3952). Complaint Counsel leaves out what Mr. Sullivan did next: once Mr. Cohen "started talking about Atlantic

Dental Care,” Mr. Sullivan “immediately stopped him, and I said, ‘Chuck, this is not a discussion that you and I should be having’ ... [and] I cut off discussion with him on that topic.” (Sullivan, Tr. 3946, 3948). This is exactly what one would expect of a company trying to comply with the antitrust laws, and is in fact better behavior than Burkhart exhibited when contacted by Benco (and Burkhart has not been charged with being part of this alleged conspiracy).

Patterson’s Response:

Complaint Counsel cites no testimony from a Patterson witness to support this proposed finding.

Benco’s Response:

The proposed finding improperly lumps together all three Respondents, and, in doing so, seeks to use facts pertaining to one or more other Respondents to extend to Benco when, in fact, there is no evidence in the record justifying the proposed finding with respect to Benco.

1174. None of Respondents’ three economic expert witnesses contend that the agreement among Respondents would have procompetitive benefits. (See CCF ¶¶ 1175, 1176, 1177, *infra.*).

Schein’s Response:

No response, other than to note that the proposed finding improperly assumes the “agreement among Respondents” – the very thing it is Complaint Counsel’s burden to prove.

Patterson’s Response:

No specific response.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding. None of the individual findings cited in this proposed finding contain evidence that Benco entered into any agreement.

Benco's expert did not contend an agreement had procompetitive benefits because there is an absolute lack of evidence in the case that there was any agreement.

Complaint Counsel's logic here, as throughout the case, is circular and not based on actual evidence in the case.

1175. Dr. Wu does not offer any opinion that "an agreement among respondents not to do business with buying groups would have any pro-competitive benefits," and admitted that "[a]s an economist, if there is an agreement among competitors to, not to discount to customers, then I would view that as being anticompetitive." (RX2967 (Wu, Dep. at 277, 279)).

Schein's Response:

Complaint Counsel's questions to Dr. Wu assumed the existence of an agreement, the very thing it is Complaint Counsel's burden to prove.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

1176. Dr. Carlton does not discuss whether there is any procompetitive justification for any conspiracy among Respondents in the context of his report, nor does he provide an analysis of a procompetitive reason for any explicit communications because "[t]hat didn't seem relevant, given the evidence in the case as I understand it." (RX2966 (Carlton, Dep. at 233-235)).

Schein's Response:

Complaint Counsel's proposed finding is ambiguous, irrelevant, and has no probative value. Complaint Counsel's questions to Dr. Carlton assumed the existence of an agreement, the very thing it is Complaint Counsel's burden to prove. As to the "explicit communications," to the extent Complaint Counsel is referring to the six communications that Complaint Counsel says makes up its case against Schein (CC Br. 25 n.213), assessment and evaluation of communications and their content is for the fact finder to decide, not an economist. As such, Dr. Carlton properly noted he did not "investigate that one way or the other." (RX 2966 (Carlton, Dep. at 233-34)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness discussing Schein's business.

1177. Dr. Johnson does not "think [he] could offer an opinion" about procompetitive benefits in this matter, nor has he done any analysis on any procompetitive benefits. (RX2965 (J. Johnson, Dep. at 274); RX1131 (J. Johnson, Source One Dep. at 98) (could not think of any procompetitive economic justifications for an agreement not to offer discounts to buying groups.)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony. Complaint Counsel has purposefully misstated the actual testimony referenced in the proposed finding.

Dr. Johnson's actual testimony is markedly different than Complaint Counsel's fictional paraphrase in the proposed finding. Complaint Counsel's entire line of questioning was premised on Complaint Counsel asking Dr. Johnson to assume the existence of an agreement. (J. Johnson, Dep. at 273 ("assuming that there is an agreement")). Since there is no evidence of any actual agreement involving Benco, Dr. Johnson asks Complaint Counsel to articulate the details surrounding the "agreement" she is asking Dr. Johnson to "assume." (J. Johnson, Dep. at 273 ("Without more detail, I don't know that I could answer that.")). Complaint Counsel does not provide Dr. Johnson with any further details. (J. Johnson, Dep. at 273-75). Dr. Johnson again identifies the fundamental problem with Complaint Counsel's line of inquiry: "I guess what I'm struggling with is implicit in your question is, you know, is there an agreement." (J. Johnson, Dep. at 274).

Benco's expert did not contend an agreement had procompetitive benefits because there is an absolute lack of evidence in the case that there **was** any agreement.

Complaint Counsel's logic here, as throughout the case, is circular and not based on actual evidence in the case.

XV. THE BIG THREE WERE PART OF AN OVERARCHING CONSPIRACY ORCHESTRATED BY BENCO AS RINGLEADER.

1178. Communications between Benco and Patterson mirrored those between Benco and Schein. (*See, e.g.*, CCFF ¶¶ 1179-1180, 483-484, 661-664, 495-496, 500-501, 674-680 1069-1071, 576, 1133).

Schein's Response:

False. Complaint Counsel cites no record evidence to support this finding. It only cites to other proposed findings, which – as set forth in Schein's specific replies – also fail to support its characterization of the evidence. (SRF 1179-80, 483-84, 661-64, 495-96, 500-01, 674-80 1069-71, 576, 1133). Specifically, CCFF 1178 is a repeat of CFF 1071, and Schein incorporates its response to that proposed finding here.

Substantively, the communications are in no way alike.

First, Mr. Cohen's June 8, 2013 email to Mr. Guggenheim was not unsolicited – it was in response to Mr. Guggenheim's question from two days before asking whether Mr. Cohen could “shed some light on your business agreement with Atlantic Dental Care?” (CX 0062-002). In contrast, Mr. Cohen's March 27, 2013 text message to Mr. Sullivan was entirely unsolicited, as Mr. Sullivan never reached out to Mr. Cohen regarding ADC or about buying groups generally, and in fact had previously admonished Mr. Cohen not to discuss ADC or other customers. (SF 1491; Sullivan, Tr. 3946; SRF 1071, 1088).

Second, in response to Mr. Guggenheim's question, Mr. Cohen noted “we don't recognize buying groups,” and added four bullet points and a lengthy explanation as to why ADC was a large group practice. (CX 0062-001). In contrast, Mr. Cohen's text to Mr. Sullivan did *not* reveal Benco's no-buying-group policy. (SRF 1071; CX 0196-010). Rather, Mr. Cohen only sent Mr. Sullivan a three-sentence text message that said ADC “merged ownership of all the practices. ... it's a big group.” (SRF 1071; CX 0196-010).

Third, Mr. Guggenheim responded to Mr. Cohen; Mr. Sullivan did not. Mr. Guggenheim responded, “Sounds good Chuck. Just wanted to clarify where you guys stand,” and then forwarded the email internally at Patterson. (CX 0097-001). Mr. Sullivan – again, in contrast – did not respond and did not take any internal action after Mr. Cohen’s text message. Rather, he was already in the process of trying to reach Mr. Cohen by phone to again admonish him in “much stronger” terms not to discuss specific customers. (SRF 1079; Sullivan, Tr. 3966, 4198-99, 4206).

Patterson’s Response:

The proposed finding is false. Complaint Counsel does not even explain how the cited communications mirror each other, but rather makes a sweeping, unsupported generalization. Additionally, as Complaint Counsel only cites to its own proposed findings as support (which themselves do not cite any evidence that supports this proposed finding), Patterson incorporates its responses to CCFF ¶¶ 1179-1180, 483-484, 661-664, 495-496, 500-501, 674-680 1069-1071, 576, 1133.

Benco’s Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding.

1179. Cohen assured Guggenheim that Benco would maintain a no buying group policy. (CCFF ¶¶ 483-484; *see also* CCFF ¶¶ 489-490). Cohen also assured Sullivan that Benco would maintain a no buying group policy. (CCFF ¶¶ 661-664).

Schein’s Response:

False. The evidence does not support a finding that Mr. Cohen assured Mr. Sullivan that Benco would maintain a no-buying-group policy. Complaint Counsel cites no record

evidence to support this finding. It only cites to other proposed findings, and Schein incorporates its specific responses to those proposed findings here. (SRF 483-84, 489-90, 661-64).

Substantively, Complaint Counsel does not cite any *document* showing that Mr. Cohen informed Mr. Sullivan of Benco's no-buying-group policy. Moreover, as Complaint Counsel admits in its Post-Trial Brief, Mr. Sullivan consistently testified that Mr. Cohen did *not* inform him of Benco's policy on buying groups. (CC Br. 25 n.212; CX 0311 (Sullivan, IHT at 269 ("Q. Has Mr. Cohen ever shared with you his general thoughts on buying groups? A. No."), 271 (Q. "Mr. Cohen never shared...that Benco had a policy of not selling or offering discounts to buying groups? A. That's correct.))); CX 8025 (Sullivan, Dep. at 344-46 ("[N]ever, to my knowledge, did [Mr. Cohen] call me to talk about buying groups in general and the strategy"; no recollection of Mr. Cohen telling him "that Benco had a no-buying-group policy" or "that Benco doesn't work with buying groups")); Sullivan, Tr. 3944 (Mr. Cohen "did not" share with Mr. Sullivan "that Benco had a no buying group policy")).

Despite this testimony, Complaint Counsel nonetheless misleadingly cites to *unquoted* portions of Mr. Sullivan's Investigational Hearing and deposition. Neither, however, supports the proposed finding. Complaint Counsel cites to pages 260-63 and page 269 of Mr. Sullivan's Investigational Hearing, but those pages simply recount the March 25, 2013 telephone call concerning Atlantic Dental Care, not Benco's general "position with regard to bidding on buying groups." (CX 0311 (Sullivan, IHT at 261)). As Mr. Sullivan testified at the time, "I'm really not aware of what their strategy is" as he has "never had that discussion with Chuck about [their] strategy on buying groups." (CX 0311

(Sullivan, IHT at 261, 269)). Mr. Sullivan's deposition transcript is to the same effect. (CX 8025 (Sullivan, Dep. at 344-45 ("I want to clarify because you say 'other than' as if that was a discussion about buying groups. That was not a discussion about buying groups. I have not had a discussion ... with Chuck Cohen or anyone at Benco about their strategy on buying groups or ours or any attempt to come to any sort of agreement about how to treat buying groups.... [N]ever, to my knowledge did [Mr. Cohen] call me to talk about buying groups in general and the strategy therein."))).

Mr. Cohen, for his part, has consistently testified that he has no specific recollection of communicating Benco's position or policy with regard to buying groups to Mr. Sullivan. At his Investigational Hearing, Mr. Cohen testified that he had no recollection of what he relayed to Mr. Sullivan because "we're talking about several years ago." (CX 0301 (Cohen, IHT at 199-200 ("I don't recall any specifics around the conversation"))). At his deposition, Mr. Cohen again testified that he did not remember and simply drew inferences from documents Complaint Counsel showed him. (RX 1130 (Cohen, Dep. at 120 ("I don't know one way or the other."), 142 ("I don't know that I did, but it looks like, from the e-mail, I did."), 197 ("I don't know. Anything I would say would be a guess."))). At his second deposition, Mr. Cohen again testified that he could not "recall any specific conversations with Tim Sullivan about buying groups." (CX 8015 (Cohen, Dep. at 229-31 ("I can't speculate what we talked about"; "I don't recall what we talked about ... I can't recall ... I can't recall any specific conversations"; "I can't recall any specific conversations around buying groups."))).¹⁷

¹⁷ Mr. Cohen's testimony in this case is consistent with his testimony in *SourceOne v. Patterson*, 15-cv-05440 (E.D.N.Y. 2015). Mr. Cohen was asked about his March 25, 2013 call with Mr. Sullivan on, and he testified that he

When asked at trial whether he “communicate[d] Benco’s no-buying-group policy to Mr. Sullivan,” Mr. Cohen answered that he “*believe[s]* [he] did,” not that he has actual knowledge or recollection of ever doing so. (Cohen, Tr. 500-01 (emphasis added)). Mr. Cohen’s prior IHT and deposition testimony cited by Complaint Counsel was no different and is consistent with his lack of recollection. (CX 0301 (Cohen, IHT at 195-99 (“I *believe* ...”; “I don’t recall any specifics”; “I don’t know...”; “I don’t recall...”; “I don’t remember...”)); CX 8015 (Cohen, Dep. at 233-37 (“I don’t recall. These are conversations -- you put e-mails in front of me that are six or seven years old.”), 231 (“*I don’t recall any specific conversations with Mr. Sullivan about buying groups.*”) (emphasis added))).

In any event, Mr. Cohen testified at his Investigational Hearing and at trial that Benco’s policy was public, “pretty well known,” and not a secret. (CX 0301 (Cohen, IHT at 198); Cohen, Tr. 714-15).

Patterson’s Response:

The proposed finding is false. Nowhere did Cohen’s email “assure” Guggenheim that Benco would “maintain” anything. (CX0056 at 001). Nor is it clear why Guggenheim, on the receiving end of Cohen’s unsolicited email, would need such an “assur[ance].” PF ¶ 267. Complaint Counsel’s citations regarding Patterson refer to Guggenheim and Cohen’s February 2013 communication (CX0090) regarding NMDC. CCFF ¶¶ 483-484; 489-490. On February 8, 2013, Patterson Dental’s President, Paul Guggenheim, received an unsolicited mail from Benco’s President Chuck Cohen about “some noise” Cohen had picked up from public information that a fledgling entity called the New Mexico Dental

had no recollection of what was discussed. (RX 1127 (Cohen, Dep. at 389-90 (“I don’t know. I don’t have a record of that.”))).

Cooperative would be hosting a meeting in Patterson’s Albuquerque office. (Guggenheim, Tr. 1699; CX0090 at 001). Cohen *volunteered* in the email that Benco had a long-standing policy of not selling to “buying groups.” (CX0090 at 001 (“FYI: Our policy at Benco is that we do not recognize, work with, or offer discounts to buying groups (though we do work with corporate accounts) and our team understands that policy.”); Cohen, Tr. 679 (“a policy that’s been in place since 1996”)).

Moreover, Cohen’s email did not ask Guggenheim to do anything. (Cohen, Tr. 705 (“Q. Did you write that e-mail to Mr. Guggenheim for the purpose of forming any agreement? A. No.”); Cohen, Tr. 714 (“Q. Did you ask Mr. Guggenheim to do anything? A. No.”)). Cohen also did not expect to hear anything from Guggenheim in response to his email. (CX0057 at 6 [REDACTED]); Cohen, Tr. 714 (“Q. Did you expect him to do anything? A. No.”)). And Cohen never followed up with Guggenheim about the email. (Cohen, Tr. 714 (“Did you ever follow up with him? A. I did not.”)). The email, on its face, does not contain any “assurance” or “commitment” do anything, and Complaint Counsel cites nothing to support its assertion.

Additionally, as Complaint Counsel only cites to its own proposed findings as support, Patterson incorporates its responses to CCFB ¶¶ 483-484; 489-490, 661-664.

Benco’s Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding.

1180. Guggenheim assured Cohen that Patterson would maintain a no buying group policy. (CCFF ¶¶ 495-496, 500-501). Sullivan assured Cohen that Schein would maintain a no buying group policy. CCFF ¶¶ 674-680; *see also* CCFF ¶ 681-682).

Schein's Response:

False.

Complaint Counsel cites no record evidence to support this finding. It only cites to other proposed findings. Schein incorporates its specific responses to those findings here. (SRF 495-96, 500-01, 674-82).

Substantively, CCFF 674-682 make assertions regarding what Mr. Cohen supposedly “understood,” not that Sullivan “assured” Mr. Cohen of anything. Sullivan made no assurances to Mr. Cohen, nor did he provide any information to Mr. Cohen about Schein’s buying group practices or strategy. (Sullivan, Tr. 4190).

But even as to Mr. Cohen’s understanding, the proposed finding finds no support. Mr. Cohen testified time and again that he did not know Schein’s policy regarding buying groups. (Cohen, Tr. 870 (Cohen did not “know what Schein’s policies or practices were with respect to buying groups”); RX 1137 (Cohen, Dep. at 334-35 (“Q. Are you aware of Henry Schein’s policy regarding doing business with buying groups? THE WITNESS: No.”)); CX 8015 (Cohen, Dep. at 489-90 (“I don’t recall ever hearing from anyone at Schein what Schein’s policy was on buying groups. Q. Do you know what Schein’s policy is with respect to doing business or not doing business or offering discounts or not offering discount to buying groups? A. I do not.”)); CX 0301 (Cohen, IHT at 216 (“As far as their overall policy, I don’t know.”))).

Complaint Counsel ignores Mr. Cohen’s 2013 email to Jamie Kasinski seeking “the name of the buying group in [his] area that works with Schein,” which clearly indicates

that Mr. Cohen was aware, in 2013, that Schein did not have a no-buying-group policy like Benco. (CX 0061).

To the extent that Mr. Cohen held such a belief, there is no evidence that his belief was based on any communication from Schein explaining its buying group policy. (Cohen, Tr. 845 (Mr. 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”); CX 8015 (Cohen, Dep. at 490 (“I don’t recall ever hearing from anyone at Schein what Schein’s policy was on buying groups.”)); CX 0301 (Cohen, IHT at 225 (“Q. Do you recall any communications with Mr. Sullivan that gave you the impression that Schein does not sell to GPOs? A. No specific communications around that.”)); *see also* SRF 674-75 (based on a lack of scuttlebutt), 676 (no independent recollection)).

Complaint Counsel fails to cite any documents leading up to, memorializing, or post-dating any alleged communication informing Mr. Cohen of Schein’s buying group policy that would indicate that Mr. Cohen’s opinion was based on anything more than the “word on the street.” (CX 0301 (Cohen, IHT at 217)).

Patterson’s Response:

The proposed finding is false. Nowhere in the text of Guggenheim’s email did he “assure” Cohen that Patterson would take any action, besides a vague “I’ll investigate,” (CX0090 at 1), which he did not do. PF ¶ 275. Guggenheim’s statement that “we feel the same way about these,” was a statement about a feeling, which is different from a commitment. PF ¶ 681. Guggenheim denied that his response was a commitment. PF ¶¶ 272, 274 (Guggenheim, Tr. 1707 (“Did you commit in any way to Mr. Cohen in this e-mail that Patterson was not going to discount to buying groups? A. Absolutely not. Q. Did you commit in any way to do anything going forward with regard to buying groups? A.

Never.”)). Chuck Cohen also did not interpret the response as a commitment from Guggenheim to do anything. PF ¶ 270.

Rather, Guggenheim testified that he “banged out a quick response [to Cohen], probably took [] 10-15 seconds, fired it off to Chuck and moved on to the next email.” (Guggenheim, Tr. 1706). Guggenheim did not commit himself or Patterson to any particular action with respect to buying groups. (Guggenheim, Tr. 1706-07) (Q. Why did you say “feel”? A. Just my general sense is that, you know, we've always felt that way, you know, but “feel” means it's just a -- a simple way of saying how I feel, we feel, no specific science behind it. Q. Mr. Guggenheim, let's be clear. Did you commit in any way in this e-mail to Mr. Cohen that Patterson was not going to sell to buying groups? A. Absolutely not. Q. Did you commit in any way to Mr. Cohen in this e-mail that Patterson was not going to discount to buying groups? A. Absolutely not. Q. Did you commit in any way to do anything going forward with regard to buying groups? A. Never.).

Additionally, as Complaint Counsel only cites to its own proposed findings as support, Patterson incorporates its responses to CCF ¶¶ 483-484; 489-490, 661-664.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding.

1181. In Benco/Patterson agreements, there were instances of confrontation upon suspected cheating. (CCFF ¶¶ 569-570, 572-573). In the Benco/Schein agreement, there were instances of confrontation upon suspected cheating. (CCFF ¶¶ 997, 982-986, 989-992).

Schein's Response:

False. Complaint Counsel cites no record evidence to support this finding. It only cites to other proposed findings, which – as set forth in Schein's specific replies – also fail to support its characterization of the evidence. Schein incorporates those specific responses here. (SRF 569-70, 572-73, 997, 982-86, 989-92).

Complaint Counsel relies on two alleged instances of claims "confrontation" between Schein and Benco: Smile Source (2012) and Dental Alliance.

The first never occurred. On July 25, 2012, Benco's Pat Ryan received an email in which Smile Source's then-President, Dr. Goldsmith, wrote that, "in the past," Smile Source had used Schein, but was now looking for a new distribution partner. (SRF 914; SRF 978). Mr. Ryan forwarded the email to Mr. Cohen with a "flippant" remark to "tell your buddy Tim to knock this ... off." (CX 0018-001; SRF 982). Mr. Cohen then asked Mr. Ryan to re-forward the message in a clean email, so he could "print & send to Tim with a note." (CX 0018-001). But Mr. Ryan *did not do this*. (SRF 990; CX 1251). Mr. Cohen has no recollection of receiving a clean email from Mr. Ryan, printing it out, writing a note to Mr. Sullivan, or sending any such note. (SRF 992; Cohen, Tr. 885-86). Mr. Sullivan similarly testified that he did not receive any note from Mr. Cohen about Smile Source or any buying group. (SRF 992; Sullivan, Tr. 4252-53). Importantly, when Smile Source later approached Schein in 2013, Mr. Sullivan's conduct was the opposite of Benco's: he embraced the idea and subsequently submitted an offer. (SF 1156-86). Thus, the phantom note provides no basis for Complaint Counsel's confrontation theory.

As to Dental Alliance, Complaint Counsel relies on a single unsolicited text message from Mr. Cohen to Mr. Sullivan:

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

(CX 6027-028). There is nothing “confrontational” about the text, and Mr. Cohen’s follow-up text – in which he says, “Could be a rumor, sometimes stories go around” – is consistent with Mr. Cohen’s testimony that he was trying to *gain* competitive intelligence, *not* that he was seeking an agreement from Schein to terminate Dental Alliance or otherwise change Schein’s behavior. (CCFF 999 (conceding as much); *see also* Cohen, Tr. 557 (“I wanted more market intelligence on the topic.”)). And Schein continued to do business with them throughout the relevant period. (SRF 997; SF 1319, 1543; Sullivan, Tr. 4241). Moreover, the text itself does not even mention Schein. As Mr. Sullivan testified, when he received the text, he believed it related to ADC, since that was the subject of Mr. Cohen’s prior unsolicited text, and that it was just more background research about the group that Mr. Cohen was passing long.

Patterson’s Response:

Complaint Counsel’s proposed finding is false and has been contradicted by the overwhelming record evidence in this case. This proposed finding also assumes the existence of an agreement, which is counter to Complaint Counsel’s burden of proof. *In the Matter of Mcwane, Inc. & Star Pipe Prod., Ltd.*, 155 F.T.C. 903, 2013 WL 8364918 at *261 (May 1, 2013). Complaint Counsel points to *only one* alleged instance of what it alleges was a “confrontation” between Patterson and Benco—Guggenheim and Cohen’s June 2013 email (CX0062) regarding ADC—but the actual evidence in the record disproved Complaint Counsel’s strained assertion. The *one* email was not a “confrontation.” At trial, both Guggenheim and Cohen denied that this email constituted

enforcement of an agreement not to work with buying groups. (Guggenheim, Tr. 1871-72 (“Q. And again, just so the record is crystal clear on this, by this e-mail, did you believe that you were enforcing any agreement between Patterson and Benco not to do business with buying groups? A. Absolutely not. Q. And by this e-mail, did you intend to enforce any such agreement? A. No.”)); (Cohen, Tr. 918–19 (“Q. Is there a secret code that you and Mr. Guggenheim worked out where one of these terms means enforce or enforcement? A. No. Q. Was there ever -- when you were a kid, did you ever use lemon juice to create invisible ink and then you put it over a candle or something and it appears? Did you ever do when you were a kid? A. Yes. Q. Is there -- was there lemon juice with a secret code that’s invisible to the rest of us that has ‘enforce’ or ‘enforcement’ in there? A. No. Q. I mean, you’d pretty much have to make that up if you were interpreting this to contain the word “enforce” or “enforcement,” wouldn’t you, sir? A. The answer is no, and Paul ran at that point a much larger operation than Benco did. I’m not in the business of telling him how to run his business. It would not be something I would say even in jest. Q. All right. And just so we’re clear, you’d pretty much have to make it up to think that this e-mail thread between you and Mr. Guggenheim somehow had the word “enforce” or “enforcement” in it, wouldn’t you? A. I would think so.”)).

Additionally, Complaint Counsel cites no record evidence to support this proposed finding. It only cites to other proposed findings, which—as set forth in Patterson’s specific replies—also fail to support Complaint Counsel’s characterization of the evidence. As such, Patterson incorporates its responses to CCFF ¶¶ 569-570, 572-573.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding.

1182. Cohen reassured Guggenheim of Benco's compliance with its no buying group policy. (CCFF ¶¶ 574-577, 579). Cohen reassured Sullivan of Benco's compliance with its no buying group policy. (CCFF ¶ 997).

Schein's Response:

False. Complaint Counsel only cites to its own proposed findings to support CCFF 1182, and Schein incorporates its responses to those findings here. (SRF 997).

Substantively, CCFF 997 quotes Mr. Cohen's unsolicited text message about Dental Alliance. This was not an effort to "reassure" Schein of anything, as Schein had not raised any questions or concerns about it. It was an unsolicited text. Moreover, Complaint Counsel *misquotes* the text. According to Complaint Counsel, "Cohen [wrote] to Sullivan: 'Dental Alliance buying group contacted me about a year ago.... Told him he was out of his tree.'" (CC Br. 59 (citing CCFF 997 (misquoting CX 6027-028))). In fact, Mr. Cohen simply copied an email he received from a Benco Regional Manager. (SRF 1001; CX 0061; Cohen, Tr. 557-58). Thus, Dental Alliance did not approach Mr. Cohen, and the "out of his tree" comment was not Mr. Cohen's.

Patterson's Response:

This finding is inaccurate and directly contradicts the record. Complaint Counsel's citations refer to Guggenheim and Cohen's June 2013 email (CX0062) regarding ADC. CCFF ¶ 574-577, 579. At trial, both Guggenheim and Cohen denied that this email constituted enforcement of an agreement not to work with buying groups. (Guggenheim,

Tr. 1871-72 (“Q. And again, just so the record is crystal clear on this, by this e-mail, did you believe that you were enforcing any agreement between Patterson and Benco not to do business with buying groups? A. Absolutely not. Q. And by this e-mail, did you intend to enforce any such agreement? A. No.”)); (Cohen, Tr. 918–19 (“Q. Is there a secret code that you and Mr. Guggenheim worked out where one of these terms means enforce or enforcement? A. No. Q. Was there ever -- when you were a kid, did you ever use lemon juice to create invisible ink and then you put it over a candle or something and it appears? Did you ever do when you were a kid? A. Yes. Q. Is there -- was there lemon juice with a secret code that’s invisible to the rest of us that has ‘enforce’ or ‘enforcement’ in there? A. No. Q. I mean, you’d pretty much have to make that up if you were interpreting this to contain the word “enforce” or “enforcement,” wouldn’t you, sir? A. The answer is no, and Paul ran at that point a much larger operation than Benco did. I’m not in the business of telling him how to run his business. It would not be something I would say even in jest. Q. All right. And just so we’re clear, you’d pretty much have to make it up to think that this e-mail thread between you and Mr. Guggenheim somehow had the word “enforce” or “enforcement” in it, wouldn’t you? A. I would think so.”)).

Additionally, as Complaint Counsel only cites to its own proposed findings as support, Patterson incorporates its responses to CCFB ¶¶ 574-577, 579, 997.

Benco’s Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding.

1183. Benco's documents refer to an overarching agreement among Schein, Patterson, and Benco. (CX0023 at 001 ("CHUCK --- maybe what you should do is make sure you tell Tim [Sullivan] and Paul [Guggenheim] to hold their positions as we are.") (emphasis in original); CX1149 at 002 (buying groups do not catch on "because so far, all of the major dental companies have said, "NO", and that's the stance we will continue to take.") (emphasis in original); *see also* CCF ¶¶ 1103-1104)).

Schein's Response:

False. There is no reference to an overarching agreement, or any kind of agreement.

CX 0023 does not refer to any agreement. Rather, it is an internal suggestion Mr. Ryan made to Mr. Cohen that Mr. Cohen *did not follow*. Whatever Mr. Ryan suggested to Mr. Cohen, the evidence is unequivocal that no such communication between Mr. Cohen and Mr. Sullivan occurred. Mr. Cohen never indicated that he would follow Mr. Ryan's suggestion; Mr. Cohen denied that any such call occurred; Mr. Ryan testified that he never learned of any such call; and the communications log prepared by Complaint Counsel shows no such communication. (SF 1555; Cohen, Tr. 901-02; Ryan, Tr. 1263; CX 6027). Moreover, Mr. Ryan speculation as to Schein's "position" cannot be taken for its truth. Mr. Ryan "had no knowledge of" what Mr. Sullivan and Mr. Guggenheim's "actual positions were" and "only know[s] what [he] can see in the street." (Ryan, Tr. 1114-15).

Nor does CX 1149 indicate any kind of agreement. Mr. Ryan's SharePoint post in CX 1149 was, at best, an unsubstantiated opinion. To the extent his comment regarding "all of the major dental companies" included Schein, Mr. Ryan testified that his assessment of Schein's stance on buying groups "was just pure speculation" – his "sense from market intel" – and not based on any actual first-hand knowledge. (Ryan, Tr. 1222, 1253; SRF 527-30).

Patterson's Response:

The proposed finding is false. The cited documents are internal Benco communications that—on their faces—refer to no agreement or conspiracy involving Patterson. (CX0023 at 001; CX1149 at 002). Regarding CX0023, Cohen testified that he could not recall ever contacting Guggenheim in response to receiving this email. ((CX8015 (Cohen, Dep. at 378))). Complaint Counsel presented no evidence that a conversation ever occurred.

Additionally, Patterson joins the responses of Benco and Schein. (*See also* responses to CCFF ¶¶ 1103-1104).

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit and testimony.

First, the first cited exhibit does not contain evidence of any "overarching agreement." (CX0023).

Pat Ryan testified that on September 16, 2013 – the date of the cited exhibit – he "had no knowledge of what their [Sullivan's and Guggenheim's] actual positions were." (Ryan, Tr. 1114). He continued: "I had no knowledge of what their position actually was. I only know what I can see in the street." (Ryan, Tr. 1114-15). Ryan even reiterated his testimony a third time. (Ryan, Tr. 1205-1206 (acknowledging that he was just "speculating.")).

Chuck Cohen never did anything in response to Pat Ryan e-mail. (Cohen, Tr. 843). Cohen never even spoke to Sullivan or Guggenheim about buying groups at any time after the date of the cited exhibit. (Cohen, Tr. 842-43).

Second, the second cited exhibit does not contain evidence of any “overarching agreement.” (CX1149).

Pat Ryan testified at trial that – at the time of this SharePoint post (February 23, 2013) – he had no personal knowledge of any other dental companies’ position on buying groups. (Ryan, Tr. 1221-22). The only basis for his statement that “all of the major dental companies have said, NO,” was “what I had seen in the field, what I can sense from market intel.” (Ryan, Tr. 1221-22).

Moreover, Pat Ryan’s post is simply a response to a post by another Benco employee about a topic unrelated to buying groups. In CX1149, Gerald Barto, a Benco sales employee, posted about a situation in which he was unable to qualify multiple dental offices – that lacked common ownership – for discounted pricing under Benco’s Partner Sharing program. (CX1149; Ryan, Tr. 1078-79). Benco’s Partner Sharing (PS) program provides volume discounts to individual customers who purchase more than \$100,000 per year in dental supplies. (CX1084; CX1100; Benco FF ¶ 152). Another Benco employee, Jeff McAdoo first responds to Gerald Barto’s post suggesting a way to seemingly avoid Benco’s rules on Partner Sharing by ignoring the common ownership requirement inherent in Benco’s Partner Sharing volume discount. At this point, Pat Ryan responds to clarify Benco’s policy that “[t]o be recognized as one customer, one of the following three situations” must apply. (CX1149; Ryan, Tr. 1080 (“I reply with the situations where we recognize somebody as one customer.”)). Therefore, the exchange between Mr. Barto, Mr. McAdoo, and Mr. Ryan contained in CX1149 was not about Benco being “afraid” of Buying Groups – or even about Buying Groups at all – but rather, about Benco’s Profit Sharing discount program. (Ryan, Tr. 1218).

1184. Patterson's documents refer to an overarching agreement among Schein, Patterson, and Benco. (CX0093 at 001 ("Confidential and not for discussion . . . our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me."); *see also* CCFF 5511, 8721, 8723, 8722)).

Schein's Response:

False. CX 0093 makes no reference to any agreement or overarching agreement.

Mr. Misiak, who wrote the quoted piece of CX 0093, was interested in competitive intelligence and may have *believed* that Schein did not work with buying groups. (SRF 540, 549). But Mr. Misiak's belief was based on nothing more than "just hearing things from the field." (CX 0316 (Misiak, IHT at 280); *see also* Misiak, Tr. 1502-04 (no personal knowledge of Schein's buying group practices)). Mr. Misiak did not have personal knowledge of Schein's strategy or practice regarding buying groups, and his belief was mistaken. (Misiak, Tr. 1502-05; CX 0316 (Misiak, IHT at 280-82); *see also* SRF 540).

Patterson's Response:

This proposed finding is blatantly false, and grossly mischaracterizes what the document says, what the witnesses have testified to regarding the document, and the entire fact record. The cited document is an internal Paterson communication that—on its face—refers to no agreement involving Patterson. (CX0093 at 001). Misiak testified that his statement regarding Benco and Schein was based on market observations, not an agreement. (Misiak, Tr. 1363) ("Well, to reference something that was said recently, part of my role as president of the company is to understand the business environment -- as president of the dental business, I think it was important for me to understand the market, the climate, the environment, the customers and the competition, so I'm asking, if they heard something, to let me know."); Misiak, Tr. 1364–65 ("A. I'm asking, if you hear

differently and have specific proof, to send that to me. Q. Did you want Mr. Fruehauf to tell you if he heard that Schein or Benco were selling to GPOs? A. I'm referencing our two largest competitors and then, if he has specific proof, to send that, so I would say yes."'). (See also responses to CCF 5511, 8721, 8723, 8722).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to internal Patterson documents.

1185. Schein's documents refer to an overarching agreement among Schein, Patterson, and Benco. (CX2106 at 001 ("The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott."); CX2094 at 001 (Schein, PDCO and Benco all refused to bid on their business when they entered the GPO/Buying Group world."); see also CCF 5755, 3097)).

Schein's Response:

False.

Mr. Foley, who wrote the quote from CX 2106, never talked to Benco or Patterson about being "on the same page" about buying groups. (Foley, Tr. 4710; see also SRF 947, 1138). Indeed, the only communication he received was an unsolicited call from Mr. Ryan in October 2013. Mr. Foley acted precisely as one should in response to an unsolicited call from a competitor. When Mr. Ryan raised Smile Source, Mr. Foley ended the discussion and reported it to his boss, Mr. Muller. (SRF 1016-17; CX 0243). Mr. Foley did not share any information about Schein's policies, practices, or plans concerning buying groups generally, or Smile Source specifically. (SRF 1016; Foley, Tr. 4579).

Mr. Foley also wrote the quoted email in CX 2094, which is about Tralongo. However, there is no evidence that Mr. Foley or anyone at Schein ever discussed Tralongo with anyone at Patterson or Benco. (SF 1278). Mr. Foley testified that he "had no direct

knowledge” of whether PDCO or Benco bid on Tralongo. (SF 1278). Rather, he was just reporting market intelligence based on the fact that he had “never run into them at any buying group opportunities.” (SF 1278).

Thus, Mr. Foley had no actual knowledge of what “page” Patterson or Benco were actually on, or whether they in fact refused to bid. More importantly, Mr. Foley’s observations of Patterson’s and Benco’s market behavior are no basis on which to claim an “overarching agreement.”

Patterson’s Response:

The proposed finding is inaccurate. The cited documents are internal Schein communications that—on their faces—refer to no agreement or conspiracy involving Patterson. (CX2106 at 001; CX2094 at 002).

Additionally, Patterson joins the response of Schein. (*See also* responses to CCFF ¶¶ 5755, 3097).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to internal Patterson documents.

1186. The Benco/Patterson and Benco/Schein agreements were part of one overarching conspiracy. (CCFF ¶¶ 1178-1185, 1187-1198)

Schein’s Response:

The asserted fact is a legal conclusion improperly presented as a proposed finding. In any event, it is false. Complaint Counsel cites no record evidence to support this finding. It only cites to other proposed findings, and Schein incorporates its specific responses to

those proposed findings here. (SRF 1178-85, 1187-98). None support a finding of an agreement, or meet the legal standards to show an overarching conspiracy.

Patterson's Response:

There was no agreement between Patterson and Benco or Schein, and no overarching agreement involving Patterson, Benco, and Schein. Complaint Counsel's unsupported assertion is contradicted by the overwhelming record evidence in this case. As Complaint Counsel only cites to its own proposed findings as support (which themselves to not support the proposed finding), Patterson incorporates its responses to CCFF ¶¶ 1178-1185 and 1187-1198.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding.

1187. On February 27, 2013, Misiak (Patterson) directed a Regional Manager to refuse a buying group, explaining that Patterson's largest competitors, Henry Schein and Benco, refuse buying groups as well:

Confidential and not for discussion . . . our 2 largest competitors stay out of these as well. If you hear differently and have specific proof please send that to me.

(CX0093 at 001 (emphasis in original); Misiak, Tr. 1356-1358; *see also* CCFF ¶¶ 549-552).

Schein's Response:

This is the same proposed finding as CCFF 549. Schein incorporates its response to that proposed finding here. (SRF 549). In short, Mr. Misiak's belief was nothing more than "just hearing things from the field." (CX 0316 (Misiak, IHT at 280); *see also* Misiak, Tr. 1502-04 (no personal knowledge of Schein's buying group practices)). His desire for

substantiated competitive intelligence is innocuous and shows that he actually did not know what Benco's or Schein's policies were, as there would have been no need to ask for additional information if he already knew.

Patterson's Response:

Inaccurate. First, Misiak did not "direct[] a Regional Manager to refuse a buying group." Misiak's email was responding to *Fruehauf's request* for advice. (CX0093 at 001). Misiak advised Fruehauf that *his (Misiak's) personal* approach to buying group requests was to "politely" decline. (CX0093 at 001). Moreover, Fruehauf testified that Misiak "didn't specifically tell him not to" bid on ADC. (CX8013 (Fruehauf, Dep. at 113-114)).

Second, Misiak testified that his statement regarding Benco and Schein was based on market intelligence, not a conspiracy. (Misiak, Tr. 1363 ("Well, to reference something that was said recently, part of my role as president of the company is to understand the business environment -- as president of the dental business, I think it was important for me to understand the market, the climate, the environment, the customers and the competition, so I'm asking, if they heard something, to let me know."); Misiak, Tr. 1364-65 ("A. I'm asking, if you hear differently and have specific proof, to send that to me. Q. Did you want Mr. Fruehauf to tell you if he heard that Schein or Benco were selling to GPOs? A. I'm referencing our two largest competitors and then, if he has specific proof, to send that, so I would say yes.")).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

1188. On February 27, 2013, Misiak wrote to Guggenheim, “I’ve coached [Regional Manager Fruehauf] on how to stay out of this [buying group] with grace. I’m concerned that Schein and Benco sneak into these co-op bids and deny it. . . .” (Misiak, Tr. 1368; CX0092 at 001; *see also* CCFF 539-540). Misiak testified that “this” referred to ADC. (Misiak, Tr. 1367; CX8038 (Misiak, Dep. at 159)).

Schein’s Response:

This is the same proposed finding as CCFF 540. Schein incorporates its response to that proposed finding here. (SRF 540). In short, Mr. Misiak’s email simply reflected his desire for business intelligence about what the competition is doing, and that he has no personal knowledge of Schein’s strategy or approach to buying groups. Moreover, as the record in this case demonstrates, once a distributor wins a buying group’s business, it becomes public knowledge quickly, so there is no ability to hide a buying group win. (*E.g.*, RX 2090 (Smile Source informing Schein it had decided to go to Burkhardt); CX 2591-002 (Smile Source told Schein it decided to go with Darby)).

Patterson’s Response:

False. The proposed finding is also duplicative of CCFF ¶¶ 540-541, and Patterson refers to its responses to those proposed findings.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson’s business.

1189. Misiak was concerned that Schein and Benco would submit bids for buying groups and deny it. (CX0092 at 001; CX8038 (Misiak, Dep. at 160)). At trial, Misiak could not recall why he was concerned that Schein and Benco would “sneak into” bids and “deny it.” (Misiak, Tr. 1369 (“Q. What was the concern if Benco and Schein deny it? A. I don’t recall what I meant by that”); Misiak, Tr. 1370 (“Q. And when you said ‘deny’, whom did you have in mind that Schein and Benco would deny it to? A. I don’t remember.”); Misiak, Tr. 1372 (“Q. From your perspective, how could Benco or Schein work with buying groups but deny it? A. I’m not sure.”)).

Schein's Response:

This is essentially the same proposed finding as CCF 540. Schein incorporates its response to that proposed finding here. (SRF 540). In short, Mr. Misiak's email simply reflects his desire for business intelligence about what the competition is doing, and that he has no personal knowledge of Schein's strategy or approach to buying groups. Mr. Misiak testified that his remark merely reflected his *opinion* based on his experience. (Misiak, Tr. 1357).

Complaint Counsel cites Mr. Misiak's lack of recollection as to what he meant by "deny." The fact that Mr. Misiak did not recall the specifics of the email nearly six years after he wrote it is unsurprising and innocuous. But Mr. Misiak did explain his "concern." His concern was "to understand what the competition is doing, the business environment." (Misiak, Tr. 1369).

As for Mr. Misiak's concern about Schein or Benco "sneaking" into a buying group relationship, this simply reflects a concern that, particularly in a concentrated market, competitors might try to hold their business dealings and strategies close to the vest so that competitors do not catch on and follow suit.

As it pertains to buying groups, however, the record in this case demonstrates that once a distributor wins a buying group's business, it quickly becomes public knowledge, so there is little ability to hide a buying group win. (*E.g.*, RX 2090 (Smile Source informing it had decided to go to Burkhardt); CX 2591-002 (Smile Source told Schein it decided to go with Darby)).

Patterson's Response:

False. The proposed finding is duplicative of CCF ¶ 540, and Patterson refers to its response to that proposed finding.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

1190. On August 4, 2013, Rogan (Patterson) wrote to McFadden: "Neal, we don't need GPO's in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry." (CX0106 at 001; McFadden, Tr. 2710; *see also* CCF ¶¶ 603).

Schein's Response:

Complaint Counsel's proposed finding simply quotes Mr. Rogan's email to Mr. Neal McFadden. The quote is based on speculation and is contrary to the evidence.

The August 1, 2013 email indicates that, per the Senior Vice President of the buying group Tim Bugg, "Henry Schein has been in his office looking to sign an agreement with them." (CX 0106-002). Mr. McFadden forwarded the email because he believed that Schein was involved with a buying group. (SRF 602). Ignoring Mr. McFadden's email, Mr. Rogan offered his "two cents," saying that "Schein, Benco, and Patterson have always said no." (CX 0106-001). Mr. Rogan's belief as to what Schein was or was not doing regarding buying groups, however, is not reliable evidence of what Schein was actually doing. As Mr. Rogan testified, "I have no idea if Schein or Benco have policies" and his email was just "to the best of my knowledge." (CX 0317 (Rogan, IHT at 239)). At trial, Mr. Rogan confirmed that he has never spoken to anyone at Schein in any fashion about buying groups. (Rogan, Tr. 3571, 3655, 3657). Instead, any comment made by Mr. Rogan regarding Schein's purported approach to buying groups was based on market intelligence and nothing else. (CX 8017 (Rogan, Dep. at 72-73)).

In fact, Mr. Rogan's belief was mistaken. Mr. McFadden responded that he had "the impression that Schein is in [the buying group] space." (McFadden, Tr. 2841; CX 0161; SRF 250). Mr. Rogan testified that Henry Schein's approach differed from his opinion regarding GPOs. (Rogan, Tr. 3661; CX 0106).

Patterson's Response:

Rogan testified at trial that his statement "We don't need GPOs in the dental business," was *his personal opinion* at the time based on the fact that GPOs "don't provide any value, they don't help, they don't do anything. They don't provide access to customers. . . . [A]ll they want is a better deal, but they don't provide any value to the customer" (Rogan, Tr. 3572–73). Rogan developed and held this opinion on his own throughout his entire career at Patterson, without regard for any communications between Chuck Cohen and Paul Guggenheim. (Rogan, Tr. 3573 ("Q. Did you form that opinion because Mr. Guggenheim forwarded an email to you from Mr. Cohen earlier that summer? A. No.")).

Moreover, Rogan also testified that his statement "Schein, Benco, and Patterson have always said no," was *his opinion*, not a fact. (Rogan, Tr. 3573–74). Rogan further testified that his opinion was not based on any email from Chuck Cohen forwarded by Paul Guggenheim, but from his years in the dental industry. (Rogan, Tr. 3574).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Patterson witness discussing Patterson's business.

1191. On May 19, 2015, Ryan (Benco) received an inquiry from Dentistry Unchained, a buying group with 226 dentists that "want[ed] to use Benco"; in response, Ryan wrote to Cohen: "The best part about calling these [buying groups] is I already KNOW that Patterson and Schein have said NO." (CX0012 at 001; Ryan, Tr. 1123-1124).

Schein's Response:

Complaint Counsel's proposed finding is contrary to the evidence. The evidence shows that Mr. Ryan's speculation was mistaken. Schein was in the midst of negotiations with Dentistry Unchained at the time of Mr. Ryan's email and continued negotiations into 2016. (RX 2457-001; RX 2334-001-02; RX 2115-006; Titus, Tr. 5272-73).

There are no inter-firm communications regarding Dentistry Unchained. (Ryan, Tr. 1257; Titus, Tr. 5195). Mr. Ryan conceded that he never spoke with anyone at Schein or Patterson about Dentistry Unchained. (Ryan, Tr. 1209). Mr. Ryan's email was just speculation "from my experience [that] we usually got approached after, after Schein and Patterson." (Ryan, Tr. 1209-10). Mr. Ryan was not aware of Schein's negotiations with Dentistry Unchained, had no idea whether his May 2015 email to Mr. Cohen was true, and was just speculating. (Ryan, Tr. 1254-55). This proposed finding, like many other of Complaint Counsel's proposed findings, shows the impropriety of relying on hearsay or speculative emails to prove "facts" when the actual facts are different as shown by direct evidence.

In 2016, after Schein discovered Dentistry Unchained was featuring Patterson products on its website, however, Schein decided not to pursue the partnership further. (SF 705-06). This, of course, was *after* the alleged conspiracy period. But it was consistent with Schein's approach before and during the alleged conspiracy: careful consideration and evaluation of the opportunity with a focus on compliance and exclusivity. (Titus, Tr. 5199-203, 5274; Meadows, Tr. 2495, 2506, 2544; Sullivan, Tr. 4088, 4098-99; Cavaretta, Tr. 5574-76; Foley, Tr. 4638-39, 4614-15).

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, the cited exhibit is an internal Benco e-mail chain that contains no communications between Benco and Dentistry Unchained at all. (CX0012).

Second, the claims made by Dentistry Unchained were simply not credible. Dentistry Unchained was claiming to have 226 dental practices in a buying group. (Ryan, Tr. 1210-11). Such a size buying group does not exist. By comparison, of Benco's approximately 90 DSO customers, only 1 of them is larger than 226 practices. (Ryan, Tr. 1210-11). Accordingly, Pat Ryan was "skeptical" of the veracity of Dentistry Unchained claim. (Ryan, Tr. 1211).

Third, Pat Ryan testified that he never spoke to anyone at Schein or Patterson about Dentistry Unchained. (Ryan, Tr. 1209). Ryan's basis for writing that "I already KNOW that Patterson and Schein have said NO" was his experience that Benco – as the third largest dental distributor – is only approached after Patterson and Schein have been approached already. (Ryan, Tr. 1209-1210).

Fourth, the context for Pat Ryan's quoted statement was two humorous exchanges with his colleagues wherein they were joking regarding the incredibleness of Dentistry Unchained's claim that it had 226 dental practices. (Ryan, Tr. 1211-13).

The proposed finding should be rejected by the court as unsupported by evidence.

1192. On July 13, 2015, Scott Jack emailed Ryan regarding 50 to 75 dentists that were in the process of starting a buying group. (Ryan, Tr. 1126; CX1185 at 002). Jack wrote, "I'd rather not deal with a group like this but also need to keep about \$1M in current business from joining." (CX1185 at 002; Ryan, Tr. 1126). Jack also asked Ryan to explain how "large group practices

work and what the pricing difference is compared to Partnersharing.” (CX1185 at 002; Ryan, Tr. 1126).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit and testimony.

First, the date of the cited exhibit is July 13, 2015. (CX1185). Therefore, the date of the cited exhibit is **after** the date of Complaint Counsel’s alleged end of the conspiracy period.

Second, the cited exhibit shows Pat Ryan responding to various e-mails from a Benco territory representative Scott Jack. (CX1185). Jack ask multiple questions of Ryan throughout the e-mail chain. (CX1185). Specifically, Jack is asking about how Benco’s Large Group practices work, the pricing differences between Benco’s Large Group pricing and Partnersharing program, and whether is a group forms “a new corporation under on umbrella” they would qualify for Benco’s Large Group pricing. (CX1185). It is only Jack’s final question that implicates the application of Benco’s no-middleman policy. Consistent with Benco’s policy, Pat Ryan responds that Benco would need to evaluate the hypothetical group’s incorporation papers to determine whether “it met our requirements.” (CX1185). Ryan’s response is perfectly consistent with Benco’s no-middleman policy.

Third, to the extent that Pat Ryan is discussing application of Benco’s no-middleman policy **after** the end of Complaint Counsel’s alleged conspiracy period, the

cited exhibit undercut Complaint Counsel's case. Benco developed its policy in 1996 and has applied it consistently before, during, and after Complaint Counsel's alleged conspiracy period. (BFF ¶¶ 166-270; 1285-1334).

1193. On July 13, 2015, Ryan wrote to Scott Jack a sales representative who was concerned about losing \$1 million in "current business" to a buying group: "We don't allow [volume discount] pricing unless there is common ownership. Neither Schein nor Patterson do either." (Ryan, Tr. 1126-1127; CX1185 at 002)

Schein's Response:

This email does not support Complaint Counsel's case because it arose after the end of the alleged conspiracy.

Moreover, Mr. Ryan testified that his comment about Schein was just speculation and that he had no actual knowledge of what Schein or Patterson were doing. (Ryan, Tr. 1114-15). Indeed, as noted in SRF 425, Mr. Ryan was mistaken in speculating what Schein had told Dentistry Unchained.

Mr. Ryan further testified that he has not discussed any general or specific buying groups with anyone at Schein. (Ryan, Tr. 1255-58, 1127-28). He has never spoken to anyone at Schein about CHC buying groups, Synergy Dental Partners, Dental Co-Op of Utah, or any other buying group in Utah, Dentistry Unchained, Atlantic Dental Care or ADC, Long Island Dental Forum, Dental Partners of Georgia, OrthoSynetics, Advantage Dental, Comfort Dental, Steadfast Dental, MeritDent, or the Nexus buying group. (Ryan, Tr. 1255-58).

Patterson's Response:

First, Patterson notes that the email cited in the proposed finding is dated three months after Complaint Counsel stated the alleged conspiracy ended. (Kahn, Tr. 19).

Second, Ryan testified at trial that he based his email on his own experience, not knowledge of Patterson's position. (Ryan, Tr. 1127-28 (Q. And there, you're telling the sales rep that Schein and Patterson don't allow group pricing for buying groups either? A. In my experience. That's been my -- that was my experience at the time.")).

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit and testimony.

First, the date of the cited exhibit is July 13, 2015. (CX1185). Therefore, the date of the cited exhibit is after the date of Complaint Counsel's alleged end of the conspiracy period.

Second, the cited exhibit shows Pat Ryan responding to various e-mails from a Benco territory representative Scott Jack. (CX1185). Jack ask multiple questions of Ryan throughout the e-mail chain. (CX1185). Specifically, Jack is asking about how Benco's Large Group practices work, the pricing differences between Benco's Large Group pricing and Partnersharing program, and whether is a group forms "a new corporation under on umbrella" they would qualify for Benco's Large Group pricing. (CX1185). It is only Jack's final question that implicates the application of Benco's no-middleman policy. Consistent with Benco's policy, Pat Ryan responds that Benco would need to evaluate the hypothetical group's incorporation papers to determine whether "it met our requirements." (CX1185). Ryan's response is perfectly consistent with Benco's no-middleman policy.

Third, to the extent that Pat Ryan is discussing application of Benco's no-middleman policy after the end of Complaint Counsel's alleged conspiracy period, the cited exhibit undercut Complaint Counsel's case. Benco developed its policy in 1996 and has

applied it consistently before, during, and after Complaint Counsel's alleged conspiracy period. (BFF ¶¶ 166-270; 1285-1334).

1194. On March 5, 2014, Foley (Schein) wrote to Chad Thompson of Heartland: "The good thing here is that PDCO, Benco and us are on the same page regarding these buying groups/consortiums. Checking to see if we should join the TDA boycott." (CX2106 at 001; Foley, Tr. 4596-4598; *see also* CCFF ¶ 1138).

Schein's Response:

CX 2106 does not indicate that Mr. Foley had any actual knowledge of what "page" Patterson or Benco were on. (*See* SRF 1138). As such, it cannot support Complaint Counsel's requested inference of an agreement.

Indeed, Mr. Foley never talked to Benco or Patterson about being "on the same page" about buying groups. (Foley, Tr. 4710). The only communication about a buying group he received was an unsolicited call from Mr. Ryan in October 2013 about Smile Source. Mr. Foley acted precisely as one should in response to an unsolicited call from a competitor. When Mr. Ryan raised Smile Source, Mr. Foley ended the discussion and reported it to his boss, Mr. Muller. (SRF 1016-17, 1019; CX 0243). Mr. Foley did not share any information about Schein's policies, practices, or plans concerning buying groups generally or Smile Source specifically. (SRF 1016; Foley, Tr. 4579).

Patterson's Response:

At trial, Foley testified that he never discussed the TDA with anyone at Patterson. (Foley, Tr. 4709 (" Q. Mr. Foley, did you ever discuss the TDA with anyone at Patterson? A. No.")).

Moreover, Patterson notes that Complaint Counsel is not alleging a boycott of the TDA. (Kahn, Tr. 52 ("We do not allege a boycott of the trade show.")).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness discussing Schein's business.

1195. On October 28, 2015, Foley wrote to Schein employees, "Keep in mind that I and others have been in contact with Tralongo over the years. Schein, PDCO and Benco all refused to bid on their business when they entered the GPO/Buying Group world." (CX2094 at 001). Foley testified that this email is regarding Tralongo. (Foley, Tr. 4594-4595; *see also* CCFF ¶ 947).

Schein's Response:

There is no evidence that Mr. Foley or anyone at Schein ever discussed Tralongo with anyone at Patterson or Benco. (SF 947, 1278; Foley, Tr. 4714-15). Mr. Foley testified that he "had no direct knowledge" of whether Patterson or Benco bid on Tralongo. (SF 1278). Rather, he was just reporting market intelligence based on the fact that he had "never run into them at any buying group opportunities." (SF 1278). Mr. Foley's email provides no support for Complaint Counsel's requested inference of an agreement.

Indeed, Special Markets engaged in discussions with Tralongo's buying group about a potential partnership on three occasions. (Foley, Tr. 4712). Schein first began discussions with Tralongo about a potential partnership with its buying group in 2011 or 2012, during the alleged conspiracy. (Foley, Tr. 4568, 4591, 4712-13). At that time, Special Markets submitted a bid to Tralongo for its buying group business. (Foley, Tr. 4568, 4712-13). Schein did not win the bid, and Tralongo partnered with Darby. (Foley, Tr. 4713).

Mr. Foley again engaged in discussions with Tralongo in 2014, again during the alleged conspiracy period. (Foley, Tr. 4713). However, Special Markets did not submit a new bid because Tralongo refused to offer Schein's software, equipment or services to its

members. (Foley, Tr. 4568-69, 4713-14). Special Markets felt that there was thus no “stickiness,” and Tralongo was focused only on obtaining low pricing competitive with Darby’s. (Foley, Tr. 4568-69, 4713).

In 2015, Tralongo became open to using Schein for software and equipment and re-approached Schein about a potential partnership. (Foley, Tr. 4717-18). Schein entered into an agreement with Tralongo to provide software and equipment services to Tralongo’s buying group members in October 2015. (Foley, Tr. 4593, 4718-20). In 2016, Schein submitted a bid for the merchandise side of Tralongo’s buying group. (Foley, Tr. 4718-20).

Patterson’s Response:

At trial, Foley testified that he did not discuss Tralongo with anyone at Patterson. (Foley, Tr. 4715) (“Q. Mr. Foley, did you ever discuss Tralongo with anyone at Patterson? A. No.”). Otherwise, Patterson has no specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to testimony of a Schein witness discussing Schein’s business.

1196. Benco complied with the agreement with Schein and Patterson by refusing to bid for buying groups between 2011 and 2015. (See CCFF 404-425).

Schein’s Response:

False. Since the mid-1990s, Benco complied with its internal, unilateral policy not to do business with buying groups.

Refuting any notion of the alleged agreement, Schein, in contrast, did not refuse to bid for buying groups between 2011 and 2015 and indeed, negotiated with many buying

groups and did business with dozens of buying groups during this period. (SF 377-1335). Schein never had a no-buying-group strategy and has always evaluated each buying group on a case-by-case basis. (Meadows, Tr. 2495, 2506, 2544; Sullivan, Tr. 4088, 4098-99; Cavaretta, Tr. 5574-76; Titus, Tr. 5199-202; Foley, Tr. 4638-39, 4614-15; *see also* RXD 0015-001).

Schein's decision to partner with buying groups that could deliver incremental volume and drive compliance (and to avoid those that could not) was established unilaterally, without consultation or communication with Benco, and occurred long before the start of the alleged conspiracy period. (*See, e.g.*, SF 208-10 (discussing the 2010 Guidance arising out of the Pugh Dental Alliance relationship)).

Patterson's Response:

False. Complaint Counsel presented no evidence of an agreement between Patterson and either Benco or Schein regarding buying groups. This proposed finding assumes the existence of an agreement, which is counter to Complaint Counsel's burden of proof. *In the Matter of Mcwane, Inc. & Star Pipe Prod., Ltd.*, 155 F.T.C. 903, 2013 WL 8364918 at *261 (May 1, 2013). The record only contains two communications between Patterson's Guggenheim and Benco's Cohen regarding buying groups, and *zero* communications between Patterson and Schein regarding buying groups. (PF ¶¶ 267-314). Neither Guggenheim nor Cohen viewed the February 2013 email exchange as an agreement to do anything; the brief email exchange did not constitute an agreement to refuse to provide discounts to or otherwise compete for Buying Groups. (Guggenheim, Tr. 1707; Cohen Tr., 714; *see also* PF ¶¶ 274, 276). Neither viewed the June 2013 email exchange as an enforcement of an agreement not to work with buying groups. (Guggenheim, Tr. 1696; Cohen, Tr. 918-19; *see also* PF ¶¶ 304-30).

As Complaint Counsel only cites to its own proposed findings as support, which themselves do not support this proposed finding, Patterson incorporates its responses to ¶¶ CCFF 404-425.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding. None of the individual findings cited in this proposed finding contain evidence that Benco complied with any fictional agreement.

Benco developed its policy in 1996 and has applied it consistently before, during, and after Complaint Counsel's alleged conspiracy period. (BFF ¶¶ 166-270; 1285-1334).

1197. Patterson complied with the agreement with Benco and Schein by refusing to bid for buying groups between 2013 and 2015. (See CCFF ¶ 631-653).

Schein's Response:

False. Patterson did not bid for buying groups pursuant to its unilateral decision to focus on other aspects of the market.

Complaint Counsel does not claim there were any communications between Schein and Patterson in which they reached an agreement. (CC Br. 25 n.213). Further refuting any notion of an agreement, Schein, in contrast to Patterson's approach, did not refuse to bid for buying groups between 2011 and 2015 and indeed, negotiated with many buying groups and did business with dozens of buying groups during this period. (SF 377-1335). Schein never had a no-buying-group strategy and has always evaluated each buying group on a case-by-case basis. (Meadows, Tr. 2495, 2506, 2544; Sullivan, Tr. 4088, 4098-99;

Cavaretta, Tr. 5574-76; Titus, Tr. 5199-202; Foley, Tr. 4638-39, 4614-15; *see also* RXD 0015-001).

Schein's decision to partner with buying groups that could deliver incremental volume and drive compliance (and to avoid those that could not) was established unilaterally, without consultation or communication with Benco or Patterson, and occurred long before the start of the alleged conspiracy period. (*See, e.g.*, SF 208-10 (discussing the 2010 Guidance arising out of the Pugh Dental Alliance relationship)).

Patterson's Response:

This proposed finding is false, directly contradicted by the record evidence in this case. This proposed finding also assumes the existence of an agreement, which is counter to Complaint Counsel's burden of proof. *In the Matter of Mcwane, Inc. & Star Pipe Prod., Ltd.*, 155 F.T.C. 903, 2013 WL 8364918 at *261 (May 1, 2013). There was no agreement between Patterson and Benco and/or Schein. (*See also* responses to CCFF ¶ 1196 and 1998). Patterson salespeople repeatedly met with and evaluated buying groups for years before and throughout the alleged conspiracy. *See, e.g.*, FOF ¶¶ 119, 130-134, 167-173; Guggenheim, Tr. 1529, 1569-1570 (when Guggenheim was southwest regional manager from 2000 to 2010, Patterson would "often evaluate" buying groups); CX8017 (Rogan, Dep. at 60) ("[W]e take a look at [buying groups] and see if it makes sense for us to do business"); CX8023 (Guggenheim, Dep. at 185) (Guggenheim testified that Patterson has a "nuanced position on buying groups to evaluate them individually in each market based on whether or not they made sense"). Moreover, Patterson did work with buying groups both before and during Complaint Counsel's alleged conspiracy period. *See, e.g.*, FOF ¶¶ 174-175; CX3081 at 001 (as of July 2014, a local Patterson representative was "deal[ing] heavily" with Orthosynetics); McFadden, Tr. 2728 ("Orthosynetics is a quasi-buying group

that focus[es] on orthodontics”); RX0271 at 001 (as of May 2014, a Patterson branch had been selling to Jackson Health—“a GPO”—“for over 10 years”). As Complaint Counsel only cites to its own proposed findings as support, Patterson incorporates its responses to CCFF ¶¶ 631-653.

Benco’s Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding. None of the individual findings cited in this proposed finding contain evidence that Patterson complied with any fictional agreement.

1198. Schein complied with the agreement with Benco and Patterson by refusing to bid for buying groups between 2011 and 2015. (*See* CCFF ¶¶ 925-954; *see also* 733-860).

Schein’s Response:

False. Refuting any notion of an agreement, Schein did not refuse to bid for buying groups between 2011 and 2015 and indeed, negotiated with many buying groups and did business with dozens of buying groups during this period. (SF 377-1335). Schein never had a no-buying-group strategy and has always evaluated each buying group on a case-by-case basis. (Meadows, Tr. 2495, 2506, 2544; Sullivan, Tr. 4088, 4098-99; Cavaretta, Tr. 5574-76; Titus, Tr. 5199-202; Foley, Tr. 4638-39, 4614-15; *see also* RXD 0015-001).

Schein’s decision to partner with buying groups that could deliver incremental volume and drive compliance (and to avoid those that could not) was established unilaterally, without consultation or communication with Benco, and occurred long before the start of the alleged conspiracy period. (*See, e.g.*, SF 208-10 (discussing the 2010 Guidance arising out of the Pugh Dental Alliance relationship)).

Patterson's Response:

Patterson joins Schein's response. Additionally, this proposed finding assumes the existence of an agreement, which is counter to Complaint Counsel's burden of proof. *In the Matter of Mcwane, Inc. & Star Pipe Prod., Ltd.*, 155 F.T.C. 903, 2013 WL 8364918 at *261 (May 1, 2013).

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding. None of the individual findings cited in this proposed finding contain evidence that Schein complied with any fictional agreement.

XVI. BENCO INVITED BURKHART TO REFUSE TO DISCOUNT TO BUYING GROUPS.

1199. Burkhart is a family-owned, distributor of dental supplies, equipment and technical services. (Reece, Tr. 4357-4358, 4365; JX0003 at 002 (Joint Stipulation of Fact No. 7)). It has been in the dental supply business for 130 years. (Reece, Tr. 4358).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

No response.

1200. Burkhart is a direct competitor of Benco, Schein, and Patterson. (Reece, Tr. 4363, 4377; Rogan, Tr. 3437; *see also* Cohen Tr., 572).

Schein's Response:

No response, other than to note that Burkhart is also a direct competitor to many other full-service and non-full-service distributors of dental supplies.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit. As Complaint Counsel explained in the opening, Benco Schein and Patterson are the only three national full-service distributors, and Burkhart is a small regional distributor in the Pacific Northwest. (Opening, Tr. 14; 52-53). Mr. Cohen testified that Burkhart was a regional distributor and wrote that "Burkhart's problem is their lack of a national infrastructure." (Cohen, Tr. 462) (CX1084); Mr. Reece also testified that Burkhart did not have "a nationwide footprint." (Reece Tr. 4415). There are a number of other regional full-service distributors like Burkhart, such as Nashville Dental Supply, Atlanta Dental Supply, Midwest Dental and Midway, as well as other companies, like Darby, Amazon, Scott's Dental, that are direct competitors to Benco, Patterson and Schein. (Ryan, Tr. 1046) (Reece Tr. 4401; 4455).

1201. Burkhart is the 4th largest dental distributor. (Reece, Tr. 4363; Cohen, Tr. 572; Rogan, Tr. 3437-3438; Ryan, 1046). Burkhart has annual sales around \$200 million. (Reece, Tr. 4364).

Schein's Response:

Schein does not dispute Mr. Reece's testimony regarding Burkhart's annual sales. The asserted relative size of Burkhart, however, is irrelevant, as the assertion is not made in relation to any relevant market that Complaint Counsel alleges, which are local.

(Marshall, Tr. 3369 (“Q. Now, you concluded that the relevant geographic markets are local in nature; correct? A. That’s fair. Local, regional in nature, yes.”)). As Dr. Marshall found, Burkhart is the [REDACTED]

[REDACTED] (CX 7101-142-43).

Patterson’s Response:

No specific response.

Benco’s Response:

No response.

1202. Burkhart is a full-service dental products distributor. (Reece, Tr. 4361; Cohen, Tr. 675; JX0003 at 002 (Joint Stipulation of Fact No. 7)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

No response.

1203. Burkhart is not a national full-service distributor. It is a regional dental products distributor, headquartered in Tacoma, Washington. (Reece, Tr. 4357). Burkhart operates throughout the Northwest and the western United States. (Reece, Tr. 4357, 4365-4366; CX0319 (Reece, IHT at 16) (Burkhart’s regions include Alaska, Washington, Oregon, Idaho, Utah, California, Colorado, Arizona, Texas and Oklahoma); Ryan, Tr. 1046, 1089; Sullivan, Tr. 3936).

Schein’s Response:

While Burkhart is not a national full-service distributor, it is not true that it only operates “throughout the Northwest and the western United States.” As its agreement with

the Kois Buyers Group makes clear, Burkhart operates beyond the western United States. It provides a full-service offering in the Northwest and western United States, and provides a “limited service” offering with sales phone support in other areas of the country. (CX 0287-001; CX 1032; *see also* Kois Jr., Tr. 355-57).

Patterson’s Response:

No specific response.

Benco’s Response:

No response.

1204. Burkhart formed a Special Markets Division in 2011 to work with groups including buying groups. (Reece, Tr. 4393).

Schein’s Response:

There is no support for the asserted fact that Burkhart formed a Special Markets division to “work with ... buying groups.” The cited testimony does not refer to buying groups. Mr. Reece’s testimony was that Burkhart’s Special Markets division “is comprised of different segments of business [including] DSOs, GPOs, CHCs, government, schools and universities, different types of groups that are larger in size and scope generally than an independent practice.” (Reece, Tr. 4393).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit. Mr. Reece testified that Burkhart formed its Special Markets Division in 2011 to work with “different segments of business that are unique to

that independent dentist” including “DSOs, GPOs, CHCs, government, schools and universities” (Reece, Tr. 4393). The cited testimony does not say that Burkhart formed its special markets division to work with buying groups.

1205. Burkhart’s began discounting to buying groups in 2011, starting with Amerinet. (Reece, Tr. 4466-4467).

Schein’s Response:

No response, other than to note the cited testimony indicates Burkhart “had discussions with” Amerinet in 2011. (Reece, Tr. 4466-67). The cited testimony does not specify when Burkhart began offering discounts to Amerinet.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is mischaracterizes the cited testimony. Mr. Reece did not testify that Burkhart began discounting to buying groups in 2011, starting with Amerinet. Mr. Reece testified that Burkhart began discussions with Amerinet in the fall of 2011, around the same time it began discussions with Smile Source. (Reece, Tr. 4466-67)

1206. Smile Source approached Burkhart about a potential partnership in 2011. (Reece, Tr. 4465). Burkhart began discounting to Smile Source in 2012. (Reece, Tr. 4466-4467; CX4232 at 008 (Smile Source Roll-Out Schedule, dated January 2nd, 2012); Goldsmith, Tr. 1947-1948, [REDACTED]).

Schein’s Response:

No response, other than to note that Burkhart began discounting to Smile Source after Smile Source fired Schein. (SF 1107-14).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, and mischaracterizes the cited exhibits. Smile Source did not approach Burkhart about a potential partnership. Mr. Reece testified that it was Burkhart who approached Smile Source in the fall of 2011. (Reece, Tr. 4465-66). The "handshake agreement" between Smile Source and Burkhart began in January 2012, when Smile Source's first relationship with Henry Schein ended. (Goldsmith, Tr. 1947-48; [REDACTED]).

1207. In or around September 2013, Benco learned that Burkhart had entered into a supply agreement with a buying group. (CX1112 at 026-027 (Answer of Benco ¶53)).

Schein's Response:

Benco's Answer does not state *when* Benco first learned that Burkhart had entered into a supply agreement with a buying group. It just admits that, by September 2013, Benco "believed that Burkhart had entered into a supply agreement with a group of independent dentists." (CX 1112-026-27). Regardless, Benco's Answer is not admissible as evidence against Schein, and no record evidence is cited to support the date on which Benco learned of Burkhart's buying group activities.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding misrepresents the evidence. Benco's Answer did not admit that "in or around September 2013" Benco "*learned*" that Burkhart

had entered into a supply agreement with “a buying group.” Benco admitted only that it “*believed*” in or around September 2013 that Burkhart had entered into an agreement “with a group of independent dentists” and Benco denied the remaining allegations in the Complaint. The cited evidence does not establish when Benco came to believe that such an agreement existed. (CX1112 at 026-027 (Answer of Benco ¶53)).

1208. On September 13, 2013, Benco’s VP of Sales, Mike McElaney, called his counterpart at Burkhart, Jeffrey Reece, to discuss buying groups. (CX1328 at 011 (Benco’s Response to RFA ¶22) (McElaney spoke with Reece by telephone on September 13, 2013); CX0303 (McElaney, IHT at 27-28); CX0319 (Reece, IHT at 150)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibits. Benco’s Response to RFA ¶ 22 denied that Mr. McElaney called Mr. Reece to discuss buying groups. Mr. McElaney, who was unable to testify at trial due to declining health, admitted that he did call Mr. Reece on September 23, 2013 and they discussed that Burkhart was “moving ahead with an agreement to service a GPO.” (McElaney, IHT at 27-28). Mr. McElaney and Mr. Reece discussed “some of the pitfalls that may happen” and Mr. McElaney wished Mr. Reece “the best of luck.” CX0303 (McElaney, IHT at 29). Mr. McElaney and Mr. Reece did not discuss Benco’s policy regarding selling to GPO’s. CX0303 (McElaney, IHT at 29).

1209. McElaney called Reece because he had just learned that Burkhart “was moving forward with an agreement to service a GPO.” (CX0303 (McElaney, IHT at 27-28) (McElaney contacted Reece because Burkhart “was moving forward with an agreement to service a GPO, and I called him and I said, ‘You know, hey, what’s up?’”); Reece, Tr. 4377-4378; CX8021 (Reece, Dep. at 106)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete and mischaracterizes the cited exhibit. Mr. McElaney did not testify that he contacted Mr. Reece “because” “Burkhart was moving forward with an agreement to services a GPO.” Mr. McElaney and Mr. Reece discussed “some of the pitfalls that may happen” when dealing with GPO’s and Mr. McElahaney wished Mr. Reece “the best of luck.” CX0303 (McElaney, IHT at 29). Mr. McElaney and Mr. Reece did not discuss Benco’s policy regarding selling to GPO’s. CX0303 (McElaney, IHT at 29). Mr. Reece believed that, at the time of the call, Benco was working with buying groups. (Reece, Tr. 4377-78)

1210. The September 13, 2013, call from McElaney to Reece about buying groups lasted approximately 10-12 minutes. (Reece, Tr. 4379; CX8021 (Reece, Dep. at 107) (“Q. Most of the call was about the topic of GPOs and not other things? A. That’s correct.”); CX0023 at 001 (Statement of McElaney: “I spoke with Jeff Reece at length late Friday about buying groups.”)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibits. Mr. Elaney had previously worked for Burkhart, and he and Mr. Reece had been colleagues for 13 or 14 years and the two remained friends. CX8021 (Reese, Dep. at 105); (Reese, Tr. 4376). In the phone call identified by counsel, Mr. McElaney and Mr. Reece also discussed casual matters. (Reese, Tr. 4377).

1211. On the September 13, 2013 call, McElaney informed Reece that "group purchasing organizations were not favorable to the dental industry and were not going to be good for Burkhart. . . ." (Reece, Tr. 4377).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is a willful misstatement of the cited testimony. Mr. Reece immediately clarified that Mr. McElaney only said that buying groups "were not good for the *medical industry*," a point that the Court specifically noted. (Reece, Tr. 4378-79). Mr. McElaney and Mr. Reece discussed "some of the pitfalls that may happen" when dealing with GPO's and Mr. McElahaney wished Mr. Reece "the best of luck." CX0303 (McElaney, IHT at 29). Mr. McElaney and Mr. Reece did not discuss Benco's policy regarding selling to GPO's. CX0303 (McElaney, IHT at 29). Mr. Reece believed that, at the time of the call, Benco was working with buying groups. (Reece, Tr. 4377-78).

1212. On the September 13, 2013 call to Burkhart about buying groups, Benco's McElaney informed Reece that the group purchasing model was a threat to the dental industry. (CX0319 (Reece, IHT at 153) ("He, more than anything, I think, just wanted to be really clear that he thought it was a threat. Q. That buying groups are a threat? A. That a group purchasing model is a threat to our industry. . . Q. And do you – do you recall how you ended the call with Mr. McElaney? A. You know, I don't remember any angry discussion . . . but it was clear to me that he wanted me to know that he didn't think it was acceptable."); CX0319 (Reece, IHT at 153) (McElaney "wanted to be really clear that he thought it [the group purchasing model] was a threat.")).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibits. Mr. Reece testified that Mr. McElaney only said that buying groups "were not good for the *medical industry*," a point that the Court specifically noted. (Reece, Tr. 4378-79) Mr. Reece testified similarly in the investigational hearing transcript cited by Complaint Counsel, where he testified that Mr. McElaney discussed the impact of GPOs on the "*medical industry*." CX0319 (Reece, IHT at 150). Mr. McElaney and Mr. Reece discussed "some of the pitfalls that may happen" when dealing with GPO's and Mr. McElaney wished Mr. Reece "the best of luck." CX0303 (McElaney, IHT at 29). Mr. McElaney and Mr. Reece did not discuss Benco's policy regarding selling to GPO's. CX0303 (McElaney, IHT at 29). Mr. Reece believed that, at the time of the call, Benco was working with buying groups. (Reece, Tr. 4377-78).

1213. McElaney said that buying groups were a "race to the bottom" and caused "declining margins," noting that they were "not good for the medical industry." (Reece, Tr. 4378 ("Q. And what did Benco's McElaney say about . . . the buying groups in the industry? A. Well, he inferred

and said directly that it was not good for the medical industry and that it's not good for the company, that – declining margins, it's a race to the bottom.”)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibits. Mr. McElaney and Mr. Reece discussed “some of the pitfalls that may happen” when dealing with GPO's and Mr. McElaney wished Mr. Reece “the best of luck,” CX0303 (McElaney, IHT at 29), and told Reece that Burhart “needed to be careful.” (Reece, Tr. 4377). Mr. Reece he did not understand why Mr. McElaney's statements, because he thought Benco was working with GPO's and when Mr. Reece asked if Benco was working in the GPO “space,” Mr. McElaney did not answer. (Reece, Tr. 4377-78).

1214. Reece testified that, on the September 13, 2103 call, McElaney expressed concern regarding Burkhart discounting to buying groups:

I think [McElaney] just expressed his concern about group purchasing organizations, and, you know, the fact that . . . it took [the medical] industry down and certainly made the whole distribution model obsolete, and there was a genuine fear there that that could happen in dentistry as well.

(CX0319 (Reece, IHT at 150-151); *see also* Reece, Tr. 4379 (“[H]e said directly that it was not good for Burkhart's business”)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibits. The cited exhibits do not state that Mr. McElaney expressed "concern regarding Burkhart discounting to buying groups" and do not mention discounting at all. Benco does not dispute that the quote from Mr. Reece accurately reflects the transcript, but that Mr. Reece so testified is not a proper finding of fact. At the end of the call, Mr. McElaney wished Mr. Reece "the best of luck," CX0303 (McElaney, IHT at 29).

1215. Reece challenged McElaney over his assertion that discounting to buying groups was bad for the industry and ended the call. (Reece, Tr. 4378-4379).

Schein's Response:

This is not a fair characterization of Mr. Reece's testimony. Mr. Reece testified that his "initial reaction was almost with a smile on my face. I remember thinking, but wait a second, you're in this space, right? So why is it good for you and not good for Burkhart?" (Reece, Tr. 4378). So, Mr. Reece "challenged [Ms. McElaney]" and said, "so you're not working in this space? Is that correct? And he never answered." (Reece, Tr. 4378). This testimony does not constitute a challenge over the assertion that discounting to buying groups is bad for the industry. It constitutes a challenge concerning Benco's own practices, or, more accurately, an *inquiry* into Benco's own practices. By Complaint Counsel's standards, Burkhart should have been guilty of a conspiracy because it was soliciting supposedly confidential information from Benco, something that Schein never did.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibits. Mr. Reece "challenged" Mr. McElaney by asking whether Benco was "working in this space" (*i.e.*, working with GPOs), and Mr. McElaney did not answer. (Reece, Tr. 4378). The cited evidence does not state that Mr. Reece ended the call after that exchange. There is no chronology of the statements made in the call. The testimony states only that, when the call ended, Mr. Reece said that he "appreciate[d]" Mr. McElaney's comments, and that Mr. McElaney wished Mr. Reece, "the best of luck." (Reece, Tr. 4379); CX0303 (McElaney, IHT at 29). Complaint Counsel did not ask who ended the identified call, and Mr. Reese did not state that he ended it.

1216. Reece did not share with McElaney Burkhart's business rational for working with buying groups, other than to say that Burkhart's management wanted to work with buying groups. (CX0303 (McElaney, IHT at 30)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

No response.

1217. Benco had a no buying group policy at the time that it encouraged Burkhart to refrain from working with buying groups. (CX0303 (McElaney, IHT at 30-31)).

Schein's Response:

No response, except to note that Mr. McElaney also testified that he did not disclose Benco's no-buying-group policy to Mr. Reece. (CX 0303 (McElaney, IHT at 31)).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibits. First, the evidence does not show that Benco "encouraged Burkhart to refrain from working with buying groups." Mr. McElaney and Mr. Reece discussed "some of the pitfalls that may happen" when dealing with GPO's and Mr. McElaney wished Mr. Reece "the best of luck," CX0303 (McElaney, IHT at 29), and told Reece that Burkhart "needed to be careful." (Reece, Tr. 4377). Furthermore, although Benco had, since the mid-1990's, a no-middleman policy (and has that policy today), there is no evidence in the record that Benco ever informed Burkhart of that policy. On the contrary, Burkhart believed that Benco was working with buying groups at that time. (Reece, Tr. 4377 ("[I]t was my belief at that time that Benco was working with group purchasing organizations...").

1218. Following that conversation, McElaney reported to his boss, Cohen, Ryan, and Paul Jackson at Benco in a September 16, 2013 email:

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

(CX0023 at 001 (emphasis in original)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

No response.

1219. Cohen never told McElaney to stop contacting Burkhart about buying groups. (Cohen, Tr. 580-581).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete. Mr. Cohen never told Mr. McElaney to ask Mr. Reece to anything, and does not believe that Mr. McElaney ever asked Mr. Reece to to anything. (Cohen, Tr. 829).

1220. Ryan responded to McElaney's September 16, 2013 email, "Maybe we should discuss with Lori as well." (CX0023 at 001). Ryan's email referred to Benco raising the discussion of buying groups with Lori Isbell Burkhart, owner of Burkhart. (CX0023 at 001; Ryan, Tr. 1111-1113).

Schein's Response:

No response, except to note that no such call or communication took place.

Patterson's Response:

No specific response.

Benco's Response:

No response.

1221. Approximately three to four weeks after McElaney's September 13, 2013 call to Reece, McElaney made a second, unsolicited call to Reece. (Reece, Tr. 4380 (McElaney initiated the call)).

Schein's Response:

The testimony on this is conflicting, as Mr. McElaney testified that there was only one call. (CX 0303 (McElaney, IHT at 31 ("Q. And can you remember, was it one conversation you had with Mr. Reece or multiple conversations that you had with him? A. One conversation. My phone call to Jeff. That was all there was on the GPO. Q. Do you remember any in-person conversations with Mr. Reece during any conventions concerning GPOs? A. No. I saw Jeff and had coffee with him at many conventions, but we never discussed the GPO."))).

Patterson's Response:

No specific response.

Benco's Response:

Mr. McElaney only made one call to Mr. Reece concerning GPOs. CX0303 (McElaney, IHT at 29).

1222. The second call from McElaney to Reece was "very similar" to the first, although "not as social." (Reece, Tr. 4380, 4381). In this second call, McElaney directly warned Reece against working with buying groups. (Reece, Tr. 4380-4381 (McElaney told Reece "you need to be very careful here, that group purchasing organizations are not good for your business."))).

Schein's Response:

The testimony concerning the existence of the second call is conflicting. (See SRF 1221).

Patterson's Response:

No specific response.

Benco's Response:

Mr. McElaney only made one call to Mr. Reece concerning GPOs. CX0303 (McElaney, IHT at 29). To the extent that Mr. Reece claimed that there was a second call, Mr. Reece testified that at that time he still believed Benco was working with GPOs, and Mr. McElaney did not give him a clear answer when Mr. Reece supposedly asked Mr. McElaney if Benco was "participating in that space." (Reese, Tr. 4381).

1223. The second 2013 call from McElaney to Reece was shorter than the first call. Reece estimated that it lasted six minutes. (Reese, Tr. 4381). As had occurred with the first call from McElaney, Reece terminated the call. (Reese, Tr. 4379, 4381).

Schein's Response:

The testimony concerning the existence of the second call is conflicting. (See SRF 1221).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibits. Mr. McElaney only made one call to Mr. Reece concerning GPOs. CX0303 (McElaney, IHT at 29). To the extent that Mr. Reece claimed that there was a second call, the testimony cited by Complaint Counsel does not support

the statement that Mr. Reece ended either the first call or the claimed second call. (Reece, Tr. 4379, 4381). Complaint Counsel did not ask who ended the identified calls, and Mr. Reece did not state that he ended them.

1224. Reece took offense to McElaney's second 2013 call regarding buying groups, believing that McElaney "was overstepping his bounds as a friend to tell me how to do business and how – and tell Burkhart how to do business." (Reece, Tr. 4381).

Schein's Response:

The testimony concerning the existence of the second call is conflicting. (See SRF 1221).

Patterson's Response:

No specific response.

Benco's Response:

Mr. McElaney only made one call to Mr. Reece concerning GPOs. CX0303 (McElaney, IHT at 29).

1225. In October 2013, Reece, McElaney, and Cohen all attended the Dental Trade Alliance Annual Meeting in Ponte Vedra Beach, Florida. (Reece, Tr. 4383-4384; CX1112 at 028-029 (Answer of Benco ¶59) (Cohen attended the DTA annual meeting in Ponte Vedra Beach, Florida in October 2013)); see also CX4145 (McElaney, Cohen, and Reece all registered for Dental Trade Alliance Annual Meeting); CX4449-a at 001 (2013 Dental Trade Alliance Annual Meeting in Ponte Vedra Beach, Florida took place from October 15-18, 2013)). Ryan also attended the Dental Trade Alliance Annual Meeting in Ponte Vedra Beach, Florida in October 2013. (Ryan, Tr. 1107-1108; CX0027 at 001; CX4145 (Ryan registered for the Dental Trade Alliance Annual Meeting)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

No response.

1226. During one day of the 2013 Dental Trade Alliance meeting around lunchtime, McElaney approached Reece and asked him to come to be introduced someone. (Reece, Tr. 4383). McElaney brought Reece to a table on a patio occupied by Cohen and Ryan. (Reece, Tr. 4383-4384; Ryan, Tr. 1107-1108). Reece believed McElaney wanted to introduce him to Cohen because Cohen and Reece had never had a formal introduction. (Reece, Tr. 4384).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate. The claimed meeting between Mr. Cohen, Mr. McElaney and Mr. Reese did not take place. (Cohen, Tr. 829) (Q. Are you aware that the FTC in this case has alleged that you had a conversation with Mr. Reece at a DTA meeting about buying groups? A. Yes. Q. Is that true? A. No.). Mr. Cohen's detailed notes of who he spoke with at that meeting do not reflect any meeting with Mr. Reese. (Cohen, Tr. 830). Mr. Reese has testified that his only interaction with Cohen was an "informal passing in the hallway," or "maybe just an acknowledgement". (RX1135; Reece, Dep., at 17:25-18:1). Mr. McElaney did not testify to this supposed meeting in his investigative hearing deposition.

1227. After Reece had been introduced to Cohen and Ryan, Cohen launched into a conversation with Reece about working with buying groups. (Reece, Tr. 4384 ("Q. How did the conversation begin? A. Very respectfully . . . And then [Cohen] proceeded to share similar thoughts about group purchasing organizations with me as Mr. McElaney had previously."); CX0319 (Reece, IHT at 154) ("They kind of went immediately to their disappointment that, 'are you sure you really

know what you are getting yourself into by working with buying groups?”); *see also* CX1112 at 028-029 (Answer of Benco ¶59) (Cohen spoke with Reece at the October 2013 Dental Trade Alliance annual meeting)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is inaccurate. The claimed meeting between Mr. Cohen, Mr. McElaney and Mr. Reese did not take place. (Cohen, Tr. 829) (Q. Are you aware that the FTC in this case has alleged that you had a conversation with Mr. Reece at a DTA meeting about buying groups? A. Yes. Q. Is that true? A. No.). Mr. Cohen’s detailed notes of who he spoke with at that meeting do not reflect any meeting with Mr. Reese. (Cohen, Tr. 830). Mr. Reese has testified that his only interaction with Cohen was an “informal passing in the hallway,” or “maybe just an acknowledgement”. (RX1135; Reece, Dep., at 17:25-18:1). Mr. McElaney did not testify to this supposed meeting in his investigational hearing deposition, and denied that he had ever met with Mr. Reece and discussed GPOs. CX0303 (McElaney, IHT at 29) (Q. Do you remember any in-person conversations with Mr. Reece during any dental conventions concerning GPOs? A. No. I saw Jeff and had coffee with him at many conventions, but we never discussed the GPO.”)

1228. According to Reece, the conversation immediately veered into buying groups with Cohen and McElaney sending a clear message that Burkhardt’s participation in buying groups was not acceptable:

[T]hey kind of went immediately to their disappointment, that “Are you sure you really know what you are getting yourself into by working with

buying groups?” . . . [I]t was clear that Chuck wanted to send a very clear message that it wasn’t acceptable.

(CX0319 (Reece, IHT at 154-155)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is inaccurate and incomplete. The claimed meeting between Mr. Cohen, Mr. McElaney and Mr. Reese did not take place. (Cohen, Tr. 829) (Q. Are you aware that the FTC in this case has alleged that you had a conversation with Mr. Reece at a DTA meeting about buying groups? A. Yes. Q. Is that true? A. No.). Mr. Cohen’s detailed notes of who he spoke with at that meeting do not reflect any meeting with Mr. Reese. (Cohen, Tr. 830). Mr. Reese has testified that his only interaction with Cohen was an “informal passing in the hallway,” or “maybe just an acknowledgement”. (RX1135; Reece, Dep., at 17:25-18:1). To the extent Mr. Reece testified differently at trial, even then he confirmed his belief that at the time of the alleged meeting, Benco was working with buying groups. (Reese, Tr. 4377-4378, 4381).

Mr. McElaney did not testify to this supposed meeting in his investigational hearing deposition, and denied that he had ever met with Mr. Reece and discussed GPOs. CX0303 (McElaney, IHT at 29) (Q. Do you remember any in-person conversations with Mr. Reece during any dental conventions concerning GPOs? A. No. I saw Jeff and had coffee with him at many conventions, but we never discussed the GPO.”)

1229. The Benco executives spoke to Reece for ten to fifteen minutes at the 2013 Dental Trade Alliance Meeting. (Reece, Tr. 4387).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate. The claimed meeting between Mr. Cohen, Mr. McElaney and Mr. Reese did not take place. (Cohen, Tr. 829) (Q. Are you aware that the FTC in this case has alleged that you had a conversation with Mr. Reece at a DTA meeting about buying groups? A. Yes. Q. Is that true? A. No.). Mr. Cohen's detailed notes of who he spoke with at that meeting do not reflect any meeting with Mr. Reese. (Cohen, Tr. 830). Mr. Reese has testified that his only interaction with Cohen was an "informal passing in the hallway," or "maybe just an acknowledgement". (RX1135; Reece, Dep., at 17:25-18:1). Mr. McElaney did not testify to this supposed meeting in his investigational hearing deposition, and denied that he had ever met with Mr. Reece and discussed GPOs. CX0303 (McElaney, IHT at 29) (Q. Do you remember any in-person conversations with Mr. Reece during any dental conventions concerning GPOs? A. No. I saw Jeff and had coffee with him at many conventions, but we never discussed the GPO.")

1230. Reece felt "set up" by McElaney and the Benco executives he was introduced to at the 2013 Dental Trade Alliance Annual Meeting because "Mike McElaney took advantage of that situation and what was meant to be just a casual introduction clearly turned into something with an agenda." (Reece, Tr. 4385).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and inaccurate. The claimed meeting between Mr. Cohen, Mr. McElaney and Mr. Reese did not take place. (Cohen, Tr. 829) (Q. Are you aware that the FTC in this case has alleged that you had a conversation with Mr. Reece at a DTA meeting about buying groups? A. Yes. Q. Is that true? A. No.). Mr. Cohen's detailed notes of who he spoke with at that meeting do not reflect any meeting with Mr. Reese. (Cohen, Tr. 830). Mr. Reese has testified that his only interaction with Cohen was an "informal passing in the hallway," or "maybe just an acknowledgement". (RX1135; Reece, Dep., at 17:25-18:1). Mr. McElaney did not testify to this supposed meeting in his investigational hearing deposition, and denied that he had ever met with Mr. Reece and discussed GPOs. CX0303 (McElaney, IHT at 29) (Q. Do you remember any in-person conversations with Mr. Reece during any dental conventions concerning GPOs? A. No. I saw Jeff and had coffee with him at many conventions, but we never discussed the GPO.")

1231. Cohen's agenda with Reece was "to tell me [Reece] that he really felt that group purchasing organizations were not healthy for our industry and that it could do damage to our business and threaten our business." (Reece, Tr. 4385).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and incomplete. The claimed meeting between Mr. Cohen, Mr. McElaney and Mr. Reese did not take place. (Cohen, Tr. 829) (Q. Are you aware that the FTC in this case has alleged that you had a conversation with Mr. Reece at a DTA meeting about buying groups? A. Yes. Q. Is that true? A. No.). Mr. Cohen's detailed notes of who he spoke with at that meeting do not reflect any meeting with Mr. Reese. (Cohen, Tr. 830). Mr. Reese has testified that his only interaction with Cohen was an "informal passing in the hallway," or "maybe just an acknowledgement". (RX1135; Reece, Dep., at 17:25-18:1). Mr. McElaney did not testify to this supposed meeting in his investigational hearing deposition, and denied that he had ever met with Mr. Reece and discussed GPOs. CX0303 (McElaney, IHT at 29) (Q. Do you remember any in-person conversations with Mr. Reece during any dental conventions concerning GPOs? A. No. I saw Jeff and had coffee with him at many conventions, but we never discussed the GPO.")

More importantly, to the extent that Mr. Reece later changed his testimony concerning this claimed meeting, Complaint Counsel's proposed finding regarding Mr. Cohen's supposed "agenda" substitutes Mr. Reece's claimed "impressions" from what Mr. Reece claims was actually said at the claimed meeting. (Tr. 4390) (JUDGE CHAPPELL: "That's what I told you earlier. I don't want to hear about the inference or anything like that, just what you recall was said")

1232. When Cohen told Reece that buying groups could "threaten our business," Reece understood that Cohen meant "declining margins and that that would ultimately threaten profitability." (Reece, Tr. 4386).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and incomplete. The claimed meeting between Mr. Cohen, Mr. McElaney and Mr. Reese did not take place. (Cohen, Tr. 829) (Q. Are you aware that the FTC in this case has alleged that you had a conversation with Mr. Reece at a DTA meeting about buying groups? A. Yes. Q. Is that true? A. No.). Mr. Cohen's detailed notes of who he spoke with at that meeting do not reflect any meeting with Mr. Reese. (Cohen, Tr. 830). Mr. Reese has testified that his only interaction with Cohen was an "informal passing in the hallway," or "maybe just an acknowledgement". (RX1135; Reece, Dep., at 17:25-18:1). Mr. McElaney did not testify to this supposed meeting in his investigational hearing deposition, and denied that he had ever met with Mr. Reece and discussed GPOs. CX0303 (McElaney, IHT at 29) (Q. Do you remember any in-person conversations with Mr. Reece during any dental conventions concerning GPOs? A. No. I saw Jeff and had coffee with him at many conventions, but we never discussed the GPO.")

To the extent that Mr. Reece later changed his testimony concerning this claimed meeting, Complaint Counsel's proposed finding is incomplete, because Mr. Reece confirmed that there was no suggestion about what to do about declining margins." (Reece, Tr. 4386).

1233. During Cohen's conversation with Reece at the 2013 Dental Trade Alliance Annual Meeting, Cohen was not specific to certain buying groups, but rather spoke against working with buying groups in general. (Reece, Tr. 4386) ("Q. Did Mr. Cohen address Burkhart's work with buying groups? A. I don't recall him being specific to a certain buying group that we were working with. I think he spoke in a more general sense.")).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and incomplete. The claimed meeting between Mr. Cohen, Mr. McElaney and Mr. Reese did not take place. (Cohen, Tr. 829) (Q. Are you aware that the FTC in this case has alleged that you had a conversation with Mr. Reece at a DTA meeting about buying groups? A. Yes. Q. Is that true? A. No.). Mr. Cohen's detailed notes of who he spoke with at that meeting do not reflect any meeting with Mr. Reese. (Cohen, Tr. 830). Mr. Reese has testified that his only interaction with Cohen was an "informal passing in the hallway," or "maybe just an acknowledgement". (RX1135; Reece, Dep., at 17:25-18:1). Mr. McElaney did not testify to this supposed meeting in his investigational hearing deposition, and denied that he had ever met with Mr. Reece and discussed GPOs. CX0303 (McElaney, IHT at 29) (Q. Do you remember any in-person conversations with Mr. Reece during any dental conventions concerning GPOs? A. No. I saw Jeff and had coffee with him at many conventions, but we never discussed the GPO.")

1234. When Reece spoke with Cohen at the 2013 Dental Trade Alliance Annual Meeting, Cohen expressed "a very strong opinion about group purchasing organizations and that it wasn't positive for our industry." (Reece, Tr. 4385; *see also* CX8021 (Reece, Dep. at 112) (Cohen "proceeded to

challenge me on why Burkhart was working with group purchasing organizations, of which I took great offense to”)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is inaccurate and incomplete. The claimed meeting between Mr. Cohen, Mr. McElaney and Mr. Reese did not take place. (Cohen, Tr. 829) (Q. Are you aware that the FTC in this case has alleged that you had a conversation with Mr. Reece at a DTA meeting about buying groups? A. Yes. Q. Is that true? A. No.). Mr. Cohen’s detailed notes of who he spoke with at that meeting do not reflect any meeting with Mr. Reese. (Cohen, Tr. 830). Mr. Reese has testified that his only interaction with Cohen was an “informal passing in the hallway,” or “maybe just an acknowledgement”. (RX1135; Reece, Dep., at 17:25-18:1). Mr. McElaney did not testify to this supposed meeting in his investigational hearing deposition, and denied that he had ever met with Mr. Reece and discussed GPOs. CX0303 (McElaney, IHT at 29) (Q. Do you remember any in-person conversations with Mr. Reece during any dental conventions concerning GPOs? A. No. I saw Jeff and had coffee with him at many conventions, but we never discussed the GPO.”)

More importantly, even to the extent that Mr. Reece changed his testimony about this claimed meeting, Mr. Reece clearly testified that Benco had never suggested how Burkhart should conduct its business. (Reece, Tr. 4389) (“**Q. Over the course of those**

three conversations with Benco about buying groups, was there any suggestion of how Burkhart should conduct its business? A. No.”)

1235. Over the ten to fifteen minute meeting initiated by Benco at the 2013 Dental Trade Alliance Annual Meeting, Reece, said very little. (Reece, Tr. 4387) Reece did not inform Cohen what he thought about buying groups. (Reece, Tr. 4386). Reece felt uncomfortable and incredulous at Benco’s suggestion of how Burkhart should conduct its business. (Reece, Tr. 4387).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is inaccurate and incomplete. The claimed meeting between Mr. Cohen, Mr. McElaney and Mr. Reese did not take place. (Cohen, Tr. 829) (Q. Are you aware that the FTC in this case has alleged that you had a conversation with Mr. Reece at a DTA meeting about buying groups? A. Yes. Q. Is that true? A. No.). Mr. Cohen’s detailed notes of who he spoke with at that meeting do not reflect any meeting with Mr. Reese. (Cohen, Tr. 830). Mr. Reese has testified that his only interaction with Cohen was an “informal passing in the hallway,” or “maybe just an acknowledgement”. (RX1135; Reece, Dep., at 17:25-18:1). Mr. McElaney did not testify to this supposed meeting in his investigational hearing deposition, and denied that he had ever met with Mr. Reece and discussed GPOs. CX0303 (McElaney, IHT at 29) (Q. Do you remember any in-person conversations with Mr. Reece during any dental conventions concerning GPOs? A. No. I saw Jeff and had coffee with him at many conventions, but we never discussed the GPO.”)

More importantly, even to the extent that Mr. Reece changed his testimony about this claimed meeting, Mr. Reece clearly testified that Benco had never suggested how Burkhart should conduct its business. (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.**”)

1236. Reece ended the conversation with Cohen and the other Benco executives. (Reese, Tr. 4388; CX8021 (Reese, Dep. Tr. at 113)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is inaccurate and is not supported by the cited exhibits. The claimed meeting between Mr. Cohen, Mr. McElaney and Mr. Reese did not take place. (Cohen, Tr. 829) (Q. Are you aware that the FTC in this case has alleged that you had a conversation with Mr. Reece at a DTA meeting about buying groups? A. Yes. Q. Is that true? A. No.). Mr. Cohen’s detailed notes of who he spoke with at that meeting do not reflect any meeting with Mr. Reese. (Cohen, Tr. 830). Mr. Reese has testified that his only interaction with Cohen was an “informal passing in the hallway,” or “maybe just an acknowledgement”. (RX1135; Reese, Dep., at 17:25-18:1). Mr. McElaney did not testify to this supposed meeting in his investigational hearing deposition, and denied that he had ever met with Mr. Reece and discussed GPOs. CX0303 (McElaney, IHT at 29) (Q. Do you remember any in-person conversations with Mr. Reece during any

dental conventions concerning GPOs? A. No. I saw Jeff and had coffee with him at many conventions, but we never discussed the GPO.”)

To the extent that Mr. Reece changed his testimony about this meeting, Complaint Counsel’s proposed finding that Mr. Reese ended the claimed meeting is not supported by the cited exhibit. Mr. Reece was asked how the claimed meeting ended, and he responded **“I remember Mr. Cohen just making some final remarks,** and I said, "Thank you very much, pleasure meeting you," and pushed my chair away and walked back to my group.” (Reece, Tr. 4388).

1237. Through the two telephone conversations between McElaney and Reece, and the in- person meeting between Reece, Cohen, Ryan, and McElaney at the 2013 Dental Trade Alliance Annual Meeting, “Benco had encouraged Burkhart not to engage in group purchasing organizations based on the fact that that was going to be detrimental to our business and certainly to the business in the dental industry for those that participated.” (Reece, Tr. 4391).

Schein’s Response:

No response, other than to note that the testimony concerning the existence of the second call is conflicting. (See SRF 1221).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is inaccurate and incomplete. Mr. McElaney only made one call to Mr. Reece concerning GPOs, CX0303 (McElaney, IHT at 29), and the claimed meeting between Mr. Cohen, Mr. McElaney and Mr. Reese did not take place. (Cohen, Tr. 829) (Q. Are you aware that the FTC in this case has alleged that you had a conversation with Mr. Reece at a DTA meeting about buying groups? A. Yes. Q. Is that true? A. No.). Mr. Cohen’s detailed notes of who he spoke with at that meeting do not

reflect any meeting with Mr. Reese. (Cohen, Tr. 830). Mr. Reese has testified that his only interaction with Cohen was an “informal passing in the hallway,” or “maybe just an acknowledgement”. (RX1135; Reece, Dep., at 17:25-18:1). Mr. McElaney did not testify to this supposed meeting in his investigational hearing deposition, and denied that he had ever met with Mr. Reece and discussed GPOs. CX0303 (McElaney, IHT at 29) (Q. Do you remember any in-person conversations with Mr. Reece during any dental conventions concerning GPOs? A. No. I saw Jeff and had coffee with him at many conventions, but we never discussed the GPO.”)

Furthermore, in the telephone call between Mr. Reece and Mr. McElaney, Mr. McElaney only said that buying groups “were not good for the *medical industry*,” a point that the Court specifically noted. (Reece, Tr. 4378-79) Mr. Reece testified similarly in the investigational hearing transcript cited by Complaint Counsel, where he testified that Mr. McElaney discussed the impact of GPOs on the “*medical industry*.” CX0319 (Reece, IHT at 150). To the extent that Mr. Reece changed his testimony about this claimed meeting, Mr. Reece clearly testified that Benco had never suggested how Burkhart should conduct its business. (Reece, Tr. 4389) (“Q. Over the course of those three conversations with Benco about buying groups, was there any suggestion of how Burkhart should conduct its business? A. No.”)

1238. Over the course of the two telephone conversations between McElaney and Reece, and the in-person meeting between Reece, Cohen, Ryan, and McElaney at the 2013 Dental Trade Alliance Annual Meeting, Benco executives repeatedly warned Reece to be careful and represented that buying groups were not favorable to the dental industry, a threat, detrimental, and not good for Burkhart. (Reece, Tr. 4377, 4379, 4380, 4385, 4386, 4391)

Schein's Response:

No response, other than to note that the testimony concerning the existence of the second call is conflicting. (*See* SRF 1221).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and incomplete. Mr. McElaney only made one call to Mr. Reece concerning GPOs, CX0303 (McElaney, IHT at 29), and the claimed meeting between Mr. Cohen, Mr. McElaney and Mr. Reese did not take place. (Cohen, Tr. 829) (Q. Are you aware that the FTC in this case has alleged that you had a conversation with Mr. Reece at a DTA meeting about buying groups? A. Yes. Q. Is that true? A. No.). Mr. Cohen's detailed notes of who he spoke with at that meeting do not reflect any meeting with Mr. Reese. (Cohen, Tr. 830). Mr. Reese has testified that his only interaction with Cohen was an "informal passing in the hallway," or "maybe just an acknowledgement". (RX1135; Reece, Dep., at 17:25-18:1). Mr. McElaney did not testify to this supposed meeting in his investigational hearing deposition, and denied that he had ever met with Mr. Reece and discussed GPOs. CX0303 (McElaney, IHT at 29) (Q. Do you remember any in-person conversations with Mr. Reece during any dental conventions concerning GPOs? A. No. I saw Jeff and had coffee with him at many conventions, but we never discussed the GPO.")

Furthermore, in the telephone call between Mr. Reece and Mr. McElaney, Mr. McElaney only said that buying groups "were not good for the *medical industry*," a point that the Court specifically noted. (Reece, Tr. 4378-79) Mr. Reece testified similarly in the investigational hearing transcript cited by Complaint Counsel, where he testified that Mr.

McElhaney discussed the impact of GPOs on the “*medical industry*.” CX0319 (Reece, IHT at 150). To the extent that Mr. Reece changed his testimony about this claimed meeting, Mr. Reece clearly testified that Benco had never suggested how Burkhart should conduct its business. (Reece, Tr. 4389) (“Q. Over the course of those three conversations with Benco about buying groups, was there any suggestion of how Burkhart should conduct its business? A. No.”)

1239. Reece took offense to the statements by Benco executives about doing business with buying groups and did not appreciate being told how Burkhart should run its business. (Reece, Tr. 4381, 4387). Reece was angry at the end of the third conversation. (Reece, Tr. 4388).

Schein’s Response:

No response, other than to note that the testimony concerning the existence of the second call is conflicting. (*See* SRF 1221).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is inaccurate and incomplete. Mr. McElaney only made one call to Mr. Reece concerning GPOs, CX0303 (McElaney, IHT at 29), and the claimed meeting between Mr. Cohen, Mr. McElaney and Mr. Reece did not take place. (Cohen, Tr. 829) (Q. Are you aware that the FTC in this case has alleged that you had a conversation with Mr. Reece at a DTA meeting about buying groups? A. Yes. Q. Is that true? A. No.). Mr. Cohen’s detailed notes of who he spoke with at that meeting do not reflect any meeting with Mr. Reece. (Cohen, Tr. 830). Mr. Reece has testified that his only interaction with Cohen was an “informal passing in the hallway,” or “maybe just an acknowledgement”. (RX1135; Reece, Dep., at 17:25-18:1). Mr. McElaney did not testify

to this supposed meeting in his investigational hearing deposition, and denied that he had ever met with Mr. Reece and discussed GPOs. CX0303 (McElaney, IHT at 29) (Q. Do you remember any in-person conversations with Mr. Reece during any dental conventions concerning GPOs? A. No. I saw Jeff and had coffee with him at many conventions, but we never discussed the GPO.”)

Furthermore, in the telephone call between Mr. Reece and Mr. McElaney, Mr. McElaney only said that buying groups “were not good for the *medical industry*,” a point that the Court specifically noted. (Reece, Tr. 4378-79) Mr. Reece testified similarly in the investigational hearing transcript cited by Complaint Counsel, where he testified that Mr. McElaney discussed the impact of GPOs on the “*medical industry*.” CX0319 (Reece, IHT at 150). To the extent that Mr. Reece changed his testimony about this claimed meeting, Mr. Reece clearly testified that Benco had never suggested how Burkhart should conduct its business. (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.”)

1240. Burkhart did not change its policy or strategy with regard to working with buying groups as a result of the telephone calls from McElaney. (Reece, Tr. 4446, 4487). Burkhart continued selling to buying groups following the three Benco attempts to persuade the company to change its course from working with buying groups. (Reece, Tr. 4397-4398 (Smile Source), Reece, Tr. 4409-4410 (Kois)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and incomplete. Benco agrees that Burhart did not change its policy with regard to buying groups as a result of any discussion with Benco, but Mr. McElaney only made one call to Mr. Reece concerning GPOs, CX0303 (McElaney, IHT at 29), and the claimed meeting between Mr. Cohen, Mr. McElaney and Mr. Reese did not take place. (Cohen, Tr. 829) ("Q. Are you aware that the FTC in this case has alleged that you had a conversation with Mr. Reece at a DTA meeting about buying groups? A. Yes. Q. Is that true? A. No."). Mr. Cohen's detailed notes of who he spoke with at that meeting do not reflect any meeting with Mr. Reese. (Cohen, Tr. 830). Mr. Reese has testified that his only interaction with Cohen was an "informal passing in the hallway," or "maybe just an acknowledgement". (RX1135; Reece, Dep., at 17:25-18:1). Mr. McElaney did not testify to this supposed meeting in his investigational hearing deposition, and denied that he had ever met with Mr. Reece and discussed GPOs. CX0303 (McElaney, IHT at 29) (Q. Do you remember any in-person conversations with Mr. Reece during any dental conventions concerning GPOs? A. No. I saw Jeff and had coffee with him at many conventions, but we never discussed the GPO.")

Furthermore, in the telephone call between Mr. Reece and Mr. McElaney, Mr. McElaney only said that buying groups "were not good for the medical industry," a point that the Court specifically noted. (Reece, Tr. 4378-79) Mr. Reece testified similarly in the investigational hearing transcript cited by Complaint Counsel, where he testified that Mr. McElaney discussed the impact of GPOs on the "medical industry." CX0319 (Reece, IHT at 150). To the extent that Mr. Reece changed his testimony about this claimed meeting, Mr. Reece clearly testified that Benco had never suggested how Burkhart should conduct its business. (Reece, Tr. 4389) ("Q. Over the course of those three conversations with

Benco about buying groups, was there any suggestion of how Burkhart should conduct its business? A. No.”)

1241. Benco encouraged Burkhart not to engage in buying groups. (Reece, Tr. 4391, 4444-4445 (“What Mr. Cohen told me was that it was not in Burkhart’s best interest to be working with group purchasing organizations.”); CX8021 (Reece, Dep. at 110-111) (“My recollection is very clear that Chuck Cohen asked me about group purchasing organizations and that his opinion was that it was not good for the industry and it was not good for Burkhart and that you might want to be careful about that.”)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is inaccurate and incomplete. Benco never suggested to Burkhart how it should conduct its business. (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.”)

1242. Ryan testified that he is “sure” that he and McElaney from Benco spoke with Guggenheim of Patterson at the 2013 DTA Meeting Annual. (Ryan, Tr. 1119).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and incomplete. Mr. Ryan testified that he did not recall the conversation involving himself, Mr. Ryan and Mr. Guggenheim, but that he had no reason to doubt that it took place when shown an email referencing the conversation. (Ryan, Tr. 1119).

1243. A contemporaneous email confirms executives from Benco met with Schein, Patterson, and Burkhart at the 2013 DTA meeting in Florida. (CX0027 at 001). In an October 20, 2013 email, McElaney described how he and Ryan met with representatives of other distributors at the 2013 DTA meeting. (CX0027 at 001). McElaney identifies Sullivan and Guggenheim by name and states what they told Benco about their ratio of service technician to sales representatives from conversations at the 2013 DTA Annual Meeting. (CX0027 at 001; Ryan, Tr. 1118-1120).

Schein's Response:

The asserted fact is not accurate and is irrelevant. CX 0027 does not indicate any "meeting" between Benco and Schein. All it says is that Benco's Mr. McElaney and Mr. Ryan "had the opportunity to ask different companies" a question. (CX 0027-001). It makes clear that the question had nothing to do with buying groups. Benco asked about the "ratio of service techs to TR's." (CX 0027-001). There is no basis to support an inference that anyone from Schein spoke to anyone at Benco about buying groups at the 2013 DTA meeting.

Patterson's Response:

No specific response.

Benco's Response:

No response.

1244. Ryan testified he met Reece at the October 2013 Dental Trade Alliance Annual Meeting and was introduced to Reece by McElaney or Cohen. (Ryan, Tr. 1107-1108).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and incomplete. When asked the specific question, Mr. Ryan testified that he did not recall whether Mr. Cohen was present when Mr. Ryan was introduced to Mr. Reece. (Ryan, Tr. 1120). Mr. Cohen did not meet with Mr. Reese at the October 2013 DTA meeting. (Cohen, Tr. 829) ("Q. Are you aware that the FTC in this case has alleged that you had a conversation with Mr. Reece at a DTA meeting about buying groups? A. Yes. Q. Is that true? A. No.").

1245. On October 23, 2013, a few days after the October 2013 Dental Trade Alliance Annual Meeting where McElaney introduced Reece to Ryan and Cohen, Ryan sent a text message to Cohen that "I think I figured out what Jeff Rees [*sic*] was talking about with that buying group," (Ryan, Tr. 1121, 1123).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and incomplete. Mr. Cohen was not introduced to Mr. Reece at the October 2013 DTA meeting. (Cohen, Tr. 829) ("Q. Are you aware that the FTC in this case has alleged that you had a conversation with Mr. Reece at a DTA meeting about buying groups? A. Yes. Q. Is that true? A. No."). Mr.

Reese has testified that his only interaction with Cohen was an “informal passing in the hallway,” or “maybe just an acknowledgement”. (RX1135; Reece, Dep., at 17:25-18:1).

1246. [REDACTED]

Schein’s Response:

The asserted fact is not supported by reliable evidence. Mr. Reece’s IHT testimony is not reliable evidence regarding the extent to which buying groups contributed to Burkhart’s growth because Complaint Counsel failed to lay an adequate foundation. There, Complaint Counsel asked, “Do you have a sense of how much GPOs have contributed to the revenue increase?” Mr. Reece made his lack of knowledge apparent: “Again, this is just kind of a gut, but I would say roughly a third of our growth has come from those partnerships.” (CX 0319 (Reece, IHT at 21)).

The asserted fact is also irrelevant, as Complaint Counsel has produced no evidence that Burkhart’s experience with buying groups is indicative of what another distributor’s experience would be. (Cavaretta, Tr. 5563-65 (confirming that just because a buying group is a good deal for Burkhart, does not mean that it is a good deal for Schein)). Dr. Marshall made this point as well. While he believed “[i]t makes economic sense that a distributor with a small customer base and small sales would find it profitable to supply such buying groups..., a distributor with a large customer base and large sales might find it less profitable to supply such buying groups.” (CX 7100-175-76). In fact, Schein’s experience was quite different. Schein lost money discounting to Smile Source in 2011 and 2017, as

well as to Steadfast. (SF 1722-35; RX 3058; Marshall, Tr. 3073-75, 3121-22; SF 1218-19; CX 0255; Titus, Tr. 5250-51).

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Complaint Counsel has not cited any data, because it cannot, supporting Jeff Reece's overly optimistic, anecdotal testimony. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1247. The Kois Buyers Group alone accounted for more than [REDACTED]

[REDACTED]

Schein's Response:

The growth of Kois Buyers Group sales to Burkhart from 2015 to 2016 is consistent with the evidence that the Kois Buyers Group was not initially successful under Mr. Ahmed's leadership, but turned around after Mr. Kois Jr. took the helm in late 2015 and made changes. (Kois Sr., Tr. 223 (the Kois Buyers Group "was not doing very well"), 239-41; Kois Jr., Tr. 361, 364-65 (Mr. Kois Jr. drastically reduced the cost of membership to \$299 per year)). Mr. Reece's IHT testimony, however, is not reliable evidence of the sales growth in 2017 or where it came from. He testified, [REDACTED]

[REDACTED] (CX 0319 (Reece, IHT at 144-45)). There is no evidence that Mr. Reece's memory was based on any studies or other reliable evidence. This had Mr. Reece worried too: [REDACTED]

[REDACTED] (CX 0319 (Reece, IHT at 145)). As to where that estimated growth came from, Mr. Reece testified that he [REDACTED]

[REDACTED] not that it did. (CX 0319 (Reece, IHT at 144-45)). Whatever Mr. Reece would like to think cannot be taken for the truth of the matter asserted.

Moreover, the asserted fact is irrelevant, as Complaint Counsel has produced no evidence that Burkhart's experience with buying groups is indicative of what another distributor's experience would be. (Cavaretta, Tr. 5563-65 (confirming that just because a buying group is a good deal for Burkhart, does not mean that it is a good deal for Schein)). Dr. Marshall made this point as well. While he believed "[i]t makes economic sense that

a distributor with a small customer base and small sales would find it profitable to supply such buying groups..., a distributor with a large customer base and large sales might find it less profitable to supply such buying groups.” (CX 7100-175-76). In fact, Schein’s experience was quite different. It lost money discounting to Smile Source in 2012 and 2017, as well as to Steadfast. (SF 1722-35; RX 3058; Marshall, Tr. 3073-75, 3121-22; SF 1218-19; CX 0255; Titus, Tr. 5250-51).

Patterson’s Response:

Patterson joins Schein and Benco’s responses.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Complaint Counsel has not cited any data, because it cannot, supporting Jeff Reece’s overly optimistic, anecdotal testimony. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1248. [REDACTED]

Schein's Response:

The asserted fact is misleading. At the time Burkhart signed up with Smile Source, Smile Source only had [REDACTED] customers. There is no evidence concerning how many of those [REDACTED] customers switched to Burkhart. Rather, the evidence is that Schein retained most of those customers, and increased its profits from continuing to sell to them. (SF 1724; RX 3058; Marshall, Tr. 3073, 3076; *see also* RXD 0014-039).

While the evidence shows that Burkhart served new Smile Source members, there is no evidence concerning how many of those new Smile Source members were already Burkhart customers. That is, the record does not reflect the degree of cannibalization, although Dr. Marshall's analysis suggests that [REDACTED] of Burkhart's Smile Source sales were cannibalized from existing Burkhart customers. (CX 7100-165).

Complaint Counsel's citation to Mr. Reece's testimony is also not reliable, as Mr. Reece prefaced his answer by saying he did not [REDACTED] and then offered a guess. (CX 8021 (Reece, Dep. at 90)). There is thus no reliable evidence supporting the first sentence of CCFF 1248. Moreover, according to Mr. Reece's (inaccurate) recollection, there were only [REDACTED] Smile Source members at the time, and [REDACTED] [REDACTED] If that were true, Burkhart's share of the Smile Source membership would have actually been higher than its national average. (CX 8021 (Reece, Dep. at 90); CX 7100-038).

In any event, the asserted fact is irrelevant, as Complaint Counsel has produced no evidence that Burkhart's experience with buying groups is indicative of what another distributor's experience would be. (Cavaretta, Tr. 5563-65 (confirming that just because a buying group is a good deal for Burkhart, does not mean that it is a good deal for Schein)). Dr. Marshall made this point as well. While he believed "[i]t makes economic sense that

a distributor with a small customer base and small sales would find it profitable to supply such buying groups..., a distributor with a large customer base and large sales might find it less profitable to supply such buying groups.” (CX 7100-175-176). In fact, Schein’s experience was quite different. It lost money discounting to Smile Source in 2012 and 2017, as well as to Steadfast. (SF 1722-35; RX 3058; Marshall, Tr. 3073-75, 3121-22; SF 1218-19; CX 0255; Titus, Tr. 5250-51).

Patterson’s Response:

Patterson joins Schein and Benco’s responses.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

First, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1249. [REDACTED]

[REDACTED]

Schein’s Response:

The cited evidence does not support the cited fact. Mr. Reece testified that [REDACTED]

[REDACTED]

[REDACTED] but he did not testify as to the basis for his belief. (Reece, Tr. 4420).

There is no evidence that it was based on any kind of systematic or reliable study. In fact,

[REDACTED] (Reece, Tr. 4420).

Accordingly, the asserted fact cannot be taken for the truth of the matter.

Moreover, the asserted fact is irrelevant. Complaint Counsel did not specify what market share Mr. Reece was testifying about, and did not relate his testimony to any relevant market as alleged by Complaint Counsel. Nor has Complaint Counsel produced any evidence that Burkhart's experience with buying groups is indicative of what another distributor's experience would be. (Cavaretta, Tr. 5563-65 (confirming that just because a buying group is a good deal for Burkhart, does not mean that it is a good deal for Schein)). Dr. Marshall made this point as well. While he believed "[i]t makes economic sense that a distributor with a small customer base and small sales would find it profitable to supply such buying groups..., a distributor with a large customer base and large sales might find it less profitable to supply such buying groups." (CX 7100-175-76). In fact, Schein's experience was quite different. It lost money discounting to Smile Source in 2012 and 2017, as well as to Steadfast. (SF 1722-35; RX 3058; Marshall, Tr. 3073-75, 3121-22; SF 1218-19; CX 0255; Titus, Tr. 5250-51).

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

Complaint Counsel has not cited any data, because it cannot, supporting Jeff Reece's overly optimistic, anecdotal testimony. (Reece, Tr. 4420). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1250. Had Burkhart declined to work with buying members, members of buying groups would have experienced increases in prices. (CX7100 at 214 (¶ 494) (Marshall Expert Report) (Had Burkhart elected to not supply the Kois Buyers Group and Smile Source, their members would have experienced an increase in prices)).

Schein's Response:

The asserted fact is unsupported by record evidence and is pure speculation.

As an initial matter, if Burkhart declined to work with Smile Source, Smile Source may not have fired Schein. Likewise, if Burkhart had declined to work with Kois, then Kois may have agreed to engage in reasonable due diligence and further negotiations with Schein, and it is possible that a deal may (or may not) have been reached. Moreover, if Burkhart had declined to work with buying groups, there may have been other distributors (such as Darby or a regional distributor, such as Atlanta Dental or Nashville Dental) that could have contracted with such buying groups. Even if no other distributors contracted with such buying groups, many dentists may have been able to negotiate lower prices with their FSCs. Finally, there has been no analysis that any Smile Source member saved money on dental supplies, after factoring in the high royalty rates – [REDACTED]

_____ – which equals between _____ and _____ of dental supply spend. (SF 51; Goldsmith, Tr. 2061, 2142-43 _____).
_____).

Moreover, neither Complaint Counsel nor Dr. Marshall has presented evidence or analysis of what would happen if Burkhart declined to work with buying groups. Nor did Complaint Counsel or Dr. Marshall present any evidence that any buying group member would have been unable to obtain similar pricing from a distributor outside the buying group. The evidence shows the opposite. For instance, Schein continued to offer the Dental Co-Op of Utah members the same pricing they had received under the buying group even after the group's relationship with Schein ended. (SF 623).

Patterson's Response:

This Proposed Finding of Fact disregards this Court’s Order dated Feb. 21, 2019, which prohibits “cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents,” Order on Post-Trial Briefs, 3, as well as this Court’s admonition: “Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That’s what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I’m letting you know today so that you don’t think you’re going to question your experts about facts and rely on that,” (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight.

Benco's Response:

Paragraph 1250 is not even a proposed finding of fact. Rather, it constitutes conjecture of Complaint Counsel based only on the debunked report of Complaint

Counsel's expert. Of course, Marshall – despite his \$2.5 million fee – did no empirical studies to support his own wild speculation. Incredibly, Marshall does not even bother to provide any citation or footnote to support this “point.” (CX7100 at 214 (¶ 494) (Marshall Expert Report)).

This proposed finding should be rejected since it is not based on the testimony of fact witness, exhibits in evidence, or any other credible evidence.

1251. Reece never contacted Schein, Patterson, or Benco to see if they were discounting to buying groups, nor did he share Burkhart's strategy with regard to buying groups or any specific customer with any competing dental products distributor. (Reece, Tr. 4375).

Schein's Response:

No response, except the same statement is true of Schein, as well (Schein never contacted Benco, Patterson, or Burkhart regarding buying groups).

Patterson's Response:

No specific response.

Benco's Response:

No response.

1252. Mike McElaney's health rendered him unavailable for trial. (Ryan, Tr. 1110; Cohen, Tr. 573).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

No response

XVII. “PLUS-FACTOR” EVIDENCE CONFIRMS THE EXISTENCE OF AN UNLAWFUL AGREEMENT.

A. The Big Three Engaged in Repeated Unexplained Communications about Buying Groups with Their Top Competitors.

1253. Executives of the Big Three engaged in repeated and regular communications regarding buying groups. (CCFF ¶¶ 474-1100, 1109-1158).

Schein’s Response:

False. Complaint Counsel cites no record evidence to support this finding. It only cites to other proposed findings, which – as set forth in Schein’s specific replies – also fail to support its characterization of the evidence. Schein incorporates its responses to those proposed findings here. (SRF 474-1100, 1109-58).

Patterson’s Response:

None of the cited testimony supports the assertion that Patterson executives had “repeated” and “regular” communications regarding buying groups with executives from Benco or Schein. Patterson participated in only two communications during the alleged conspiracy period relating to buying groups. Both were between Patterson’s Paul Guggenheim and Benco’s Chuck Cohen, one from February 2013, the other from June 2013. (CX0090 at 1; CX0062 at 2). There are no other communications between Patterson and Benco regarding buying groups in the record. There are also no communications between Patterson and Schein regarding buying groups in the record. *See also* Response to Findings ¶¶ 474-1100, 1109-1158, *supra*.

Benco’s Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this

proposed finding. None of the individual findings cited in this proposed finding contain evidence of Benco engaging in repeated and regular communications regarding buying groups. By way of further response, Benco refers the Court to its responses to ¶¶ 474-1100, 1109-1158.

B. The Big Three Acted Against Their Unilateral Self Interest.

1. Discussion of Buying Group Strategies.

1254. The Big Three discussed their positions and strategies regarding buying groups throughout the conspiracy period. (CCFF ¶¶ 474-1100, 1109-1158).

Schein's Response:

False. Complaint Counsel cites no record evidence to support this finding. It only cites to other proposed findings, which – as set forth in Schein's specific replies – also fail to support its characterization of the evidence. Schein incorporates its responses to those proposed findings here. (SRF 474-1100, 1109-58).

Patterson's Response:

Patterson participated in only two communications during the alleged conspiracy period relating to buying groups. Both were between Patterson's Paul Guggenheim and Benco's Chuck Cohen, one from February 2013, the other from June 2013. (CX0090 at 1; CX0062 at 2). Neither of these two communications discussed Patterson's positions regarding buying groups except for a statement in the February 2013 email of, "We feel the same way about these." (CX0090 at 1). And neither of these two communications discussed Patterson's strategies regarding buying groups. There are no other communications between Patterson and Benco regarding buying groups in the record. There are also no communications between Patterson and Schein regarding buying group

positions and strategies in the record. *See also* Response to Findings ¶¶ 474-1100, 1109-1158, *supra*.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding. None of the individual findings cited in this proposed finding contain evidence of Benco discussing its positions and strategies regarding buying groups with Schein or Patterson. By way of further response, Benco refers the Court to its responses to ¶¶ 474-1100, 1109-1158.

2. Refusing to Bid on Buying Groups.

1255. Selling or discounting to buying groups was in each of the Big Three's unilateral self-interest, but each refused to bid on buying groups during the conspiracy period. (*See infra* Section CCF ¶¶ 1256-1296).

Schein's Response:

False. Complaint Counsel cites no record evidence to support this finding. It only cites to other proposed findings, which – as set forth in Schein's specific replies – also fail to support its characterization of the evidence. Schein incorporates its responses to those specific proposed findings here. (SRF 1256-96).

Substantively, the evidence shows that buying groups rarely, if ever, delivered incremental volume that outweighed the effects of cannibalization. (*E.g.*, SF 88). Schein's own experience with groups such as Steadfast, MeritDent, and the Dental Co-Op demonstrated that buying groups were not always profitable. (SF 179, 363, 969-81). Dr. Marshall's analysis also showed that Schein *lost* profits by supplying Smile Source in 2012 and again in 2017. (SF 1722-35; RX 3058; Marshall, Tr. 3073-75, 3121-22). There are

also numerous documents in which Schein evaluated buying groups and concluded that the risks of cannibalization were significant and the likelihood of additional volume minimal. Schein’s documents also note that buying groups created significant conflicts and other problems. (SF 90-114, 189-236, 269-304, 425, 458, 655-56). There is no evidence that Schein ever turned down a buying group opportunity that would have been profitable for it. The fact that Complaint Counsel cannot name a single such entity is telling.

Patterson’s Response:

Patterson regularly evaluated buying groups during the alleged conspiracy period and decided working with them was not in its unilateral self-interest. PF ¶¶ 167–173. Also, in relying on Dr. Marshall’s report for this finding, Complaint Counsel disregards this Court’s Order dated February 21, 2019, which prohibits “cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents,” Order on Post-Trial Briefs, 3, as well as this Court’s admonition: “Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That’s what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I’m letting you know today so that you don’t think you’re going to question your experts about facts and rely on that,” (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added).

Moreover, as to the 29 “buying groups” Complaint Counsel identifies in their brief, each should be disregarded for the reasons listed below.

Listed Group	Response
--------------	----------

1. Academy of General Dentistry Buying Group	<ul style="list-style-type: none"> • No evidence of interaction with Patterson. • No Patterson document cited in reference to this entity in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). (CX7100 at 209-213) • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not on list of buying groups from discovery. PF ¶ 482. • Not called as a witness at trial.
2. American Academy of Cosmetic Dentistry	<ul style="list-style-type: none"> • Never mentioned at trial. • No evidence of interaction with Patterson. • No Patterson document cited in reference to this entity in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). (CX7100 at 209-213) • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
3. Business Intelligence Group	<ul style="list-style-type: none"> • Never mentioned at trial. • No evidence of interaction with Patterson. • No Patterson document cited in reference to this entity in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). (CX7100 at 209-213) • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
4. Catapult Group	<ul style="list-style-type: none"> • David Misiak met with Lou Graham, who was planning to launch the Catapult Group, over dinner, evaluated his proposal and concluded it made no business sense to Patterson because it was uninformed, had little to no members or purchasing history, and was overall not a good opportunity for Patterson. (CX3287; Guggenheim, Tr. 1811-14). • Patterson concluded it was "not at all" a good opportunity because it wanted a "vig" or "kickback," Which Patterson considered "unethical" and costly. PF ¶¶ 485-91; (Guggenheim, Tr. 1814). • Complaint Counsel did not ask Dr. Marshall about this entity at trial. On cross, Dr. Marshall conceded he did not know whether it made a coherent proposal to Patterson. (Marshall, Tr. 3265). • Dr. Marshall conceded that it was rational for Patterson to turn down "incoherent" proposals from buying groups. PF ¶ 709 (Marshall, Tr. 3259) ("If there was, however, some kind of incoherent management at one of these firms, I could understand them turning away that business, that that would not be irrational to me.").

	<p>There is no evidence Patterson ever communicated with Schein or Benco about Catapult.</p> <ul style="list-style-type: none"> • Not called as a witness at trial.
5. Dental Purchasing Group	<ul style="list-style-type: none"> • Patterson evaluated the group, saw it was run by a <i>veterinarian</i>, and ultimately decided to pass. PF ¶¶ 168, 171. • Dr. Marshall did not review the group’s proposal to Patterson and did not know it was run by a veterinarian. (Marshall, Tr. 3267, 3270-71). • Complaint Counsel did not ask Dr. Marshall about this entity at trial. On cross, Dr. Marshall conceded that it was rational for Patterson to turn down “incoherent” proposals from buying groups. PF ¶ 709 (Marshall, Tr. 3259) (“If there was, however, some kind of incoherent management at one of these firms, I could understand them turning away that business, that that would not be irrational to me.”). • No evidence Patterson communicated with Schein or Benco about the group. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
6. Dental Visits LLC	<ul style="list-style-type: none"> • Never mentioned at trial. • No evidence of interaction with Patterson. • No Patterson document cited in reference to this entity in Dr. Marshall’s ¶ 491 (allegedly affected “buying groups”). (CX7100 at 209-213) • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
7. Dentistry Unchained	<ul style="list-style-type: none"> • Did not exist during the alleged conspiracy. PF ¶ 338. • Patterson rejected <i>after</i> the alleged conspiracy. PF ¶ 352. • Complaint Counsel did not ask Dr. Marshall about this entity at trial. On cross, Dr. Marshall conceded he did not know it did not exist during the alleged conspiracy and that Patterson rejected it after the alleged conspiracy. PF ¶ 338, 346–51. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.

8. DDS Group	<ul style="list-style-type: none"> • No evidence of interaction with Patterson. • No Patterson document cited in reference to this entity in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). (CX7100 at 209-213) • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
9. Dr. David Carter	<ul style="list-style-type: none"> • Never mentioned at trial. • No evidence of interaction with Patterson. • No Patterson document cited in reference to this entity in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). (CX7100 at 209-213) • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
10. Erie Family Dental Equipment	<ul style="list-style-type: none"> • Never mentioned at trial. • No evidence of interaction with Patterson. • No Patterson document cited in reference to this entity in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). (CX7100 at 209-213) • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
11. Florida Dental Association	<ul style="list-style-type: none"> • Patterson declined to work with this group for a second time in <i>March 2012</i>, nearly a year <i>before</i> allegedly joining a conspiracy. PF ¶ 119. • Patterson was already doing business with likely 30 to 35% of dentists in Florida and buying groups were not part of Patterson's core strategy. (Misiak, Tr. 1493). • No evidence of interaction with Patterson in Complaint Counsel's proposed findings of fact. • No evidence Patterson communicated with Schein or Benco about the group. • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
12. IDA	<ul style="list-style-type: none"> • No evidence of interaction with Patterson. • Not listed in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). (CX7100 at 209-213) • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not on list provided in discovery. PF ¶ 482.

	<ul style="list-style-type: none"> • Not called as a witness at trial.
13. Insight Sourcing Group	<ul style="list-style-type: none"> • Never mentioned at trial. • No evidence of interaction with Patterson. • No Patterson document cited in reference to this entity in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). (CX7100 at 209-213) • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
14. Kois Buyers Group	<ul style="list-style-type: none"> • Patterson evaluated and decided not to move forward with the group because it presented an incoherent, outlandish proposal. • Its representative, Qadeer Ahmed, was caught lying to Patterson about its number of members and claimed manufacturer relationships. PF ¶¶ 578-85. • In reality, Kois did not yet exist and had zero members. • Dr. Marshall conceded it made sense for Patterson to walk away from such a proposal. (Marshall, Tr. 3259-60). • No evidence Patterson communicated with Schein or Benco about the group.
15. Dr. Narducci Buying Group	<ul style="list-style-type: none"> • Dr. Narducci, who was a "very good Patterson client," started "his own dental distributor company" during the alleged conspiracy, reportedly supplied by Schein, and stole away Patterson customers. (McFadden, 2713-15; CX0163). • No evidence Patterson communicated with Schein or Benco about the group. • Not listed in Dr. Marshall's ¶ 491 (allegedly affected "buying groups"). (CX7100 at 209-213) • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
16. New Mexico Dental Cooperative	<ul style="list-style-type: none"> • Did not exist at the time it approached Patterson. • Patterson was "pull[ing] back" from NMDC as of the day before it allegedly joined a conspiracy. • Dr. Mason had no reason to doubt Patterson's decision came from its local branch. PF ¶¶ 292, 293, 296.

	<ul style="list-style-type: none"> Does not consider itself a buying group. PF ¶¶ 282, 289–93.
17. Nexus Dental	<ul style="list-style-type: none"> Neal McFadden spoke with Nexus’s representative, Kianor Shah, who was an unknown to Patterson at the time he reached out through a “contact the CEO” form. PF ¶ 167; (Guggenheim, Tr. 1804–05). The group was looking for a vig and Patterson found the group’s proposal “offensive.” (Guggenheim, Tr. 1800–07). No evidence Patterson communicated with Schein or Benco about the group. No Patterson document cited in reference to this entity in Dr. Marshall’s ¶ 491 (allegedly affected “buying groups”). (CX7100 at 209–213) Complaint Counsel did not ask Dr. Marshall about this entity at trial. Not on list provided in discovery. PF ¶ 482. Not called as a witness at trial.
18. Pacific Group Management Services	<ul style="list-style-type: none"> No evidence of interaction with Patterson. No Patterson document cited in reference to this entity in Dr. Marshall’s ¶ 491 (allegedly affected “buying groups”). (CX7100 at 209–213) Complaint Counsel did not ask Dr. Marshall about this entity at trial. Not on list provided in discovery. PF ¶ 482. Not called as a witness at trial.
19. Pearl Network Buying Group	<ul style="list-style-type: none"> Never mentioned at trial. No evidence of interaction with Patterson. Not listed in Dr. Marshall’s ¶ 491 (allegedly affected “buying groups”). (CX7100 at 209–213) Not on list provided in discovery. PF ¶ 482. Not called as a witness at trial.
20. Unified Smiles	<ul style="list-style-type: none"> No evidence of interaction with Patterson. No Patterson document cited in reference to this entity in Dr. Marshall’s ¶ 491 (allegedly affected “buying groups”). (CX7100 at 209–213) Not called as a witness at trial.

21. UOBG	<ul style="list-style-type: none"> • A doctor claiming to be a part of UOBG asked Patterson about getting a discount on an X-Ray machine in 2014, and another doctor made a similar request in May 2015, after the alleged conspiracy. PF ¶¶ 661–69.¹⁸ • Patterson responded to the <i>post</i>-conspiracy inquiry, “<i>We currently have little appetite to deal with the buying groups as we feel they compete directly with the branches and reps.</i>” PF ¶ 668. • No evidence Patterson communicated with Benco or Schein about the group. • Not listed in Dr. Marshall’s ¶ 491 (allegedly affected “buying groups”). (CX7100 at 209-213) • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not called as a witness at trial.
22. Smile Source	<ul style="list-style-type: none"> • Patterson met with and evaluated Smile Source in 2013, and its impression was poor. PF ¶¶ 141–42. • Smile Source was looking for a second distributor in addition to Burkhart. PF ¶ 142. • All Smile Source members appeared to already be Patterson customers. PF ¶¶ 153, 154. • Patterson decided to keep Smile Source on the “idea board,” and in 2015 bid for its business when it had quadrupled its membership, terminated its representative, been vouched for by manufacturers, and developed a suite of services it was offering its members. PF ¶¶ 155, 158, 161–64. • Smile Source insists it is not a buying group. PF ¶ 465. • There is no evidence that Patterson communicated with Benco or Schein about Smile Source.
23. Dr. Stephen Sebastian	<ul style="list-style-type: none"> • Dr. Stephen Sebastian reached out to Patterson wanting to “talk to someone about the possibility of starting” a buying group and explained he was “looking to recruit a group of individually owned offices.” • There “was no upside to Patterson” since Dr. Sebastian had no company and no clients, just an idea that was not a coherent business plan, so Patterson independently decided not to move forward with this proposal. (McFadden, Tr. 2816-17).

¹⁸ Patterson’s proposed finding of fact 661 mistakenly reported that there was no trial testimony about UOBG. Patterson is not aware of any additional trial references to UOBG aside from the one cited above.

	<ul style="list-style-type: none"> • Complaint Counsel did not ask Dr. Marshall about this entity at trial. On cross, Dr. Marshall conceded that it was rational for Patterson to turn down “incoherent” proposals from buying groups. PF ¶ 709 (Marshall, Tr. 3259) (“If there was, however, some kind of incoherent management at one of these firms, I could understand them turning away that business, that that would not be irrational to me.”). • There is no evidence that Patterson communicated with Benco or Schein about Dr. Stephen Sebastian. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
24. Save Dentists, Inc.	<ul style="list-style-type: none"> • Never mentioned at trial. • No evidence of interaction with Patterson. • Does not appear in Complaint Counsel’s proposed findings of fact. • No Patterson document cited in reference to this entity in Dr. Marshall’s ¶ 491 (allegedly affected “buying groups”). (CX7100 at 209-213) • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
25. Schulman Group	<ul style="list-style-type: none"> • No evidence of interaction with Patterson. • No Patterson document cited in reference to this entity in Dr. Marshall’s ¶ 491 (allegedly affected “buying groups”). (CX7100 at 209-213) • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not called as a witness at trial.
26. Synergy Dental Partners	<ul style="list-style-type: none"> • Patterson rejected Synergy in 2011, long before it allegedly joined a conspiracy in February 2013. PF ¶¶ 641–45. • No Patterson document cited in reference to this entity in Dr. Marshall’s ¶ 491 (allegedly affected “buying groups”). (CX7100 at 209-213) • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not called as a witness at trial.

27. Tralongo	<ul style="list-style-type: none"> • Neal McFadden evaluated Tralongo and determined it to be an “outlandish buying group request” looking for money. (McFadden, Tr. 2818-19). • Mr. McFadden decided not to move forward with this entity as part of Patterson Special Markets but let the branch know that they could pursue this opportunity if they chose to do so. (McFadden, Tr. 2819-20). • There is no evidence that Patterson communicated with Schein and/or Benco about Tralongo; in fact, Mr. Rogan testified he never contacted Benco when he was made aware that Benco might have been selling to Tralongo. (Rogan, Tr. 3575-76). • No evidence of interaction with Patterson in Complaint Counsel’s proposed findings of fact. • Not listed in Dr. Marshall’s ¶ 491 (allegedly affected “buying groups”). (CX7100 at 209-213). • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
28. WheelSpoke LLC	<ul style="list-style-type: none"> • No evidence of interaction with Patterson. • No Patterson document cited in reference to this entity in Dr. Marshall’s ¶ 491 (allegedly affected “buying groups”). (CX7100 at 209-213). • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.
29. XYZ Dental	<ul style="list-style-type: none"> • No evidence of interaction with Patterson. • No Patterson document cited in reference to this entity in Dr. Marshall’s ¶ 491 (allegedly affected “buying groups”). (CX7100 at 209-213) • Complaint Counsel did not ask Dr. Marshall about this entity at trial. • Not on list provided in discovery. PF ¶ 482. • Not called as a witness at trial.

Benco’s Response:

Complaint Counsel’s proposed finding is overly broad, inaccurate, and mischaracterizes the evidence.

Selling or discounting to buying groups was not in Benco's unilateral self-interest. (See BFF ¶¶ 879-1242; RRF ¶¶ 1256-1296).

a) Schein

1256. Schein thought buying groups provided an opportunity to win business from competitors and grow its profit margins. (CCFF ¶¶ 12567-1269).

Schein's Response:

False. Complaint Counsel cites no record evidence to support this finding. It only cites to other proposed findings, and Schein incorporates its specific responses to those proposed findings here. (SRF 1257-69).

Schein did not think that all, or even most, buying groups provided an opportunity to win business and grow profit margins. In fact, it was appropriately skeptical of buying groups' ability to do so. (SF 77-114, 160-88). This was expressed in internal documents from as early as 2002. (RX 2405-001 (2002: "[W]e have held a pretty firm line on saying NO to virtually all of them. ... [T]his type of GPO would kill the margins for both manufacturers and distributors. ... [T]here would be no increased volume and just lower costs. ... In my opinion we need to stop this effort."); *see also* SF 1342). Indeed, in 2010 – over a year before Complaint Counsels' (current) alleged start of the conspiracy – when Schein developed the 2010 Guidance in response to Pugh Dental, Schein concluded that buying groups that did not have "complete control of purchasing policy that would force the distributor purchases to Schein" and could not "force compliance" did not provide any opportunities for Schein. (CX 2153; CX 2111; SF 189-222).

As the 2010 Guidance makes clear, however, certain buying groups did present opportunities, and Schein did business with such entities. (SF 375-1335).

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Schein.

1257. Sullivan stated that buying groups were beneficial and an opportunity to win customers from competitors. (Sullivan, Tr. 3911-3912).

Schein's Response:

Overbroad. Recognizing that not all buying groups are the same, and the reality that buying groups pose risks of cannibalization and conflicts, Mr. Sullivan testified that buying groups "can be threats and opportunities." (Sullivan, Tr. 3911, 4087-92).

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Schein.

1258. Meadows also believed that buying groups presented the opportunity to bring in new customers and increase profit margins. (Meadows, Tr. 2652).

Schein's Response:

Overbroad. Mr. Meadows recognized that "[i]f they bring us new customers or help us retain the customers we have or would help us bring our mission to life, yes." (Meadows, Tr. 2652 (emphasis added)). This was often a big "if," however, as very few buying groups actually had the capability of driving compliance to help retain customers, and given the risks of cannibalization and internal conflicts that buying groups often bring.

(Meadows, Tr. 2506-07, 2519-22, 2525-30, 2532-34, 2545-53, 2555-57, 2559-60; SF 78-114).

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Schein.

1259. Foley also stated that Schein Special Markets viewed buying groups favorably. (Foley, Tr. 4528).

Schein's Response:

Overbroad. Mr. Foley explained that ***certain*** buying groups that could “add value-added services to our customers were positive.” (Foley, Tr. 4528-29). Not all buying groups exhibited the characteristics of exclusivity, compliance, and stickiness that made good partners. (Foley, Tr. 4615-16; SF 168).

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Schein.

1260. Foley also believed buying groups “would bring in clients that [Schein] wouldn’t have before” and “for existing customers, it – again, it could lead to longer retention on the customer.” (CX0306 (Foley, IHT at 78-79)).

Schein's Response:

Overbroad. Complaint Counsel’s question at Mr. Foley’s IHT was ***not*** limited to buying groups of independent dentists – the definition Complaint Counsel now uses for purposes of this case. (CX 0306 (Foley, IHT at 78-79)). Indeed, Complaint Counsel omits

the portion of Mr. Foley's testimony where he makes this clear. As he stated in explaining his "[f]avorably" comment, "For those that brought value to their customer in the *community health center* world, we understood that they were associated with a buying group" and "[t]heir retention rate with Schein was higher than a person not associated with a buying group." (CX 0306 (Foley, IHT at 78) (emphasis added)).

While Mr. Foley explained that certain buying groups of private practice dentists could deliver additional volume, Mr. Foley pointed only to Breakaway and OrthoSynetics. (CX 0306 (Foley, IHT at 79)). As Mr. Foley explained, the reason the Breakaway buying group was beneficial was because it was willing to "work[] with compliance...." (CX 0306 (Foley, IHT at 83)). Not all buying groups, however, exhibited such compliance. (Foley, Tr. 4615-16; SF 168). That is why they needed to be evaluated on a case-by-case basis.

Ironically, while Mr. Foley explained that Breakaway and OrthoSynetics are the type of buying group Schein did business with because they could drive compliance, Complaint Counsel tries to disqualify them as buying groups because including them within the definition of a buying group would negate their case. (CC Br. 97 n.740, 98). But Complaint Counsel cannot have it both ways. If the entities that Mr. Foley identified as being able to deliver incremental volume are not buying groups, then there is no basis for saying that Mr. Foley believed the buying groups could deliver incremental volume.

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Schein.

1261. Schein benefitted through buying group relationships, and Schein witnesses testified that buying groups were an opportunity to win customers from competitors. Foley testified that buying groups allowed Schein to gain customers it did not previously have. (CX8003 (Foley, Dep. at 189); CX0306 (Foley, IHT at 78-79)). Foley testified that buying groups also could lead to longer retention rates for Schein's existing customers. (CX0306 (Foley, IHT at 78-79)). Meadows testified that buying groups were a great opportunity for Schein, as they helped Schein fulfill its mission, retain business, and expand market share by bringing in new sales from competitors. (CX8016 (Meadows, Dep. at 29)).

Schein's Response:

This restates the prior four proposed findings, and Schein incorporates its responses to those findings here. (SRF 1257-60).

CCFF 1261 is overbroad. Schein benefitted from *some* buying group relationships, but was harmed by others. Schein lost money discounting to Smile Source in 2011 and 2017, and lost business and customers through its business with the Dental Co-Op of Utah and Steadfast. (SF 593-601, 1218-19, 1722-35; RX 3058; Marshall, Tr. 3073-75, 3121-22; CX 0255; Titus, Tr. 5251-52).

This is reflected in the cited testimony. Mr. Foley explained at his Investigational Hearing that the reason the Breakaway buying group was beneficial was because it was willing to "work[] with compliance...." (CX 0306 (Foley, IHT at 83)). Not all buying groups, however, exhibit such compliance. (Foley, Tr. 4615-16; SF 168). And at his deposition, Mr. Foley explained that in order to provide a good opportunity, a buying group needs to "drive compliance" among other things. (CX 8003 (Foley, Dep. at 47-48)). In such cases, buying groups "*could*" lead to a gain in customers for Schein. (CX 8003 (Foley, Dep. at 189) (emphasis added)). And as Mr. Meadows testified at his deposition, Schein negotiated with buying groups on a "case-by-case" basis looking at their "ability to help [Schein] grow our business, retain our business, and bring our mission to life." (CX 8016 (Meadows, Dep. at 61-63, 71, 101)).

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Schein.

1262. As described above, Schein had profitable partnerships with buying groups prior to 2011. (CCFF ¶¶ 440-453).

Schein's Response:

This restates the prior five proposed findings, and Schein incorporates its responses to those findings here. (SRF 1257-61).

CCFF 1262 is overbroad. Schein had *some* profitable buying group partnerships, and some *unprofitable* ones. Schein lost money discounting to Smile Source prior to 2012, for instance. (SF 1722-35; RX 3058; Marshall, Tr. 3073-75). Complaint Counsel's temporal qualifier "prior to 2011" is irrelevant, however. Schein continued to have profitable and unprofitable buying group partnerships after 2011. For example, it lost business through its partnerships with the Dental Co-Op of Utah and Steadfast during the alleged conspiracy. (SF 593-601, 1218-19, CX 0255; Titus, Tr. 5250-51). At the same time, it maintained business with at least 25 buying groups representing \$30 million annually during the alleged conspiracy period. (SF 375-1335, 1627-28).

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Schein.

1263. For example, Schein's Smile Source relationship was viewed as a growth opportunity. (Foley, Tr. 4535).

Schein's Response:

As an initial matter, Smile Source was not viewed as a growth opportunity. After three years, Smile Source only had [REDACTED]

[REDACTED]

[REDACTED] (SF 1728; Goldsmith, Tr. 2103; CX 7100-178).

Mr. Foley also testified that he did not know whether HSD gained new customers when it worked with Smile Source. (Foley, Tr. 4534-35). He did not do an analysis of whether it helped Special Markets increase the amount of business it was doing with existing customers. (Foley, Tr. 4534-35).

As it turned out, Smile Source was not a growth opportunity. In both instances that Schein contracted with Smile Source, Schein lost money. (SF 1722-35; RX 3058; Marshall, Tr. 3073-75, 3121-22). Dr. Marshall showed that, had Schein continued with its 2011 deal with Smile Source, Schein would have suffered losses. (Marshall, Tr. 3097 ("If Schein's shares and margins stay the same as ... when Schein actually had the business ... but Smile Source were to grow, Schein's losses would continue to grow.")).

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Schein.

1264. Schein gained new customers by selling to Smile Source. (Foley, Tr. 4534; CX8005 (Muller, Dep. at 53-54); CX0309 (Muller, IHT at 101)).

Schein's Response:

The assertion is vague and devoid of any magnitude. Schein sold to exactly [REDACTED] Smile Source members between 2008 and 2011. (Goldsmith, Tr. 2103). It is unclear how many, if any, customers were not buying from Schein prior to becoming Smile Source members. Mr. Foley did not recall customer details, but he did remember “*one*” customer that was a “good opportunity.” (Foley, Tr. 4534-35 (emphasis added)).

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Schein.

1265. Sullivan thought the Smile Source account was valuable. (Sullivan, Tr. 3922-3933).

Schein's Response:

Misrepresents Mr. Sullivan's testimony. Mr. Sullivan testified that he saw value in Smile Source's “potential” such that he was willing to “test the theory” that Smile Source could help Schein grow its business. (Sullivan, Tr. 3922-24). As Dr. Marshall's analysis showed, the theory did *not* work, and Schein lost money by continuing to do business with Smile Source in 2010. (SF 1722-35; RX 3058; Marshall, Tr. 3073-75, 3097 (“If Schein's shares and margins stay the same as ... when Schein actually had the business ... but Smile Source were to grow, Schein's losses would continue to grow.”)).

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Schein.

1266. Sullivan did not want to lose the Smile Source account because it was bringing at least \$1 million of business to Schein. (Sullivan, Tr. 3922-3923; CX2113 at 001).

Schein's Response:

Misrepresents Mr. Sullivan's testimony. Mr. Sullivan testified that he believed the \$1 million was Smile Source's "potential," and he was willing to "test the theory" that Smile Source could help Schein grow its business. (Sullivan, Tr. 3922-24; SRF 432).

As Dr. Marshall's analysis showed, however, the theory did *not* work, and Schein lost money by continuing to do business with Smile Source in 2010. (SF 1722-35; RX 3058; Marshall, Tr. 3073-75, 3097 ("If Schein's shares and margins stay the same as ... when Schein actually had the business ... but Smile Source were to grow, Schein's losses would continue to grow.")).

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Schein.

1267. [REDACTED]

Schein's Response:

False.

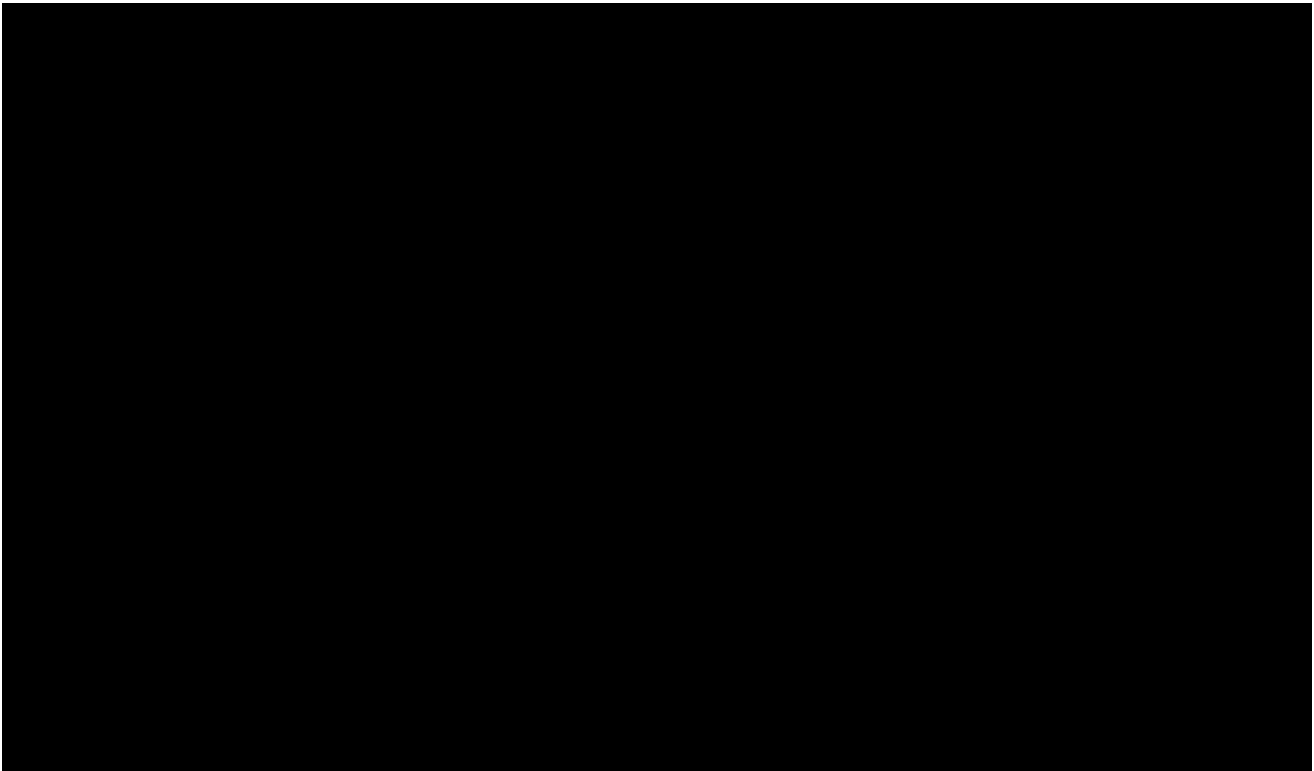
First, Dr. Goldsmith's claim of [REDACTED] is unreliable and contradicted by the data. Dr. Marshall showed that Burkhardt obtained less than [REDACTED] of purchases from customers that had been Smile Source members when Schein had the contract. (CX 7100-

085; *see also* CX 7100-163, -171, -178). In fact, as Dr. Goldsmith conceded on cross, Smile Source [REDACTED] [REDACTED] (Goldsmith, Tr. 2054-55, 2092). Dr. Goldsmith *claims* [REDACTED] of Smile Source members used its distributors, but none of the [REDACTED] he purports to base his claim on are in evidence. (Goldsmith, Tr. 1968). Thus, Dr. Goldsmith's testimony is not admissible for its truth. Fed. R. Evid. 1002.

Second, Dr. Marshall found that Schein *gained* – not *lost* – sales after its relationship with Smile Source ended. (SF 1722-35; RX 3058; Marshall, Tr. 3073-75, 3121-22). [REDACTED] [REDACTED] (Goldsmith, Tr. 2088-89; *see also* CX 7100-067). Dr. Marshall performed an analysis of Schein's sales and profits to these [REDACTED] before and after termination. That analysis, which Dr. Marshall prepared and included in his back-up materials, shows that Schein retained most of the [REDACTED] and [REDACTED] *after* it was terminated by Smile Source. (RX 3058; Marshall, Tr. 3073, 3076; *see also* RXD 0014-039).

As the cross examination of Dr. Marshall demonstrated, Schein could very well have lost even more if it had continued discounting to Smile Source. (SF 1719-20; Marshall, Tr. 2926-27, 2986-87, 3031-68, 3096-98; RXD 0014). At trial, for example, Dr. Marshall conceded that, as shown in the chart below, if Schein had continued to charge its pre-termination margins and maintained its pre-termination share, but Smile Source had experienced similar membership growth, Schein would have *lost* over [REDACTED]. (Marshall, Tr. 3097 (“Q. If Schein's shares and margins stay the same as they were [pre-

termination] but Smile Source were to grow, then Schein's losses would continue to grow. A. Yes...."); RXD 0014-041). This loss exceeds the [REDACTED] loss to Schein when Smile Source transitioned to Burkhart. (RXD 0014-041). As such, Schein *gained* [REDACTED] in sales as a result of Smile Source's termination of Schein, *proving* that Smile Source did not deliver incremental volume sufficient to outweigh the cannibalistic effects of the Smile Source relationship.



In order to avoid the result that discounting to Smile Source was unprofitable for Schein, Dr. Marshall constructed an analysis that ignores the fact that Schein would have to continue offering discounts to Smile Source members if it wanted to maintain the Smile Source business. The assumption that Schein would not have to continue discounting is embedded in his back-casting mode of analysis. In Figure 69 of his report, Dr. Marshall has a column that says [REDACTED] and a column that says [REDACTED] (CX 7100-165). The [REDACTED]

columns refer to the 2011 time period before the Burkhart contract, when Schein had the Smile Source contract. But while it *supposedly* relates to the period when Schein had the contract, it does *not* reflect the margins Schein charged or the share it had among Smile Source members in 2011. In fact, the figures measure Schein's margins and shares for the [REDACTED] dentists who *later* purchased from Burkhart, at least [REDACTED] of whom were not Smile Source members when Schein had the contract. (See CX 7100-165 (Fig. 69), -162 (¶374)). As such, the "before Smile Source" figures largely represent Schein's margins and sales to non-Smile Source customers who were not Smile Source members at the time of Schein's termination, as do the [REDACTED] figures. Thus, it does not compare margins or share from when Schein had the contract to when it lost the contract. Indeed, because both the before and after columns largely reflect Schein's sales to *non-members*, the analysis improperly assumes that Schein could somehow have continued to maintain the Smile Source contract and the Smile Source share without offering any discounts to Smile Source.

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Schein.

1268. Schein also identified other buying group opportunities during the conspiracy period that it rejected. (CCFF ¶¶ 733-870, 925-954).

Schein's Response:

Complaint Counsel cites no record evidence to support this finding. It only cites to other proposed findings, and Schein incorporates its responses to those findings here. (SRF 733-870, 925-54).

From time immemorial, Schein was skeptical of buying groups, though it did business with them from time to time. It did so by evaluating each opportunity on a case-by-case basis, looking at each buying group's ability to drive compliance, willingness to be exclusive, and ability to add value or "stickiness." Pursuant to the 2010 Guidance, Schein declined to do business with buying groups that did not present a good business opportunity, and engaged with those that did. (*E.g.*, SF 159-341). Following this deliberate, rational, and unilateral approach, Schein worked with at least 25 buying groups during the alleged conspiracy. (SF 375-1335, 1627).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the evidence.

Before 2011, between 2011 and 2015, and after 2015, Schein evaluated the opportunity to bid for buying group business on a case by case basis; sometimes Schein bid for buying group business, and sometimes Schein decided not to bid for buying group business. (Titas, Tr. 5192-94; RX2957 at 12-13).

1269. Schein's refusal to work with buying groups resulted in lost sales and profit. (CCFF ¶¶ 1267, 1655, 1658, 1660, 1665, 1667).

Schein's Response:

False. Complaint Counsel cites no record evidence to support this finding. It only cites to other proposed findings, which – as set forth in Schein's specific replies – also fail to support its characterization of the evidence. Schein incorporates its responses to those specific proposed findings here. (SRF 1267, 1655, 1658, 1660, 1665, 1667).

Substantively, Complaint Counsel has not identified a single buying group opportunity that Schein should have said yes to that it did not. It cites only to Dr. Marshall's analyses of Smile Source and Kois. As noted in Schein's post-trial briefs, proposed findings, and herein, those analyses do not show that Schein forewent sales or profits as a result of its decisions regarding those buying groups. Indeed, Dr. Marshall conceded that he was [REDACTED] (Marshall, Tr. 3002-03). Because the [REDACTED] that impacts whether a particular buying group *might* present a profitable opportunity, each buying group [REDACTED] (Marshall, Tr. 3003). But Dr. Marshall did not study any buying group other than Smile Source and the Kois Buyers Group. (Marshall, Tr. 2970-73, 2986, 2863). In fact, Dr. Marshall's Schein-Smile Source analyses showed that Schein lost money discounting to Smile Source in 2011 and 2017. (SF 1722-35; RX 3058; Marshall, Tr. 3073-75, 3121-22).

Dr. Marshall's opinions cannot support a finding of lost profits or sales because Dr. Marshall did not actually study the question. He did not even attempt to analyze the but-for world, and thus failed to fully analyze what Schein's experience with buying groups would be, including cannibalization, impact on FSCs, and internal conflicts between Special Markets and HSD. (SF 1661, 1713-21). Moreover, Dr. Marshall's analysis is fundamentally unreliable as evidenced by (i) the false positives it generates (it incorrectly

finds acts against self-interest outside of the alleged conspiracy period) (SF 1661, 1662-69); (ii) its attempt to render generalized conclusions as to all buying groups based on analysis of just two non-representative groups (SF 1661, 1689-95); and (iii) its failure to distinguish between oligopolistic interdependence and conspiracy (SF 1661, 1670-75).

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

Benco joins in the response of Schein.

b) Patterson

1270. Patterson sales representatives and executives asked about opportunities to sell to buying groups, which some Patterson executives viewed as growth opportunities. (CCFF ¶¶ 1271-1289).

Schein's Response:

No response.

Patterson's Response:

This Proposed Finding of Fact is vague as it does not address the time frame to which it refers. Patterson incorporates its specific responses to the paragraphs cited by Complaint Counsel. Otherwise Patterson has no specific response.

Benco's Response:

Benco joins in the response of Patterson.

1271. On August 2, 2013, McFadden sent an email to Rogan and Misiak forwarding a request regarding a buying group, Dental Branch. (CX0106 at 001).

Schein's Response:

No response.

Patterson's Response:

There is no basis for calling “Dental Branch,” which was never even mentioned at trial, a buying group. The cited exhibit says nothing about Dental Branch being a buying group. Nor is Dental Branch listed as a buying group in Complaint Counsel’s list of 29 buying groups Respondents supposedly rejected in Complaint Counsel’s brief. CC Brief 74–75. Nor is Dental Branch listed in Complaint Counsel’s interrogatory responses as a buying group that existed or tried to form between January 1, 2012 and December 31, 2015. (RX2958 at 4–5).

A plain reading of CX0106 shows that it discusses a *medical* GPO, called “GPO Premier.” (CX8017 (Rogan, Dep. at 68) (“[T]hey are under the GPO premier, so that’s an actual medical GPO.”))). It also appears to discuss business with GPO *members*, not with a GPO. (CX0106 at 2 (“Just this week I was meeting with a customer . . . called the Western North Carolina Health Network and they are under the GPO Premier. Tim Bugg is their SVP of contracting and during my meeting the subject of Dental was brought up, he claims they have a large amount of dentist in their group and *currently are doing business with Patterson.*”) (emphasis added))).

Benco's Response:

Benco joins in the response of Patterson.

1272. In the August 2, 2013 email, McFadden asked: “I know in the past we have said no[.] Is it worth it to explore GPO?????” (CX0106 at 001; McFadden, Tr. 2708-2709).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Patterson.

1273. McFadden explained that he believed Schein was working with Dental Branch and that he thought it "could be a future potential opportunity" for Patterson. (McFadden, Tr. 2709).

Schein's Response:

No response.

Patterson's Response:

As explained in Patterson's response to CCFF 1271, McFadden was never asked about, and never testified about, Dental Branch. Nor was any other witness at trial or in any deposition or investigational hearing. Indeed, from the face of the document with the words "Dental Branch," it is unclear that that is a reference to a buying group as opposed to a physical location. (CX0106-002).

McFadden's testimony was that if Schein was working with a group, he thought it might be an opportunity Patterson should consider in the future. (McFadden, Tr. 2709 ("I see here that Henry Schein is participating in this particular group, and I thought that this was -- could be a future potential opportunity if Henry Schein was participating in them, so I passed this on to the other guys as I had been abundantly told to focus on DSOs, so it was an opportunity to keep them posted about what was happening in the field.")).

Benco's Response:

Benco joins in the response of Patterson.

1274. In the August 2, 2013 email, McFadden asked Rogan and Misiak whether they should ask the regional manager “the amount of request they get” from buying groups and stated that he “used to get 1 per month in the SE” when he served as the Southeast Region Manager. (CX0106 at 001; McFadden, Tr. 2709).

Schein’s Response:

No response.

Patterson’s Response:

McFadden was Southeast Regional Manager until July 2013, meaning that he used to get one buying group request per month up until that time. This is consistent with evidence in the record of McFadden receiving and rejecting such requests well before Patterson allegedly joined a conspiracy in February 2013. (CX0159 at 1).

Benco’s Response:

Benco joins in the response of Patterson.

1275. On August 4, 2013, Rogan replied to McFadden: “Neal, we don’t need GPO’s in the dental business. Schein, Benco, and Patterson have always said no. I believe it is our duty to uphold this and protect this great industry.” (CX0106 at 001; McFadden, Tr. 2710).

Schein’s Response:

This is the same proposed finding as CCFF 603, and Schein incorporates its response to that proposed finding here. (SRF 603). In short, Mr. Rogan’s comment was in response to Mr. McFadden’s belief that Schein was involved with a buying group. Mr. Rogan ignored Mr. McFadden’s email, and Mr. McFadden later replied and corrected Mr. Rogan: “Thanks Tim on the advice. ***I have the impression that Schein is in this space....*** see below.” (CX 0161 (emphasis added); McFadden, Tr. 2840-41). Mr. Rogan testified that Henry Schein’s approach differed from his opinion regarding GPOs. (Rogan, Tr. 3661; CX 0106).

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Patterson.

1276. McFadden also told Guggenheim that buying groups could be a good opportunity for Patterson. (McFadden, Tr. 2713).

Schein's Response:

No response.

Patterson's Response:

The proposed finding is incomplete, as McFadden testified that while Guggenheim wanted him to focus on DSOs as Special Markets was launching, he was “open-minded about the future that maybe there might be something to [buying groups], but not at this particular time.” (McFadden, Tr. 2713).

Benco's Response:

Benco joins in the response of Patterson.

1277. On November 9, 2013, Rogan sent an email to Misiak and attached a slide deck to be presented at an annual strategic planning session. (CX0104 at 006; Rogan, Tr. 3500-3501).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Patterson.

1278. That slide deck Rogan shared with Misiak in November 2013 identified “Buying Groups, Coops, and Dental Societies” as “critical.” (CX0104 at 006; Rogan, Tr. 3502-3503).

Schein’s Response:

The slide deck, created by a third-party consultant, listed buying groups on the last page of the slide deck as one of many “critical” issues. (CX 0104-006). It did not contain any explanation as to why. Mr. Rogan did not agree that buying groups were a critical issue. (Rogan, Tr. 3502-03).

Patterson’s Response:

Rogan testified that, while he did not know who prepared the slide deck, he believed this reference was in response to Neal McFadden continuing to bring buying group opportunities forward. (Rogan, Tr. 3502–04 (“So I recall that we decided that let's talk about it, because he thinks it's a critical issue, and let's decide -- if everyone else thinks it's critical, then we need to build a plan of how to service them.”)).

Benco’s Response:

Benco joins in the response of Patterson.

1279. Rogan explained that the slide titled “Most Critical Issues/Opportunities” was intended to discuss the following questions: “What are the most critical, impactful external issues,” “most critical, impact internal issues,” and “[w]hat are the greatest opportunities for competitive advantage and growth.” (CX0104 at 006; Rogan, Tr. 3503).

Schein’s Response:

The slide deck, created by a third-party consultant, listed buying groups on the last page of the slide deck as one of many “critical” issues. (CX 0104-006). It did not contain any explanation as to why. Mr. Rogan did not agree that buying groups were a critical issue. (Rogan, Tr. 3502-03).

Patterson's Response:

The cited testimony contains no such explanation. But at the bottom of the slide itself, it does list those questions as "Considerations." (CX0104 at 6; Rogan, Tr. 3503).

Benco's Response:

Benco joins in the response of Patterson.

1280. In 2014, McFadden still continued to receive "a lot of requests from buying groups." (McFadden, Tr. 2724-2725).

Schein's Response:

No response, other than to note that the phrase "a lot" is vague.

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Patterson.

1281. On April 23, 2014, McFadden sent another email to Guggenheim and Misiak about buying groups, stating "[t]hese groups are popping up everywhere." (CX3080 at 001).

Schein's Response:

No response.

Patterson's Response:

McFadden's complete sentence was "These groups are popping up everywhere - - This DR is a Vet not a dentist." (CX3080 at 1). By this he meant that the doctor looking to set up a dental buying group (for humans) was a veterinarian. (McFadden, Tr. 2810-11).

Benco's Response:

Benco joins in the response of Patterson.

1282. In response to McFadden's April 23, 2014 email, Guggenheim wrote: "Neal, Nothing unusual here. Typical approach of an upstart buying group. We pass on these as a matter of protecting our business model." (CX3080 at 001).

Schein's Response:

No response.

Patterson's Response:

Guggenheim explained at trial that there was "nothing unusual" about the buying group McFadden was forwarding, which was from a *veterinarian*:

Q. And from what you had seen, your experience, there was nothing unusual about the buying group here that Mr. McFadden had forwarded to you?

A. I think there might be -- this is somebody who's organized a group to buy together. In this case, they're a vet, so I take that to be a veterinarian versus a veteran.

But that's -- that was pretty consistently what we would see, is third parties that would want to sell their, you know, ability to roll up a pricing opportunity, and they were something we had historically never -- never been interested in, so what I was telling him here was just another one of the upstart buying groups and we pass on these.

(Guggenheim, Tr. 1656–57).

Guggenheim also explained his reference to "protecting our business model" as follows:

Q. And what did you mean by "protecting our business model"? A. Well, that meant -- you know, there's a number of elements here that concerns us. As I said, here, in this case, you have a veterinarian who has reached out to a number of dentists apparently in his market and wants to sell his ability to leverage better pricing out of suppliers. Problems that start there with that's a third party basically taking a -- what we would consider a fee to sell his negotiations with us, that's a concern because that puts somebody in between us and our customer. The second concern would be that could be ethical issues as we see it. We often have folks like this approach us saying -- for instance, consultants, saying, I have 30

customers -- I have 30 clients of mine, and they do whatever I tell them to do, so what I'd like to do is I'd like to recommend that they buy a product from you, and if they buy that product from you, you'll pay me a fee. That's an ethics issue. And that's oftentimes what we see in these types of situations.

The next issue for us is the pricing fairness in our market. This would then allow noncustomers who don't buy anything from us to potentially receive a lower price than customers that buy tens or even hundreds of thousands of dollars from us. We have an issue with that. We like to control how we implement pricing strategies in our markets, so that's where we talk about our business model. Those are the larger concerns that we have.

(Guggenheim, Tr., 1657-58).

Benco's Response:

Benco joins in the response of Patterson.

1283. On May 30, 2014, McFadden sent a third email to Guggenheim and Misiak regarding buying groups, and he wrote: "Paul and Dave, This is something that we need to really sit down and discuss. These types of study club, small group, GPO's popping up." (CX0163 at 001; McFadden, Tr. 2713-2714).

Schein's Response:

The cited email relates to a "GPO out of Jacksonville that *Schein is selling to.*" (CX 0163 (emphasis added)). Despite this fact, there is no evidence that Patterson sought to compete for the business, or tried to reach out to Schein directly or indirectly to discuss Schein's involvement with the GPO. As such, the email demonstrates *both* non-parallel conduct and lack of enforcement with the (purported) conspiracy.

Patterson's Response:

It is unclear what the basis is for calling this McFadden's "third" email to Guggenheim and Misiak regarding buying groups, as Complaint Counsel appears to cite only one other such email. CCF ¶ 1281. Otherwise, Patterson has no specific response.

Benco's Response:

Benco joins in the response of Patterson.

1284. In his May 30, 2014 email, McFadden wrote to Guggenheim and Misiak that GPO's were "an opportunity . . . to utilize special market net down pricing to help with the branches. Just my two cents. Your call." (CX0163 at 001; McFadden Tr. 2713-2714).

Schein's Response:

The cited email relates to a "GPO out of Jacksonville that *Schein is selling to.*" (CX 0163 (emphasis added)). Despite this fact, there is no evidence that Patterson sought to compete for the business, or tried to reach out to Schein directly or indirectly to discuss Schein's involvement with the GPO. As such, the email demonstrates *both* non-parallel conduct and lack of enforcement with the (purported) conspiracy.

Patterson's Response:

McFadden testified as to this email at trial that "you have to kind of go back in these e-mails to put this into context." (McFadden, Tr. 2714). The context, he explained, was that Dr. Narducci, a good Patterson client of Patterson's number one sales rep, Ginger Harris, was forming his own company supplied by Schein Special Markets, even though he had very few dental office locations. (McFadden, Tr. 2714). McFadden said that, given Harris's status as Patterson's number one sales rep and the fact she was raising a concern about this, he wanted to raise it to Guggenheim and Misiak for discussion. (McFadden, Tr. 2714). McFadden found it "disturbing that Henry Schein would give special pricing as low as [Narducci] was getting with such a small volume opportunity." (McFadden, Tr. 2715). And, McFadden testified, "we had hired a guy named Travis on our team to help with some deviated pricing from time to time with our local territory reps to help them in competitive situations," meaning that this situation with Dr. Narducci was an opportunity

for Travis to help Patterson's local branches compete with Schein. (McFadden, Tr. 2715).

No witness testified contrary to McFadden regarding CX0163. Otherwise, Patterson has no specific response.

Benco's Response:

Benco joins in the response of Patterson.

1285. On October 23, 2014, James Stewart, Patterson's Branch Manager in Rochester, New York, sent an email to McFadden and asked: "is Patterson participating in a group buy program through Kois?" (CX3128 at 001).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Patterson.

1286. On September 11, 2014, another sales manager named Joseph Techar emailed McFadden to ask whether Patterson would engage with buying groups. (RX0342 at 002; McFadden, Tr. 2727).

Schein's Response:

The email specifically asks whether there is an issue with "putting together [a] Formulary for OrthoSynetics, ... since they are a buying group...." (RX 0342-002). Schein, however, partnered with OrthoSynetics throughout the alleged conspiracy period, with sales between [REDACTED] every year between 2009 and 2017. (CX 7101-140). Notably, Complaint Counsel apparently takes the position that OrthoSynetics is a buying

group here (when it suits its purposes), but in its brief, Complaint Counsel contests that fact. (CC Br. 97 n.740).

Patterson's Response:

Techar did not ask McFadden whether Patterson would engage with buying groups. Instead, Joseph Techar emailed McFadden stating that he had heard from Sirona, a manufacturer, that there was an issue as to whether OrthoSynetics would qualify for a formulary because it is a buying group and not a doctor-owned practice. (RX0342 at 2 (“I was working on putting together an EQ Formulary for OrthoSynetics. I called Steven at Sirona w/ a product question and he mentioned there is an issue with whether or not they would qualify since they are a buying group vs. a Dr owned practice – apparently Paul G and Mike A were discussing this. Do you have any additional info?”)). Techar suggested that if this was an issue, he could go to a different manufacturer than Sirona. (RX0342 at 2 (“Otherwise I suppose I would lead with a different vendor?”)).

Benco's Response:

Benco joins in the response of Patterson.

1287. McFadden responded to Techar's September 11, 2014 email that “[a]s a rule we do not deal with buying groups,” and he noted that he had a conference call scheduled shortly thereafter to discuss the issue with Guggenheim. (RX0342 at 001-002; McFadden, Tr. 2727-2728).

Schein's Response:

No response.

Patterson's Response:

The “issue” McFadden was to discuss by phone with Guggenheim was OrthoSynetics. (McFadden, Tr. 2728 (“Q. So Paul Guggenheim had a -- and you had a

conference call in a week or so to discuss this. What did ‘this’ refer to here? A. OrthoSynetics.”)). Otherwise, Patterson has no response.

Benco’s Response:

Benco joins in the response of Patterson.

1288. On June 23, 2014, Amy Barlage, Director of Operations for Special Markets at Patterson, sent an email to McFadden that listed as a proposed topic for the “first ever Special Market Enterprise wide meeting” the following July: “GPO’s to sell or not to sell?” (CX3013 at 001).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco joins in the response of Patterson.

1289. On May 20, 2015, McFadden sent Rogan and Guggenheim another email alerting them that “buying groups are popping up everywhere.” (CX0160 at 001).

Schein’s Response:

No response.

Patterson’s Response:

May 20, 2015 is after the end of the alleged conspiracy. (Kahn, Tr. 19). Otherwise, Patterson has no specific response.

Benco’s Response:

Benco joins in the response of Patterson.

1290. Patterson recognized the potential opportunities that buying groups presented, but its refusal to work with buying groups resulted in lost business and profits. (CCFF ¶¶ 597-611, 621-625, 631-651, 1270-1289).

Schein's Response:

No response, except to note that Dr. Marshall's analyses are not reliable and do not show lost business or profits because, among other reasons, they do not study the but-for world (and thus do not study the question).

Patterson's Response:

This Proposed Finding of Fact disregards this Court's Order dated February 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight.

Further, even accepting Dr. Marshall's lost profit calculations as true, any lost profits would have been immaterial relative to Patterson's annual profit and revenue. PF ¶¶ 750–51. Finally, Patterson never considered buying groups to be attractive business opportunities. PF ¶¶ 70 (Patterson had no "number three" business segment besides private practice and DSOs), 119–124. Patterson incorporates its responses to CCFF ¶¶ 597-611, 621-625, 631-651, 1270-1289.

Benco's Response:

Benco joins in the response of Patterson.

c) Benco

1291. Benco's sales representatives wanted to sell to buying groups. (Ryan, Tr. 1040).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, Complaint Counsel's proposed finding is a blanket statement that over-generalizes and seemingly applies to all Benco sales representatives. Pat Ryan's actual testimony at trial, as cited by Complaint Counsel, was far more narrow. Following an objection from Benco's counsel, the only foundation laid by Complaint Counsel for the ultimate question was that Ryan had communicated with Benco sales representatives "in some cases." (Ryan, Tr. 1040). Ryan went on to explain that the sales representatives that he had communications with "in some cases" were interested in selling to Buying Groups "to make more commissions." (Ryan, Tr. 1040-41 ("they're commissioned salespeople, so sales would equal money in their pocket.")). There is no evidence supporting Complaint Counsel's blanket statement that all Benco territory representatives wanted to sell to Buying Groups.

Second, whether some individual Benco territory representatives believe it to be in their own personal, economic interest to sell to Buying Groups has no bearing or impact on whether Benco – as a corporate entity – believes it to be in Benco’s interest to sell to Buying Groups. Benco concluded that buying groups demanded lower prices but gave nothing in return. (Cohen, Tr. 685; J. Johnson, Tr. 4834-4835; J. Johnson, Tr. 4836-4837). Without the ability to achieve cost savings, it would not make business sense to offer discounts to a buying group. (Cohen, Tr. 685; J. Johnson, Tr. 4836-4837; RX2834 at 35, ¶ 55; RX2833 at 24, ¶ 45). Therefore, Benco had determined that buying groups were inconsistent with Benco’s value proposition and business model. (BFF ¶¶ 879-86, 903-28).

1292. Benco’s regional managers also wanted to sell to buying groups. (Ryan, Tr. 1041).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, Complaint Counsel’s proposed finding is a blanket statement that over-generalizes and seemingly applies to all Benco regional managers. Pat Ryan’s actual testimony at trial, as cited by Complaint Counsel, was far more narrow. The only foundation laid by Complaint Counsel for the ultimate question was that Ryan had received e-mails from regional managers “[f]rom time to time.” (Ryan, Tr. 1041). There is no

evidence supporting Complaint Counsel's blanket statement that all Benco regional managers wanted to sell to Buying Groups.

Second, whether some individual Benco regional managers believe it to be in their own personal, economic interest to sell to Buying Groups has no bearing or impact on whether Benco – as a corporate entity – believes it to be in Benco's interest to sell to Buying Groups. Benco concluded that buying groups demanded lower prices but gave nothing in return. (Cohen, Tr. 685; J. Johnson, Tr. 4834-4835; J. Johnson, Tr. 4836-4837). Without the ability to achieve cost savings, it would not make business sense to offer discounts to a buying group. (Cohen, Tr. 685; J. Johnson, Tr. 4836-4837; RX2834 at 35, ¶ 55; RX2833 at 24, ¶ 45). Therefore, Benco had determined that buying groups were inconsistent with Benco's value proposition and business model. (BFF ¶¶ 879-86, 903-28).

1293. Don Taylor, Benco's regional manager for Colorado and New Mexico, sent an email to Ryan and others at Benco and stated that working with a buying group in Arizona "would be a great opportunity to win some business from Schein." (CX1242 at 002; Ryan, Tr. 1042-1043).

Schein's Response:

No response, other than to note that this email expressly references Schein working with buying groups, and in particular, the Dental Co-Op. (CX 1242).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Complaint Counsel's proposed finding includes only a cherry-picked quotation taken out of context. In the cited exhibit, a dental cooperative in Arizona sent a cold

solicitation to Brian Evans, a Benco regional manager in Arizona. (CX1242-003). Evans then forwards the e-mail as an “FYI” to Don Taylor and others at Benco. (CX1242-002). Don Taylor, who was Benco’s regional manager for Colorado, Wyoming, and New Mexico, then responds: “I spoke with Pat about this earlier and got the sense that we could not pursue groups like this per Chuck. If we can, this would be a great opportunity to win some business from Schein. They certainly do it.” (CX1242-002). First, the dental cooperative is not even based in Don Taylor’s region. (CX1242-003 (“Creating an AZ Cooperative”). Second, the dental cooperative did not approach Don Taylor directly. (CX1242). Third, there is no evidence that – in light of these two points – that Don Taylor did any investigation or due diligence on the dental cooperative. Fourth, Don Taylor – in his first sentence – acknowledges that he already knew that Benco did not do business with middlemen like the dental cooperative because it was inconsistent with Benco’s value proposition and business model. (CX1242-002). Finally, Don Taylor – in his last sentence – acknowledges that he knew that Schein did business with groups like the dental cooperative. (CX1242).

When asked at trial about the cited exhibit, Pat Ryan succinctly testified that it was merely Don Taylor’s opinion. (Ryan, Tr. 1042-43 (“Q. And you read that to mean that Mr. Taylor was saying that if Benco could work with this buying group, it would be a great opportunity to win some business from Schein? A. Yes. That was his opinion.”)). Since the dental cooperative was not in his region, did not approach him directly, and Taylor did no investigation or due diligence, Taylor’s opinion as to the likelihood of Benco winning business from Schein via the dental cooperation was nothing more than his own uninformed opinion.

1294. On February 22, 2013, Benco sales representative Gerald Barto posted a message on Benco's internal bulletin board and stated that he lost two customers because Benco's no buying group policy did not allow him to extend discounts to multiple offices that were not all under common ownership. (CX1149 at 001; Ryan, Tr. 1078-1080).

Schein's Response:

The Benco sales representative did not lose sales to a buying group, but rather to Patterson. (CX 1149-001 ("I tried to get 6 other offices under partner sharing but I couldn't because it was mixed with different owners. It worked in reverse because Patterson gave my two offices [the] same deal that the 6 offices had.")).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit. The cited exhibit is not about Buying Groups.

In CX1149, Gerald Barto, a Benco sales employee, posted about a situation in which he was unable to qualify multiple dental offices – that lacked common ownership – for discounted pricing under Benco's Partner Sharing program. (CX1149; Ryan, Tr. 1078-79). The dentists and dental offices that approached Mr. Barto were neither members of a Buying Group, nor were they trying to form a Buying Group. (CX1149). Benco's Partner Sharing (PS) program provides volume discounts to individual customers who purchase more than \$100,000 per year in dental supplies. (CX1084; CX1100; Benco FF ¶ 152). Another Benco employee, Jeff McAdoo first responds to Gerald Barto's post suggesting a way to seemingly avoid Benco's rules on Partner Sharing by ignoring the common ownership requirement inherent in Benco's Partner Sharing volume discount. At this point,

Pat Ryan responds to clarify Benco's policy that "[t]o be recognized as one customer, one of the following three situations" must apply. (CX1149; Ryan, Tr. 1080 ("I reply with the situations where we recognize somebody as one customer.")).

Therefore, the exchange between Mr. Barto, Mr. McAdoo, and Mr. Ryan contained in CX1149 was not about Buying Groups at all – but rather, about Benco's Profit Sharing discount program. (CX1149).

1295. Barto wrote on the bulletin board: "there must be some program that we have (even if made up) for what just happened to me . . . I'm frustrated and just wanted to get off my chest. One Dr. was fighting for me to get all, instead I lost two." (CX1149 at 001).

Schein's Response:

The Benco sales representative did not lose sales to a buying group, but rather to Patterson. (CX 1149-001 ("I tried to get 6 other offices under partner sharing but I couldn't because it was mixed with different owners. It worked in reverse because Patterson gave my two offices [the] same deal that the 6 offices had.")).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

In CX1149, Gerald Barto, a Benco sales employee, posted about a situation in which he was unable to qualify multiple dental offices – that lacked common ownership – for discounted pricing under Benco's Partner Sharing program. (CX1149; Ryan, Tr. 1078-79). Benco's Partner Sharing (PS) program provides volume discounts to individual customers who purchase more than \$100,000 per year in dental supplies. (CX1084;

CX1100; Benco FF ¶ 152). Another Benco employee, Jeff McAdoo first responds to Gerald Barto's post suggesting a way to seemingly avoid Benco's rules on Partner Sharing by ignoring the common ownership requirement inherent in Benco's Partner Sharing volume discount. At this point, Pat Ryan responds to clarify Benco's policy that "[t]o be recognized as one customer, one of the following three situations" must apply. (CX1149; Ryan, Tr. 1080 ("I reply with the situations where we recognize somebody as one customer.")).

Therefore, the exchange between Mr. Barto, Mr. McAdoo, and Mr. Ryan contained in CX1149 was not about Buying Groups at all – but rather, about Benco's Profit Sharing discount program. (CX1149).

1296. Benco's refusal to work with buying groups resulted in lost customers and business . (CCFF ¶¶ 6404-6405, 1655, 1658, 1661).

Schein's Response:

No response, except to note that Dr. Marshall's analyses are not reliable and do not show lost business or profits because, among other reasons, they do not study the but-for world (and thus do not study the question).

Patterson's Response:

This Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your*

post-trial briefs. If someone does, I expect the reply to point that out. I’m letting you know today so that you don’t think you’re going to question your experts about facts and rely on that,” (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight.

Benco’s Response:

Complaint Counsel’s proposed finding is overly broad, inaccurate, and not supported by the evidence.

Paragraphs 6404-6405 do not exist in Complaint Counsel’s proposed findings.

The remaining three cited proposed findings all rely upon Dr. Marshall’s fundamentally flawed profitability studies. Dr. Marshall’s profitability studies are based on an incorrect theory, (Carlton, Tr. 5384; Carlton, Tr. 5386-5390; RX2832 at 45, ¶ 65; RX2832 at 48-49, ¶¶ 70-71), followed no accepted method of economic analysis, (J. Johnson, Tr. 4837-38; Marshall, Tr. 3241), studied only a tiny fraction of the dentists in the United States, ([REDACTED]), studied only two buying groups, neither of which was representative of buying groups in general, (Wu, Tr. 5037-5046; RX2833 at 10, ¶ 13), studied only three distributors, each of which was fundamentally different than Benco, (Marshall, Tr. 3373-3374), used an “after-the-fact” review that failed to account for risk and uncertainty, (Wu, Tr. 5055-5057, 5060), were limited only to those dentists who made purchases from the buying group’s contracting distributor, (RX2833 at 43, ¶ 98), [REDACTED] relied on unsupported assumptions, (J. Johnson, Tr. 4838-4840; RX2834 at 37, ¶ 58; RX2832 at 54, ¶ 81), failed to control for other factors, (J. Johnson, Tr. 4855-4856), and failed to perform

a counter-factual analysis, (. (J. Johnson, Tr. 4842-4844; [REDACTED]
 [REDACTED] Marshall, Tr. 3375 (“I did not perform a counterfactual exercise.”)). A proper
 counter-factual analysis demonstrates that [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

**d) Burkhart And Manufacturers Found it Profitable to Work
 With Buying Groups.**

1297. During the conspiracy period, other distributors, Burkhart, Atlanta Dental, and Nashville Dental, and their manufacturer partners, profited from working with buying groups. (CCFF ¶¶ 1298-1306, 1310-1315).

Schein’s Response:

Complaint Counsel cites no record evidence in support of its assertion, and instead cites only to other proposed findings. Schein incorporates its responses to those proposed findings here. (SRF 1298-1306, 1310-15).

Substantively, the proposed finding is irrelevant. Complaint Counsel has produced no evidence that Burkhart’s, Atlanta Dental’s, or Nashville Dental’s experiences with buying groups are indicative of what another distributor’s experience would be. (Cavaretta, Tr. 5563-65 (confirming that just because a buying group is a good deal for Burkhart, does not mean that it is a good deal for Schein)). Dr. Marshall made this point as well. While he believed “[i]t makes economic sense that a distributor with a small customer base and small sales would find it profitable to supply such buying groups..., a distributor with a large customer base and large sales might find it less profitable to supply such buying groups.” (CX 7100-175-76). In fact, Schein’s experience was quite different

from that of Burkhart, Atlanta Dental, and Nashville Dental. Schein lost money discounting to Smile Source in 2011 and 2017, as well as to Steadfast. (SF 1722-35; RX 3058; Marshall, Tr. 3073-75, 3121-22; SF 1218-19; CX 0255; Titus, Tr. 5250-51).

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is irrelevant, overly broad, and misleading. Burkhart, Atlanta Dental, and Nashville Dental are not representative of Benco, Schein or Patterson. They have different cost structures, strengths, weaknesses, opportunities, and business plans than Benco, Schein or Patterson. (See BFF 1063-1079). For example, Burkhart had a substantial presence and extensive name recognition in the Seattle region (Reese, Tr. 4357) and therefore was well positioned to increase its business with Kois Buyers Group members by entering into an agreement with the Kois Buyers Group. (RX2834 at 39, ¶ 61 and Exhibit 7). 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. (Cohen, Tr. 632-633; RX2834 at 39, ¶ 61 and Exhibit 7). There is no reason to think, simply because Burkhart increased its business with Kois Buyers Group members, that Benco would have profited by working with the Kois Buyers Group. (RX2834 at 39, ¶ 61). Conversely, Benco had opportunities elsewhere that Burkhart did not have, and therefore Benco's decisions not to seek to enter into agreements with the Kois and Smile Source buying groups was profitable for Benco even if it might not have been for Burkhart.

_____.
_____).

1298. Burkhart profited from offering discounts to the Smile Source and Kois buying groups. (Reece, Tr. 4416).

Schein's Response:

No response, other than to note that Burkhart's profits are not probative of whether Smile Source or Kois would be profitable for Schein. As Dr. Marshall admitted, "It makes economic sense that a distributor with a small customer base and small sales would find it profitable to supply such buying groups..., a distributor with a large customer base and large sales might find it less profitable to supply such buying groups." (CX 7100-175-76).

Patterson's Response:

First, Mr. Reece's testimony was not specific to Smile Source or Kois. (Reece, Tr. 4416). Second, this finding is vague as to time. Third, this proposed finding is misleading to the extent that it suggests Patterson would also have profited from working with buying groups. Patterson notes that it is a very different company than Burkhart. *See, e.g.*, CCFF ¶¶ 1453-1454 (Burkhart is a "distant 4th compared to Schein, Patterson, and Benco"); [REDACTED] (Dr. Goldsmith testified that that Burkhart, unlike Patterson, is a [REDACTED] and [REDACTED] Further, while Burkhart gained access to customers it previously did not have access to by working with buying groups, (Reece, Tr. 4414), Patterson was concerned about cannibalizing its existing business without gaining enough new business to offset the loss. (Rogan, Tr. 3546-3548). Complaint Counsel's own expert, Dr. Marshall, conceded that one downside of dealing with buying groups is cannibalization of customers. (Marshall, Tr. 3378). Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading and irrelevant. Burkhart is not representative of Benco, Schein or Patterson. It has a different cost structure, strengths, weaknesses, opportunities, and business plans than Benco, Schein or Patterson. (See BFF 1063-1079). For example, Burkhart had a substantial presence and extensive name recognition in the Seattle region (Reese, Tr. 4357) and therefore was well positioned to increase its business with Kois Buyers Group members by entering into an agreement with the Kois Buyers Group. (RX2834 at 39, ¶ 61 and Exhibit 7). 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. (Cohen, Tr. 632-633; RX2834 at 39, ¶ 61 and Exhibit 7). There is no reason to think, simply because Burkhart increased its business with Kois Buyers Group members, that Benco would have profited by working with the Kois Buyers Group. (RX2834 at 39, ¶ 61). Conversely, Benco had opportunities elsewhere that Burkhart did not have, and therefore Benco's decisions not to seek to enter into agreements with the Kois and Smile Source buying groups was profitable for Benco even if it might not have been for Burkhart. [REDACTED]

1299. Burkhart's existing customers that went on to join the Kois Buyers group ended up spending more money overall on supplies from Burkhart. (Reece, Tr. 4413-4414; [REDACTED]).

Schein's Response:

The facts are more nuanced.

According to Dr. Marshall's analysis, [REDACTED]

When Burkhart [REDACTED]

[REDACTED]. (CX 7100-156). There is no indication, however, that Burkhart could not have achieved a comparable increase in sales/share had it simply offered to reduce its margins by a comparable amount outside the context of a buying group. As such, there is no evidence that participation in a buying group increases sales beyond what a distributor could get by offering similar prices to non-member dentists. Moreover, as Dr. Marshall's own analysis shows, Burkhart was only able to capture [REDACTED] of the Kois Tribe members, which is roughly in line with its national market share. (SF 865-70 (in 2015, only 10% of tribe members joined the buying group); CX 7100-153 [REDACTED] [REDACTED]). As such, there is no evidence that participation in the buying group increased Burkhart's sales/share.

Patterson's Response:

Mr. Reece testified that existing customers did purchase more from Burkhart after joining the Kois Buyers Group, but that "access to clients that [Burkhart] previously hadn't had access to" was "really where the win came." (Reece, Tr. 4414). Additionally, the email cited [REDACTED] is dated October 2016, which is a year and a half after the alleged conspiracy ended in April 2015. (Kahn, Tr. 19). Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading and irrelevant. Burkhart is not representative of Benco, Schein or Patterson. It has a different cost structure, strengths,

weaknesses, opportunities, and business plans than Benco, Schein or Patterson. (See BFF 1063-1079). For example, Burkhart had a substantial presence and extensive name recognition in the Seattle region (Reese, Tr. 4357) and therefore was well positioned to increase its business with Kois Buyers Group members by entering into an agreement with the Kois Buyers Group. (RX2834 at 39, ¶ 61 and Exhibit 7). 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. (Cohen, Tr. 632-633; RX2834 at 39, ¶ 61 and Exhibit 7). There is no reason to think, simply because Burkhart increased its business with Kois Buyers Group members, that Benco would have profited by working with the Kois Buyers Group. (RX2834 at 39, ¶ 61). Conversely, Benco had opportunities elsewhere that Burkhart did not have, and therefore Benco's decisions not to seek to enter into agreements with the Kois and Smile Source buying groups was profitable for Benco even if it might not have been for Burkhart. [REDACTED] [REDACTED] [REDACTED]).

1300. Burkhart began partnering with buying groups in 2011. (Reece, Tr. 4370, 4466; [REDACTED]).

Schein's Response:

No response, other than to note that Smile Source switched to Burkhart in January 2012, not 2011.

Patterson's Response:

The correct trial transcript cite for this finding is: (Reece, Tr. 4370, 4467).
Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is irrelevant.

1301. Through its buying group partnerships, Burkhart enjoyed sales growth driven by new customers that switched to Burkhart from its competitors. [REDACTED]

[REDACTED] Reece, Tr. 4408, 4411; [REDACTED]

Schein's Response:

The asserted fact is not supported by reliable evidence.

Dr. Goldsmith does not have personal knowledge of Smile Source members' purchasing practices prior to becoming members or of their purchases outside of the Smile Source buying group. His testimony concerning [REDACTED] compliance is further contradicted by Dr. Marshall's own analysis, which shows compliance rates below [REDACTED]. (CX 7100-165).

Mr. Reece's testimony also does not speak to "switching." Mr. Reece does not have personal knowledge of the purchasing practices of dentists prior to joining Smile Source. Moreover, the increase in sales that Burkhart experienced does not necessarily demonstrate "switching." To the extent the dental practices are new practices when they join the buying group, there would be no "switching." A simple example makes the point, suppose Smile Source signed up two customers, a pre-existing practice that purchased almost nothing from Burkhart and continued to purchase almost nothing, and a new dentist that purchased 100% from Burkhart. Under Dr. Marshall's methodology, Burkhart's share would go from 0% to 50%, even though there was no "switching" at all.

Patterson's Response:

First, Dr. Goldsmith testified that while he did not recall the exact number of new customers Smile Source brought to Burkhart, [REDACTED] [REDACTED]. Second, this finding is misleading to the extent that it suggests Patterson would have also “enjoyed sales growth” by working with buying groups. Patterson is a very different company than Burkhart. *See, e.g.,* CCF ¶¶ 1453-1454 (Burkhart is a “distant 4th compared to Schein, Patterson, and Benco”); [REDACTED] (Dr. Goldsmith testified that that Burkhart, unlike Patterson, is a [REDACTED] and [REDACTED] [REDACTED]. Further, while Burkhart gained access to customers it previously did not have access to by working with buying groups, (Reece, Tr. 4414), Patterson was concerned about cannibalizing its existing business without gaining enough new business to offset the loss. (Rogan, Tr. 3546-3548). Complaint Counsel’s own expert, Dr. Marshall, conceded that one downside of dealing with buying groups is cannibalization of customers. (Marshall, Tr. 3378). Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel’s proposed finding is misleading and irrelevant. Burkhart is not representative of Benco, Schein or Patterson. It has a different cost structure, strengths, weaknesses, opportunities, and business plans than Benco, Schein or Patterson. (See BFF 1063-1079). For example, Burkhart had a substantial presence and extensive name recognition in the Seattle region (Reese, Tr. 4357) and therefore was well positioned to increase its business with Kois Buyers Group members by entering into an agreement with the Kois Buyers Group. (RX2834 at 39, ¶ 61 and Exhibit 7). 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. (Cohen, Tr. 632-633; RX2834 at 39, ¶ 61 and Exhibit 7). There is no reason to think, simply because Burkhart increased its business with Kois Buyers Group members, that Benco would have profited by working with the Kois Buyers Group. (RX2834 at 39, ¶ 61). Conversely, Benco had opportunities elsewhere that Burkhart did not have, and therefore Benco's decisions not to seek to enter into agreements with the Kois and Smile Source buying groups was profitable for Benco even if it might not have been for Burkhart. [REDACTED] [REDACTED] [REDACTED]).

1302. [REDACTED]
[REDACTED]

Schein's Response:

False.

There is no evidence in the record of any growth in market share by Burkhart. Dr. Marshall did not do such an analysis. Nor did Mr. Reece.

The two buying group customers Dr. Marshall studied, Kois and Smile Source, represent collectively a *de minimis* portion of the overall market. For example, there are [REDACTED] dentists in Dr. Marshall's Kois study, and [REDACTED] dentists in Dr. Marshall's Smile Source study. (CX 7100-156, -163). Of these [REDACTED] dentists, however, Burkhart already had approximately [REDACTED] share, which increased only to about [REDACTED], an increase of about [REDACTED]. (CX 7100-156, -163). Thus, Burkhart gained the equivalent of about [REDACTED] new dentists. There are, however, over 150,000 dentists in the United States. Thus, *at most*, these two buying groups (which are Burkhart's largest buying groups) could have

only increased Burkhart's market share by [REDACTED], which has not been shown to be statistically different from zero.

Patterson's Response:

First, Mr. Reece testified that [REDACTED]

[REDACTED] Second, this finding is misleading to the extent that it suggests Patterson would have also "gained market share" by working with buying groups. Patterson is a very different company than Burkhart. *See, e.g.*, CCFF ¶¶ 1453-1454 (Burkhart is a "distant 4th compared to Schein, Patterson, and Benco"); [REDACTED]

[REDACTED] and [REDACTED]. Further, while Burkhart gained access to customers it previously did not have access to by working with buying groups, (Reece, Tr. 4414), Patterson was concerned about cannibalizing its existing business without gaining enough new business to offset the loss. (Rogan, Tr. 3546-3547). Complaint Counsel's own expert, Dr. Marshall, conceded that one downside of dealing with buying groups is cannibalization of customers. (Marshall, Tr. 3378). Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading and irrelevant. Burkhart is not representative of Benco, Schein or Patterson. It has a different cost structure, strengths, weaknesses, opportunities, and business plans than Benco, Schein or Patterson. (See BFF 1063-1079). For example, Burkhart had a substantial presence and extensive name recognition in the Seattle region (Reese, Tr. 4357) and therefore was well positioned to increase its business with Kois Buyers Group members by entering into an agreement with

the Kois Buyers Group. (RX2834 at 39, ¶ 61 and Exhibit 7). 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. (Cohen, Tr. 632-633; RX2834 at 39, ¶ 61 and Exhibit 7). There is no reason to think, simply because Burkhart increased its business with Kois Buyers Group members, that Benco would have profited by working with the Kois Buyers Group. (RX2834 at 39, ¶ 61). Conversely, Benco had opportunities elsewhere that Burkhart did not have, and therefore Benco's decisions not to seek to enter into agreements with the Kois and Smile Source buying groups was profitable for Benco even if it might not have been for Burkhart. [REDACTED] [REDACTED] [REDACTED]).

1303. [REDACTED]

Schein's Response:

Mr. Reece specifically stated that any growth attributable to buying groups [REDACTED] (Reece, Tr. 4420). As such, the asserted fact is not supported by reliable evidence.

Patterson's Response:

First, when asked to estimate how much GPOs have contributed to Burkhart's revenue increase, Mr. Reece testified: [REDACTED] [REDACTED] [REDACTED] (emphasis added).

Second, it is unclear from Mr. Reece’s investigational hearing testimony whether he meant \$4 million in increased *sales*. When asked for an estimate in increased sales from Burkhart’s relationship with Kois, Mr. Reece testified: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (emphasis added).

Third, none of the cited testimony supports the assertion that Burkhart’s buying group relationships have resulted in “an increase in Burkhart’s overall market share.”

Finally, this finding is misleading to the extent that it suggests Patterson would have also “gained new customers” and have “increased sales” by working with buying groups. Patterson is a very different company than Burkhart. *See, e.g.*, CCFF ¶¶ 1453-1454 (Burkhart is a “distant 4th compared to Schein, Patterson, and Benco”); [REDACTED]

[REDACTED] (Dr. Goldsmith testified that that Burkhart, unlike Patterson, is a [REDACTED] [REDACTED] and [REDACTED] While Burkhart gained access to customers it previously did not have access to by working with buying groups, (Reece, Tr. 4414), Patterson was concerned about cannibalizing its existing business without gaining enough new business to offset the loss. (Rogan, Tr. 3546-3547). Complaint Counsel’s own expert, Dr. Marshall, conceded that one downside of dealing with buying groups is cannibalization of customers. (Marshall, Tr. 3378).

Benco’s Response:

Complaint Counsel’s proposed finding is misleading and irrelevant. Burkhart is not representative of Benco, Schein or Patterson. It has a different cost structure, strengths, weaknesses, opportunities, and business plans than Benco, Schein or Patterson. (See BFF

1063-1079). For example, Burkhart had a substantial presence and extensive name recognition in the Seattle region (Reese, Tr. 4357) and therefore was well positioned to increase its business with Kois Buyers Group members by entering into an agreement with the Kois Buyers Group. (RX2834 at 39, ¶ 61 and Exhibit 7). 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. (Cohen, Tr. 632-633; RX2834 at 39, ¶ 61 and Exhibit 7). There is no reason to think, simply because Burkhart increased its business with Kois Buyers Group members, that Benco would have profited by working with the Kois Buyers Group. (RX2834 at 39, ¶ 61). Conversely, Benco had opportunities elsewhere that Burkhart did not have, and therefore Benco's decisions not to seek to enter into agreements with the Kois and Smile Source buying groups was profitable for Benco even if it might not have been for Burkhart. [REDACTED]

1304. [REDACTED]

Schein's Response:

The asserted fact is not supported by reliable evidence. Mr. Reece's IHT testimony does not say what Complaint Counsel says it does. But even if it did, such testimony lacks foundation. Any speculation about what Burkhart's existing customers might have done had they not purchased through a buying group is pure speculation. The reality is that, if Burkhart had not signed up with a buying group, it likely would have continued serving its existing customers, just as it always had. The fact that Burkhart served those customers

through the buying group just reflects cannibalization, not that it would have otherwise lost those customers.

Patterson's Response:

This finding overstates Mr. Reece's testimony. First, Mr. Reece testified that speaking with a Burkhart customer who was considering switching to Smile Source

[REDACTED]

[REDACTED]

Additionally, Mr.

Reece agreed that part of his concern was that if Burkhart did not work with buying groups,

it would lose [REDACTED] of its customer to other dealers working with buying

groups. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Benco's Response:

Complaint Counsel's proposed finding is misleading and irrelevant. Burkhart is not representative of Benco, Schein or Patterson. It has a different cost structure, strengths, weaknesses, opportunities, and business plans than Benco, Schein or Patterson. (See BFF 1063-1079). For example, Burkhart had a substantial presence and extensive name recognition in the Seattle region (Reese, Tr. 4357) and therefore was well positioned to increase its business with Kois Buyers Group members by entering into an agreement with the Kois Buyers Group. (RX2834 at 39, ¶ 61 and Exhibit 7). 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. (Cohen, Tr. 632-633; RX2834 at 39, ¶ 61 and Exhibit 7). There is no reason to think, simply because Burkhart increased its business with Kois

Buyers Group members, that Benco would have profited by working with the Kois Buyers Group. (RX2834 at 39, ¶ 61). Conversely, Benco had opportunities elsewhere that Burkhart did not have, and therefore Benco's decisions not to seek to enter into agreements with the Kois and Smile Source buying groups was profitable for Benco even if it might not have been for Burkhart. [REDACTED] [REDACTED] [REDACTED]).

1305. [REDACTED]

Schein's Response:

The asserted fact is essentially the same as CCFF 1303 and 1304, and Schein incorporates its responses to those proposed findings here. (SRF 1303-04).

As noted, Burkhart gained a *de minimis* number of new customers, and there is no reliable evidence that its buying group contracts prevented the loss of any existing Burkhart customers. Mr. Reece's testimony, in response to a leading conclusory question, that Burkhart [REDACTED] is hardly reliable evidence of the effects of buying groups on Burkhart, let alone on other distributors, which are materially larger than Burkhart. (CX 7100-175-76 (noting that "a distributor with a large customer base and large sales might find it less profitable to supply such buying groups.")).

Patterson's Response:

First, this finding is vague as to time. Second, this finding is misleading to the extent that it suggests Patterson would have also gained new customers and kept existing customers by working with buying groups. Patterson and Burkhart are very different companies. *See, e.g.*, CCFF ¶¶ 1453-1454 (Burkhart is a "distant 4th compared to Schein,

Patterson, and Benco”); [REDACTED] (Dr. Goldsmith testified that that Burkhart, unlike Patterson, is a [REDACTED]

[REDACTED] While Burkhart gained access to customers it previously did not have access to by working with Smile Source, (Reece, Tr. 4414), Patterson was concerned about cannibalizing its existing business without gaining enough new business to offset the loss. (Rogan, Tr. 3546-3548). Complaint Counsel’s own expert, Dr. Marshall, conceded that one downside of dealing with buying groups is cannibalization of customers. (Marshall, Tr. 3378).

Benco’s Response:

Complaint Counsel’s proposed finding is misleading and irrelevant. Burkhart is not representative of Benco, Schein or Patterson. It has a different cost structure, strengths, weaknesses, opportunities, and business plans than Benco, Schein or Patterson. (See BFF 1063-1079). For example, Burkhart had a substantial presence and extensive name recognition in the Seattle region (Reese, Tr. 4357) and therefore was well positioned to increase its business with Kois Buyers Group members by entering into an agreement with the Kois Buyers Group. (RX2834 at 39, ¶ 61 and Exhibit 7). 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. (Cohen, Tr. 632-633; RX2834 at 39, ¶ 61 and Exhibit 7). There is no reason to think, simply because Burkhart increased its business with Kois Buyers Group members, that Benco would have profited by working with the Kois Buyers Group. (RX2834 at 39, ¶ 61). Conversely, Benco had opportunities elsewhere that Burkhart did not have, and therefore Benco’s decisions not to seek to enter into agreements with the Kois and Smile Source buying groups was profitable for Benco even if it might

not have been for Burkhart. [REDACTED]

[REDACTED]).

1306. Burkhart [REDACTED]

Schein's Response:

The facts are more nuanced for two reasons.

First, the magnitude of the increased sales (if any) are minimal. As Dr. Marshall calculated, Burkhart gained incremental sales of about [REDACTED] over two years, or about [REDACTED] annually. (CX 7100-156). Burkhart gained approximately [REDACTED] from Smile Source over five years (2012-2016), or approximately [REDACTED]. (CX 7100-165). This represents a total of about [REDACTED] annually. Given that the dental supply market is approximately [REDACTED], the incremental sales represents a *de minimis* portion of the market.

Second, it is inappropriate to attribute Burkhart's incremental sales to "working with buying groups." In both the Smile Source and Kois situations, [REDACTED]

[REDACTED] CX 7100-156, -165). There is no evidence that Burkhart could not have simply lowered its margins directly to independent dentists without the assistance of a buying group had it wanted to do so. As such, the evidence does not support the claim

that buying groups delivered incremental sales to Burkhart, let alone that they could for any larger distributor, which, as Dr. Marshall concedes, would experience even less incremental growth and greater cannibalization. (CX 7100-176 (“Supplying a buying group provides the large distributor with fewer opportunities than the small distributor to gain new, incremental business. The large distributor has more existing customers than the small distributor, so more incumbent customers can join the buying group and reduce the margins that they pay.”)).

Patterson’s Response:

First, the correct citation for the first reference to Mr. Reece’s trial testimony is: (Reece, Tr. 4437-4438). Second, Mr. Reece testified that as of March 2017, merchandise sales to Smile Source customers was estimated at [REDACTED]

Third, to the extent that Complaint Counsel is relying on Dr. Marshall’s expert report for this finding, doing so disregards this Court’s Order dated February 21, 2019, which prohibits “cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents,” Order on Post-Trial Briefs at 3, as well as this Court’s admonition: “Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That’s what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I’m letting you know today so that you don’t think you’re going to question your experts about facts and rely on that,” (Judge Chappell, Pre-Trial Tr. 25–26) (emphasis added). Otherwise, Patterson has no specific response.

Finally, this proposed finding is misleading to the extent it suggests Patterson would have also gained sales from working with buying groups. Patterson and Burkhart are very different companies. *See, e.g.*, CCFF ¶¶ 1453-1454 (Burkhart is a “distant 4th compared to Schein, Patterson, and Benco”); [REDACTED] (Dr. Goldsmith testified that that Burkhart, unlike Patterson, is a [REDACTED] and [REDACTED] [REDACTED]). Further, while Burkhart gained access to customers it previously did not have access to by working with buying groups, (Reece, Tr. 4414), Patterson was concerned about cannibalizing its own business. (Rogan, Tr. 3546-3547). Complaint Counsel’s own expert, Dr. Marshall, conceded that one downside of dealing with buying groups is cannibalization of customers. (Marshall, Tr. 3378). Otherwise, Patterson has no specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is misleading and irrelevant. Burkhart is not representative of Benco, Schein or Patterson. It has a different cost structure, strengths, weaknesses, opportunities, and business plans than Benco, Schein or Patterson. (See BFF 1063-1079). For example, Burkhart had a substantial presence and extensive name recognition in the Seattle region (Reese, Tr. 4357) and therefore was well positioned to increase its business with Kois Buyers Group members by entering into an agreement with the Kois Buyers Group. (RX2834 at 39, ¶ 61 and Exhibit 7). 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. (Cohen, Tr. 632-633; RX2834 at 39, ¶ 61 and Exhibit 7). There is no reason to think, simply because Burkhart increased its business with Kois Buyers Group members, that Benco would have profited by working with the Kois Buyers Group. (RX2834 at 39, ¶ 61). Conversely, Benco had opportunities elsewhere that

Burkhart did not have, and therefore Benco's decisions not to seek to enter into agreements with the Kois and Smile Source buying groups was profitable for Benco even if it might not have been for Burkhart. [REDACTED]

[REDACTED]).

1307. Burkhart continues to seek opportunities with new buying group clients. (Reece, Tr. 4415-4416).

Schein's Response:

Mr. Reece testified that, [REDACTED]

[REDACTED]

[REDACTED] (Reece, Tr. 4482-83). Mr. Reece also testified that, [REDACTED]

[REDACTED]

[REDACTED] (Reece, Tr. 4484). Burkhart has turned down buying groups that could not meet those criteria. (Reece, Tr. 4482; CX 4247 (noting the need to develop "criteria for filtering these opportunities.")).

Patterson's Response:

This proposed finding overstates Mr. Reece's testimony. Mr. Reece testified: "[W]e're definitely open to entertaining groups, provided we apply some of the lessons that we've learned over the years." (Reece, Tr. 4415-4416).

Benco's Response:

Complaint Counsel's proposed finding is irrelevant.

1308. Burkhart has experienced growth in the number of buying groups in the dental industry. (Reece, Tr. 4416).

Schein's Response:

Burkhart worked with only three buying groups over the course of the alleged conspiracy period. (Reece, Tr. 4469, 4394, 4434, 4466-67). So, either the vast majority of buying groups are not attractive opportunities for Burkhart, or they are not as prevalent and growing as Complaint Counsel suggests.

Mr. Reece's lay opinion about the growth of buying groups is not reliable, both because he does not have foundation and has not conducted any study of the number of buying groups, and because his opinion suffers from recency bias. (*See* SRF 134).

Patterson's Response:

This proposed finding is confusing and vague. Mr. Reece testified that based on his experiences, the number of buying groups in the industry is growing. (Reece, Tr. 4416 ("Q. And based on your experiences, are buying groups -- the number of buying groups growing in the industry? A. They are, yes.")).

Benco's Response:

Complaint Counsel's proposed finding is irrelevant.

1309. Burkhart sees its relationships with buying groups as a way to support independent dentists. (Reece, Tr. 4369).

Schein's Response:

The testimony lacks foundation and is irrelevant. Mr. Reece is not an independent dentist and does not know whether buying groups are necessary or important to support independent dentists. Nor is Mr. Reece's opinion about the impact of buying groups on independent dentists relevant to any issue in the case.

Patterson's Response:

This proposed finding is not supported by the cited testimony. While Mr. Reece did testify that Burkhart wants to support independent dentists, he did not testify that “Burkhart sees its relationships with buying groups” as a way to do that. (Reece, Tr. 4369 (“Q. Has Burkhart responded to the change you've seen in the dental industry? A. We have. Q. How? A. Well, it's kind of a longer story, but what I would say is that we felt probably seven or eight years ago that there was a movement coming, and there was uncertainty within our industry that, you know, some of these independent doctors were quite nervous about what the future held for them. And so much like, as I mentioned earlier, that we are a family-owned business and independent, we felt it would be important to find a way to protect that independent -- independence for these dentists. And so we tried to craft ways to help them with that and to take good care of them.”)).

Benco's Response:

Complaint Counsel's proposed finding is irrelevant.

1310. On December 19, 2014, Jeff Reece received an email notifying him that Burkhart won a customer “from Schein with \$2MM in production” by selling to Kois. (CX4220 at 001).

Schein's Response:

The document does not support the asserted fact. At most, CX 4220 indicates that Burkhart won a single office that did \$2 million “in production” that had also done at least some business with Schein. But the cited document is not reliable evidence even for that. Complaint Counsel has not provided any evidence regarding what the account's “commitment” to Burkhart was, how much, if any, business the account actually did with Schein, or how much business Schein retained after the account joined the Kois Buyers Group. Notably, the assertion is inconsistent with Dr. Marshall's own analysis. Dr.

Marshall concluded that Schein lost [REDACTED] over two years. (CX 7100-156). Even if that were accurate (which it is not for reasons described elsewhere), that would mean incremental losses of about [REDACTED]. This one customer, then, would make up all or most of Schein's alleged losses. This suggests that the cited email is not reliable.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel’s proposed finding is misleading and irrelevant. Burkhart is not representative of Benco, Schein or Patterson. It has a different cost structure, strengths, weaknesses, opportunities, and business plans than Benco, Schein or Patterson. (See BFF 1063-1079). For example, Burkhart had a substantial presence and extensive name recognition in the Seattle region (Reese, Tr. 4357) and therefore was well positioned to increase its business with Kois Buyers Group members by entering into an agreement with the Kois Buyers Group. (RX2834 at 39, ¶ 61 and Exhibit 7). 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. (Cohen, Tr. 632-633; RX2834 at 39, ¶ 61 and Exhibit 7). There is no reason to think, simply because Burkhart increased its business with Kois Buyers Group members, that Benco would have profited by working with the Kois Buyers Group. (RX2834 at 39, ¶ 61). Conversely, Benco had opportunities elsewhere that Burkhart did not have, and therefore Benco’s decisions not to seek to enter into agreements with the Kois and Smile Source buying groups was profitable for Benco even if it might not have been for Burkhart. [REDACTED] [REDACTED] [REDACTED]).

1311. Burkhart gained customers from Schein by supplying buying groups during the conspiracy period. (CX4220 at 001).

Schein's Response:

The document does not support the asserted fact. At most, CX 4220 indicates that Burkhart won a single office that did \$2 million "in production" that had also done at least some business with Schein. But the cited document is not reliable evidence even for that. Complaint Counsel has not provided any evidence regarding what the account's "commitment" to Burkhart was, how much, if any, business the account actually did with Schein, or how much business Schein retained after the account joined the Kois Buyers Group.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading and irrelevant. Burkhart is not representative of Benco, Schein or Patterson. It has a different cost structure, strengths, weaknesses, opportunities, and business plans than Benco, Schein or Patterson. (See BFF 1063-1079). For example, Burkhart had a substantial presence and extensive name recognition in the Seattle region (Reese, Tr. 4357) and therefore was well positioned to increase its business with Kois Buyers Group members by entering into an agreement with the Kois Buyers Group. (RX2834 at 39, ¶ 61 and Exhibit 7). 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. (Cohen, Tr. 632-633; RX2834 at 39, ¶ 61 and Exhibit 7). There is no reason to think, simply because Burkhart increased its business with Kois Buyers Group members, that Benco would have profited by working with the Kois Buyers

Group. (RX2834 at 39, ¶ 61). Conversely, Benco had opportunities elsewhere that Burkhart did not have, and therefore Benco's decisions not to seek to enter into agreements with the Kois and Smile Source buying groups was profitable for Benco even if it might not have been for Burkhart. [REDACTED] [REDACTED]

[REDACTED]).

1312.

Schein's Response:

The evidence does not support the asserted fact because the Atlanta Dental analysis is based on a small sample size and was infected by outliers.

In fact, Dr. Marshall's own analysis shows *no* increase in Atlanta Dental sales. In 2010, Atlanta Dental did over [REDACTED] in sales; in 2013 (when it had the Smile Source contract), it had less than [REDACTED] million in sales. (CX 7100-171). Its sales share for Smile Source members also went from approximately [REDACTED] down to about [REDACTED] in that same time frame. (CX 7100-171 (all figures approximate because the actual numbers are not reported in the chart)). Even according to Dr. Marshall, Atlanta Dental's sales [REDACTED] among Smile Source members that purchased from Atlanta Dental, which appears to be the same or lower than its 2010 share. (CX 7100-171-73).

Even if one assumed an increase in sales, such an increase is *de minimis*. Atlanta Dental only sold to [REDACTED] Smile Source customers. (CX 7100-170). But even using Dr. Marshall's cherry-picked baseline year, Atlanta Dental already had [REDACTED] of those customers' business, and only [REDACTED] (CX 7100-173). This is

the equivalent of [REDACTED] new customers over a four-year period, or an average of [REDACTED] new customers per year. (CX 7100-173).

And, as with Burkhart analyses, Dr. Marshall's analysis shows that Atlanta Dental [REDACTED] (CX 7100-173). There is no evidence that Atlanta Dental could not have picked up these [REDACTED] new customers a year by offering the same discounts directly to independent dentists. As such, there is no evidence that working with a buying group delivered any incremental volume.

Patterson's Response:

This finding is not supported by the citation to Mr. Reece's investigational hearing transcript. Mr. Reece testified that he [REDACTED] Atlanta Dental has [REDACTED] [REDACTED] Therefore, to the extent that Complaint Counsel is relying on Dr. Marshall's expert report for this finding, doing so disregards this Court's Order dated February 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs at 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (Judge Chappell, Pre-Trial Tr. 25-26) (emphasis added). Thus, this finding is entitled to no weight.

Benco's Response:

Complaint Counsel's proposed finding is misleading and irrelevant. Atlanta Dental is not representative of Benco, Schein or Patterson. It has a different cost structure, strengths, weaknesses, opportunities, and business plans than Benco, Schein or Patterson. (See BFF 1063-1079). There is no reason to think, simply because Atlanta Dental gained sales from working with buying groups, that Benco would have profited by working with buying groups.

1313. In addition, Nashville Dental also gained sales as a result of working with Smile Source. (CX4238 at 001 (The "So far, Smile Source has worked out well for us and we have managed to create a pretty strong relationship between our reps and most of their key members. It has contributed to a good share of our growth for the year and we seem to be establishing ourselves as partners in those office"))).

Schein's Response:

The asserted fact is not supported by reliable evidence.

There was no discovery of Nashville Dental and no analysis of Nashville Dental's sales. (CX 7100-181 (noting that Dr. Marshall does not have any [REDACTED] [REDACTED])). The cited email is from Burkhardt's files. Though written by a Nashville Dental employee, there has been no evidence that such employee had sufficient knowledge to reliably establish facts relating to Nashville's growth, if any, or the reasons for it.

Patterson's Response:

The cited document is vague as to whether the growth is in number of customers or in sales. (CX4238 at 1). Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading and irrelevant. Nashville Dental is not representative of Benco, Schein or Patterson. It has a different cost structure, strengths, weaknesses, opportunities, and business plans than Benco, Schein or Patterson. (See BFF 1063-1079). There is no reason to think, simply because Nashville Dental gained sales from working with buying groups, that Benco would have profited by working with buying groups.

1314. [REDACTED]

Schein's Response:

False.

First, Mr. Reece has no personal knowledge of manufacturers' sales. At his Investigational Hearing, he just testified as to his belief based on hearsay: [REDACTED]

[REDACTED]

[REDACTED] (CX 0319
(Reece, IHT at 135) (emphasis added)). Such speculation is not reliable evidence.

Second, the argument is logically unsound. If a customer switches *distributors* but continues to buy the same *products*, manufacturers' market shares would remain unchanged. To the extent dentists switch products because Burkhart carries a different mix of products than a dentist's prior distributor, that shift has nothing to do with buying groups: it happens every time a customer switches distributors.

Third, the derivative impact of buying groups on manufacturers is not relevant to this case. There is no allegation of any anticompetitive effects in any manufacturer market.

Fourth, the evidence shows that not all manufacturers found buying group relationships to be beneficial. As Mr. Kois Jr. testified, 3M declined to discount to the Kois Buyers Group precisely because “any discounts would erode profits.” (Kois Jr., Tr. 368-69). Ultradent also declined to partner with the Kois Buyers Group because “[t]hey had a bad experience with a buyers group, and going forward [were] not going to be partnering with any other buyers groups.” (CX 0321 (Kois Jr., Dep. at 164)).

Patterson’s Response:

This finding is inaccurate. Mr. Reece testified that [REDACTED]

[REDACTED]

[REDACTED]

Benco’s Response:

Complaint Counsel’s proposed finding is inaccurate, misleading and irrelevant. Complaint Counsel’s proposed finding of fact is not supported by Mr. Reece’s testimony. Manufacturers often sell directly to independent dentists independently of buying groups. (RX2834 at 16, ¶ 24 and Exhibit 1; J. Johnson, Tr. 4796-4800; CX3285 at 24; CX7100 at 15, ¶ 20; Kois, Sr. Tr. 285). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In any event, manufacturers are not representative of Benco, Schein or Patterson. There is no reason to think, simply because [REDACTED]

[REDACTED]

[REDACTED] that Benco would have profited by offering discounts to buying groups.

1315.

[REDACTED]

Schein's Response:

Irrelevant and unreliable.

First, Mr. Reece has no personal knowledge of manufacturers' market shares in their respective markets. At his Investigational Hearing, he just testified as to belief based on hearsay: [REDACTED]

[REDACTED]

[REDACTED] (CX 0319 (Reece, IHT at 135) (emphasis added)). Such speculation is not reliable evidence.

Second, the argument is logically unsound. If a customer switches *distributors* but continues to buy the same *products*, manufacturers' market shares would remain

unchanged. To the extent dentists switch products because Burkhart carries a different mix of products than a dentist's prior distributor, that shift has nothing to do with buying groups: it happens every time a customer switches distributors.

Third, the derivative impact of buying groups on manufacturers is not relevant to this case. There is no allegation of any anticompetitive effects in any manufacturer market.

Fourth, the evidence shows that not all manufacturers found buying group relationships to be beneficial. As Mr. Kois Jr. testified, 3M declined to discount to the Kois Buyers Group precisely because "any discounts would erode profits." (Kois Jr., Tr. 368-69). Ultradent also declined to partner with the Kois Buyers Group because "[t]hey had a bad experience with a buyers group, and going forward [were] not going to be partnering with any other buyers groups." (CX 0321 (Kois Jr., Dep. at 164)).

Patterson's Response:

First, Mr. Reece testified that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Second, the cited investigational hearing testimony does not support the second sentence of this finding.

Reece testified that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, misleading and irrelevant. Complaint Counsel's proposed finding of fact is not supported by Mr. Reece's testimony. Manufacturers often sell directly to independent dentists independently of buying groups. (RX2834 at 16, ¶ 24 and Exhibit 1; J. Johnson, Tr. 4796-4800; CX3285 at 24; CX7100 at 15, ¶ 20; Kois, Sr. Tr. 285). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In any event, manufacturers are not representative of Benco, Schein or Patterson. There is no reason to think, simply because

[REDACTED]

[REDACTED] that Benco would have profited by offering discounts to buying groups.

3. The Big Three Changed Their Conduct.

a) Schein

1316. Following the conspiracy, Schein bid on and worked with buying groups. (CCFF ¶¶ 1317-1319).

Schein's Response:

Schein bid on and worked with buying groups. Complaint Counsel's qualifier, "following the [alleged] conspiracy" is false on numerous levels. *First*, it improperly assumes the existence of a conspiracy, which Complaint Counsel has failed to prove. *Second*, it is imprecise as to time frame. When does Complaint Counsel claim the alleged conspiracy ended? *Third*, there is no basis in the record to limit Schein's negotiations and business with buying groups to "following the [alleged] conspiracy."

Schein bid on and worked with buying groups before, during, and after the alleged conspiracy. For example, Schein (i) entered into a new buying group relationship with the Dental Alliance in July 2011; (ii) entered into a new buying group relationship with MeritDent in February 2012; (iii) approved a new buying group relationship with Sunrise Dental in March 2012; (iv) memorialized its buying group relationship with Dental Partners of Georgia in May 2012; (v) entered into a buying group partnership program with the Schulman Group in April 2013; (vi) submitted a bid in an attempt to win back the Smile Source business in 2014; (vii) created the Mid-Market group in April 2014 to better serve buying group partners; (viii) attempted unsuccessfully to continue its partnership with the Dental Co-Op with an offer of exclusivity in July 2014; (ix) attempted unsuccessfully to

continue its partnership with Steadfast with an exclusivity offer in 2014; (x) attempted to negotiate with the Kois Buyers Group in 2014; (xi) saved its relationship with Dental Gator in late 2014 despite conflicts with FSCs; (xii) made developing a standardized buying group offering a strategic priority at the end of 2014; (xiii) entered into a buying group relationship with Floss Dental prior to January 29, 2015; and (xiv) negotiated a deal with Klear Impakt beginning in January 2015. (S. Br. 36-63; SF 257, 269-95, 605-12, 653-57, 680, 757, 816-32, 895-913, 975, 1095-96, 1163-67, 1222-24, 1244-49, 1319).

To the extent the proposed finding implies that “after the [alleged] conspiracy,” Schein no longer declined to do business with certain buying groups, the implication is false. For example, Schein negotiated with Dentistry Unchained for nearly a year starting in May 2015, but declined to move forward with a partnership in April 2016 when it became clear that Dentistry Unchained was promoting a competitor. (SF 690-707). Similarly, in 2016, Schein turned down the buying groups Direct Dental Sales, because it posed conflicts with Schein’s existing customers (SF 726-31), IDBG, because it offered no incentives other than discounts (SF 776-78), and Blue Chip Dental, because it could not explain its value proposition (SF 399-401).

Patterson’s Response:

Patterson joins Schein and Benco’s responses.

Benco’s Response:

Complaint Counsel’s use of the term “conspiracy period” is inaccurate and mischaracterizes the evidence in this matter. As was made clear throughout trial, Complaint Counsel have failed to establish parallel conduct by Respondents, and failed to establish that Respondents entered into a conspiracy. Before, during and after the alleged conspiracy period, Benco followed its longstanding no-middleman policy and simply did

not do business with buying groups. (Cohen, Tr. 445-46). Not only did Complaint Counsel fail to establish the existence of a conspiracy during the trial, but Complaint Counsel did not even consistently allege when it believed such a conspiracy began. In the Complaint, Complaint Counsel alleged that the conspiracy began as one between Benco and Schein “no later than July 2012.” (Complaint ¶ 32). At trial, Complaint Counsel changed tracks, and claimed that the alleged conspiracy between Benco and Schein began at some time in 2011. (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 also* Opening, Tr. 33).

1317. Schein entered into an agreement with buying group Teeth Tomorrow in May 15, 2017. (RX2684 at 001; CX2802 at 008 (Schein’s Response to IROG ¶1)).

Schein’s Response:

No response. For a fuller explanation of Teeth Tomorrow, see SF 1250-1262.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1318. Schein entered into an agreement with buying group Klear Impakt in August 17, 2015. (R. Johnson, Tr. 5479; RX2162 at 001; CX2802 at 008 (Schein’s Response to IROG ¶1 (2016 to Present))).

Schein’s Response:

Schein began discussing a buying group partnership with Klear Impakt “sometime in 2014,” which culminated in an agreement on August 17, 2015. (R. Johnson, Tr. 5479-

80, 5490; Titus, Tr. 5269; RX 2162; SF 815, 832). Schein began negotiations with Klear Impakt during the alleged conspiracy “in 2014,” and in January 2015, Schein told Klear Impakt it was “very impressed by the clear-eyed vision you have.” (SF 815, 822; R. Johnson, Tr. 5479, 5490; Titus, Tr. 5269; CX 2208-002).

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1319. Schein won back the Smile Source account in 2017, signing a new agreement effective on March 1, 2017. (Maurer, Tr. 4938; CX4128 at 001; CX2802 at 008 (Schein’s Response to IROG ¶1)).

Schein’s Response:

Schein won back the Smile Source account after trying for three years. The President of Smile Source, Mr. Maurer, noted that Schein [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX 2091-001).

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1320. Selling to Smile Source following the conspiracy was profitable. [REDACTED]

[REDACTED].

Schein's Response:

False. Dr. Marshall admitted on cross-examination that his 2017 analysis failed to take into account rebates and administrative fees, which should have been included. (Marshall, Tr. 3121-22). If fees and rebates are included, the analysis shows that Schein lost over [REDACTED] in 2017 as a result of supplying Smile Source. (Marshall, Tr. 3121-22)

[REDACTED] As such, while Schein may have hoped that the 2017 Smile Source contract would be profitable, it was not in fact incrementally profitable for Schein.

Patterson's Response:

This Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25-26) (emphasis added). Thus, it is entitled to no weight.

Benco's Response:

Benco has no specific response to the proposed finding.

1321. In April 2016, a Schein manager, Kam Gantos, noted, "[w]e have found that [buying groups] often pull over significant business from doctors who in the past considered PDCO [Patterson] or Benco as their primary distributor." (CX2602 at 002).

Schein's Response:

Ms. Gantos's email was just a set of notes from a call. There is no indication she had any foundation or personal knowledge of buying groups. In any event, Complaint Counsel misleadingly quotes from Ms. Gantos's notes by leaving out the last sentence: "We are very selective on who we partner with." (CX 2602-002). This shows Schein's consistency in its selective approach to buying groups since at least the development of the 2010 Guidance. It did business with those groups that exhibited attributes of compliance and could "pull over significant business," and said no to groups that could not. (CX 2602-002).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1322. Selling to or discounting to buying groups after the conspiracy was beneficial to Schein. (CCFF ¶¶ 1320-1321, 1723, 1724, 1726, 1681, 1683).

Schein's Response:

The asserted fact is the same as CCFF 1709 and like that proposed finding, cites only to other proposed findings rather than record evidence. Schein incorporates its responses to those proposed findings here. (SRF 1320-21, 1708-09, 1723, 1724, 1726, 1681, 1683).

Substantively, the evidence does not support the asserted fact. As noted, the Smile Source contract was not profitable for Schein, according to Dr. Marshall's own analysis.

(SF 1722-35; RX 3058; Marshall, Tr. 3073, 3121-22). There has also been no profitability analysis of any other buying group after the end of the alleged conspiracy period.

While Schein has always done business with buying groups – before, during and after the alleged conspiracy period – Schein’s experience with them shows that they are often not profitable. (*E.g.*, SF 1218-19, 1240-41, 1722-35). That is why Schein has always been very selective with the buying groups it partnered with. The most that can be said from Schein’s willingness to do business with such groups is that Schein hoped those partnerships would be, or would become, profitable.

Patterson’s Response:

Patterson joins Schein and Benco’s responses.

Benco’s Response:

Complaint Counsel’s use of the term “conspiracy” is inaccurate and mischaracterizes the evidence in this matter. As was made clear throughout trial, Complaint Counsel have failed to establish parallel conduct by Respondents, and failed to establish that Respondents entered into a conspiracy. Before, during and after the alleged conspiracy period, Benco followed its longstanding no-middleman policy and simply did not do business with buying groups. (Cohen, Tr. 445-46). Not only did Complaint Counsel fail to establish the existence of a conspiracy during the trial, but Complaint Counsel did not even consistently allege when it believed such a conspiracy began. In the Complaint, Complaint Counsel alleged that the conspiracy began as one between Benco and Schein “no later than July 2012.” (Complaint ¶ 32). At trial, Complaint Counsel changed tracks, and claimed that the alleged conspiracy between Benco and Schein began at some time in 2011. (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 also* Opening, Tr. 33).

b) Patterson

1323. After the conspiracy, Patterson also analyzed the buying group opportunity and bid on several buying groups. (CCFF ¶¶ 1324-1365).

Schein's Response:

No response.

Patterson's Response:

This proposed finding is vague in its reference to "the buying group opportunity," both in that it is unclear what exactly that is, and also in that the record demonstrates that buying groups are not all the same. FOF ¶ 111. This proposed finding is also misleading and inaccurate to the extent that it suggests that Patterson did not analyze, consider, or work with buying groups *before* or *during* the alleged conspiracy. Patterson salespeople repeatedly met with and evaluated buying groups for years before and throughout the alleged conspiracy. *See, e.g.*, FOF ¶¶ 119, 130-134, 167-173; Guggenheim, Tr. 1529, 1569-1570 (when Guggenheim was southwest regional manager from 2000 to 2010, Patterson would "often evaluate" buying groups); CX8017 (Rogan, Dep. at 60) ("[W]e take a look at [buying groups] and see if it makes sense for us to do business"); CX8023 (Guggenheim, Dep. at 185) (Guggenheim testified that Patterson has a "nuanced position on buying groups to evaluate them individually in each market based on whether or not they made sense"). Moreover, Patterson did work with buying groups both before and during Complaint Counsel's alleged conspiracy period. *See, e.g.*, FOF ¶¶ 174-175; CX3081 at 001 (as of July 2014, a local Patterson representative was "deal[ing] heavily"

with Orthosynetics); McFadden, Tr. 2728 (“Orthosynetics is a quasi-buying group that focus[es] on orthodontics”); RX0271 at 001 (as of May 2014, a Patterson branch had been selling to Jackson Health—“a GPO”—“for over 10 years”).

Benco’s Response:

Complaint Counsel’s use of the term “conspiracy” is inaccurate and mischaracterizes the evidence in this matter. As was made clear throughout trial, Complaint Counsel have failed to establish parallel conduct by Respondents, and failed to establish that Respondents entered into a conspiracy. Before, during and after the alleged conspiracy period, Benco followed its longstanding no-middleman policy and simply did not do business with buying groups. (Cohen, Tr. 445-46). Not only did Complaint Counsel fail to establish the existence of a conspiracy during the trial, but Complaint Counsel did not even consistently allege when it believed such a conspiracy began. In the Complaint, Complaint Counsel alleged that the conspiracy began as one between Benco and Schein “no later than July 2012.” (Complaint ¶ 32). At trial, Complaint Counsel changed tracks, and claimed that the alleged conspiracy between Benco and Schein began at some time in 2011. (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 also* Opening, Tr. 33).

1324. From 2015 to 2016 period, Tim Rogan served as the VP of Strategy and Organizational Effectiveness at Patterson Companies. (Rogan, Tr. 3423-3424).

Schein’s Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1325. During this 2015 to 2016, Rogan also served as the VP of Marketing for Patterson Dental. (Rogan, Tr. 3424).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1326. As the VP of Strategy and Organizational Effectiveness, Rogan was in charge of the annual strategic planning process for Patterson Companies. (Rogan, Tr. 3444).

Schein's Response:

No response.

Patterson's Response:

This finding overstates Rogan's testimony regarding his responsibilities as the VP of Strategy and Organizational Effectiveness. Rogan testified that he was "responsible for the strategic planning process" for the animal health and dental businesses, but that he "didn't oversee the businesses." (Rogan, Tr. 3444). Rogan was the "facilitator" of the process, but "the executives owned the meat of what we were doing." (Rogan, Tr. 3444).

Rogan agreed that he was “in charge of the strategic planning process,” but that “the decision-making was left to [the executives].” (Rogan, Tr. 3445).

Benco’s Response:

Benco has no specific response to the proposed finding.

1327. On November 10, 2015, Rogan sent an email to Guggenheim regarding a planning meeting to prepare for the annual strategic planning process. (Rogan, Tr. 3445; CX3362 at 002).

Schein’s Response:

No response.

Patterson’s Response:

Rogan’s November 10, 2015 email was sent to *both* Guggenheim and Misiak. CX3362 at 002. Additionally, there is no indication in the cited trial testimony or document that the strategic planning process is “annual.” Otherwise, Patterson has no specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1328. In response to Guggenheim’s request to share an overview of the annual strategic planning process, on November 13, 2015, Rogan responded that he had hired McKinsey & Co. to do a “deeper dive” on the North American dental business that he wrote “will be based on facts.” (CX3362 at 001; Rogan, Tr. 3446).

Schein’s Response:

No response.

Patterson’s Response:

This finding is inaccurate. First, Rogan did not write in his November 13, 2015 email that he had hired McKinsey & Co., but that he was considering or suggesting hiring

McKinsey. Rogan wrote to Guggenheim and Misiak: “Knowing our time crunch and shortage of manpower *I have asked McKinsey what it looks like* to do a deeper dive on NA dental. Maybe not the full meal deal, but more than we have and it will be based on facts.” (CX3362 at 001) (emphasis added); *see also* (Rogan, Tr. 3461) (in its questioning of Rogan at trial, Complaint Counsel described the November 13, 2015 email as containing a suggestion: “And this is consistent with the earlier e-mail [referring to CX3362] we looked at from you to Paul Guggenheim *suggesting* that you hire a consulting firm to analyze GPOs and buying groups; right?”) (emphasis added). Second, there is no there is no indication in the cited trial testimony or document that the strategic planning process is “annual.”

Benco’s Response:

Benco has no specific response to the proposed finding.

1329. When Patterson hired McKinsey in November of 2015, it was the first time that Patterson hired a consultant to in part analyze the buying group market. (Rogan, Tr. 3455).

Schein’s Response:

No response.

Patterson’s Response:

When asked if “November 2015 was the first time that Patterson hired a consultant to in part analyze the buying group market,” Rogan testified: “Okay. First of all, to -- for -- from what I know, was the first time we hired a consultant to do a deep dive, outside consultant to do a deep dive on the dental market. Did we ask them to look at a piece of the buying groups/GPO, the answer is yes.” (Rogan, Tr. 3455).

Benco's Response:

Benco has no specific response to the proposed finding.

1330. Rogan wrote to Guggenheim that “we add GPO’s/Buying Groups to the strategic plan.” (CX3362 at 001; Rogan, Tr. 3448).

Schein's Response:

No response.

Patterson's Response:

This proposed finding is misleading to the extent it suggests Rogan had made a decision that “GPO’s/Buying Groups” would be added to Patterson’s strategic plan. Rogan’s email to Guggenheim and Misiak was brainstorming ideas for the upcoming planning meeting, and Rogan *suggested* one possibility would be to remove “global” and add “buying groups” to the strategic plan. (Rogan, Tr. (“When I read the paragraph, I was giving him a *suggestion*, and he gets to make the decision, that maybe we pull global off the plan and maybe put something else on there, and here was one of the ideas, is buying groups/GPO and how we would go to market with them. So that -- that was a suggestion that I was making to the leader of the dental business at the time.”) (emphasis added); *see also* CX3362 at 001 (Rogan’s November 13, 2015 email to Guggenheim and Misiak stated: “Here is what I see happening. You have “global” on your strategic plan. Maybe that moves aside, we put a person like Michele P, or this guy you are speaking with on it. And we add GPO’s/Buying Groups to the strategic plan. Meaning we are going to build out strategy of how we are going to go to market with them? Maybe we start our own or buy one? But you will back this up with current facts. Something like that.”)).

Benco's Response:

Benco has no specific response to the proposed finding.

1331. Rogan wrote in the November 13, 2015 email: "Meaning we are going to build out a strategy of how we are going to market with them? Maybe we start our own or buy one?" (CX3362 at 001; Rogan, Tr. 3448).

Schein's Response:

No response.

Patterson's Response:

This proposed finding is confusing in that it takes text of Rogan's November 13, 2015 email out of context. In Rogan's November 13, 2015 email to Guggenheim and Misiak, he wrote: "Here is what I see happening. You have 'global' on your strategic plan. Maybe that moves aside, we put a person like Michele P, or this guy you are speaking with on it. And we add GPO's/Buying Groups to the strategic plan. Meaning we are going to build out strategy of how we are going to go to market with them? Maybe we start our own or buy one? But you will back this up with current facts. Something like that." (CX3362 at 001). Rogan explained the meaning of this portion of his email at trial: "I was giving him a suggestion, and he gets to make the decision, that maybe we pull global off the plan and maybe put something else on there, and here was one of the ideas, is buying groups/GPO and how we would go to market with them. So that -- that was a suggestion that I was making to the leader of the dental business at the time." (Rogan, Tr. 3448).

Benco's Response:

Benco has no specific response to the proposed finding.

1332. Rogan was suggesting putting critical issues on the strategic plan in his November 2015 email. (Rogan, Tr. 3447).

Schein's Response:

No response.

Patterson's Response:

Rogan never testified that he was “suggesting putting critical issues on the strategic plan in his November 2015 email.” When Complaint Counsel asked if it was “fair to say” that he would have put “the most critical issues” on the strategic plan, Rogan responded: “Well, the executive team would make that decision. In this email I was just making a suggestion.” (Rogan, Tr. 3447).

Benco's Response:

Benco has no specific response to the proposed finding.

1333. Rogan, as a senior executive with 25 years of experience at Patterson Dental, was also suggesting to Guggenheim that Patterson start its own buying group or buy a buying group as part of the strategic plan. (Rogan, Tr. 3451-3452; CX3362 at 001).

Schein's Response:

No response.

Patterson's Response:

When Complaint Counsel asked if Rogan suggested in his November 13, 2015 email to Guggenheim and Misiak that Patterson should consider starting its own or buying group or buying one, Rogan testified: “Well, one of the key words [in the November 13, 2015 email] is “maybe,” so I'm -- really was putting it in Paul's hands. It was just a suggestion. And if you're going to look at different segments of the market, you should look at it from all sides to make a good business decision. And at that point, I would tell

you even today, you know, we know more about them today, but we still don't know tons about buying groups. We don't know that they – they haven't been able to really figure themselves out in dentistry. And at the time, it just made sense to maybe have McKinsey look at it as an outsider and say, hey, Patterson, you're missing the boat or you're not missing the boat, so it was just a suggestion that I was making.” (Rogan, Tr. 3451-3452).

Benco's Response:

Benco has no specific response to the proposed finding.

1334. Rogan was making these suggestions to Guggenheim, who he viewed as “the leader of the dental business at the time.” (Rogan, Tr. 3448).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1335. On December 17, 2015, Rogan received a slide deck from McKinsey titled “Dental business growth strategy project: Second review session.” (CX3178 at 002 (hereinafter “McKinsey December 2015 Discussion Document”)).

Schein's Response:

No response.

Patterson's Response:

The correct citation for this finding is: (CX3178 at 001-002). Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1336. The McKinsey December 2015 Discussion Document stated that it conducted a “deep dive on a few key manufacturer – and customer-related market trends,” including “GPOs.” (CX3178 at 008).

Schein's Response:

No response.

Patterson's Response:

The cited document states: “Based on our initial scan and discussion last week, we agreed to deep dive on a few key manufacturer- and customer-related market trends” and lists four “highlights”— (1) “manufacturer consolidation;” (2) “vertical integration;” (3) “customer consolidation;” and (4) “specialty market evolution.” (CX3178 at 008). The “customer consolidation” highlight has a sub-point that states: “rise of corporate clinics and GPOs; increasing importance of clinic transitions due to changing dentist demographics.” (CX3178 at 008); *see also* (Rogan, Tr. 3461) (“Q. And GPOs is listed as one of the customer-related trends that Patterson wanted McKinsey to study? A. It's -- it's, yeah, one piece of customer-related trends. Yes.”).

Benco's Response:

Benco has no specific response to the proposed finding.

1337. Rogan thought the contents of the McKinsey December 2015 Discussion Document was consistent with his suggestion to Guggenheim to hire a consulting firm to analyze, in part, GPOs and buying groups. (Rogan, Tr. 3461-3462).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1338. According to the McKinsey December 2015 Discussion Document, in November 2015 “[m]ost of the GPOs remain small, but several have had moderate success and have partnered with mid-level distributors like Burkhart and Darby.” (CX3178 at 016; Rogan, Tr. 3462-3463).

Schein's Response:

No response, except to note that the McKinsey report was a “[n]on-exhaustive list, based on available information” and did not include the 25-plus buying groups Schein did business with. (CX 3178-016; Rogan, Tr. 3661-63; SF 375-1335, 1627).

Patterson's Response:

The document states: “most GPOs remain small, but several have had moderate success and have partnered with mid-level distributors like Burkhart and Darby.” (CX3178 at 016). There is no indication in the cited document or trial testimony that this statement is specific to November 2015. Finally, the cited slide also states that “GPOs have had moderate success, but many dentists reluctant to give up purchasing control and pay GPO membership fees.” (CX3178 at 016).

Benco's Response:

Benco has no specific response to the proposed finding.

1339. The McKinsey December 2015 Discussion Document did not say Schein or Benco had partnered with buying groups. (Rogan, Tr. 3463).

Schein's Response:

The proposed finding has no evidentiary value. The McKinsey report was a “[n]on-exhaustive list, based on available information.” (CX 3178-016; Rogan, Tr. 3661-63; *see also* SF 375-1335, 1627).

Patterson's Response:

This finding is misleading in that the McKinsey December 2015 Discussion Document did not state either way—that Schein and Benco had or had not partnered with buying groups. (CX3178 at 001-020); *see also* (Rogan, Tr. 3463) (“Q. And fair to say that this does not say that Schein had partnered with buying groups? A. Yes. Q. This does not say that Benco had partnered with buying groups? A. Yes. Q. Is that a yes, correct, or -- just for clarity of the record. A. *Well, the slide doesn't have Schein or Benco on it.*”) (emphasis added). Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1340. McKinsey also prepared a more detailed report titled, “Dental business growth strategy project: US Market Overview” for Patterson dated February 2016. (Rogan, Tr. 3464; CX3181 at 001 (hereinafter “McKinsey February 2016 Report”); *see also* CX8014 (Rogan, Dep. at 160)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1341. Rogan reviewed the McKinsey February 2016 Report and thought the report was accurate. (Rogan, Tr. 3465).

Schein's Response:

No response.

Patterson's Response:

Rogan was asked whether the information contained in the report “seemed generally accurate” and he responded, “from my recollection yes.” (Rogan, Tr. 3465). When asked if he “believed the information [in the report] seemed reliable,” Mr. Rogan testified: “I would call it directionally correct.” (Rogan, Tr. 3465).

Benco's Response:

Benco has no specific response to the proposed finding.

1342. The McKinsey February 2016 Report again stated that “GPOs remain 3-5% of the market, though few have had moderate success and have partnered with mid-level distributors like Darby.” (CX3181 at 051; Rogan, Tr. 3466).

Schein's Response:

No response, except to note that the McKinsey report was a “[n]on-exhaustive list, based on available information.” (CX 3178-016; Rogan, Tr. 3661-63; *see also* SF 375-1335, 1627).

Patterson's Response:

This proposed finding is confusing in its statement of “again stated.” The McKinsey December 2015 Discussion Document did not contain the above quote. The corresponding slide in the McKinsey December 2015 Discussion Document stated: “most GPOs remain small, but several have had moderate success and have partnered with mid-level distributors like Burkhart and Darby.” (CX3178 at 016). Also, the McKinsey

February 2016 Report stated: “GPOs remain 3-5% of market, though a few have had moderate success and have partnered with mid-level distributors like Darby.” (CX3181 at 051) (missing word in italics and underlined).

Benco’s Response:

Benco has no specific response to the proposed finding.

1343. Around January 2016, Patterson hired Wes Fields as a Director of Business Development. (Rogan, Tr. 3474; CX0089 at 004).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1344. Part of Fields’ responsibilities in business development included buying groups and GPOs. (Rogan, Tr. 3474; CX0312 (Fields, IHT at 24-25)).

Schein’s Response:

No response.

Patterson’s Response:

This proposed finding is confusing as to the nature of Fields’ responsibilities relating to buying groups and GPOs. At his investigational hearing, Fields testified: “Q. And what was that project? A. I was asked to evaluate the opportunities that came in and see if there was any organization that was out there that looked to be a good fit for us. Q. And you were tasked with looking at group organizations specifically? A. Any entity that

came to us, so buying groups, things like that.” (CX0312 (Fields, IHT at 24-25)). Rogan likewise testified: “[GPOs] was one of the things that he was going to maybe take at least a look at it or an assessment on it.” (Rogan, Tr. 3474).

Benco’s Response:

Benco has no specific response to the proposed finding.

1345. Patterson hired Fields in early 2016 even though the McKinsey February 2016 Report had found that buying groups and GPOs were a very small part of the market. (Rogan, Tr. 3476-3477; CCFF ¶ 1342).

Schein’s Response:

No response.

Patterson’s Response:

This finding of fact is misleading to the extent it suggests that Patterson’s actions in hiring Wes Fields were inconsistent with the findings related to buying groups of the McKinsey February 2016 Report. First, buying groups were only one part of Fields’s job responsibilities. (CX0089 (Fields worked on “transitions, rep recruiting, supply guarantee and budget, GPOs, [and Patterson’s] Advantage Program”); CX0312 (Fields, IHT at 22) (Fields projects when he first started were related to education, practice transitions, and GPOs)). Second, when asked about Patterson’s decision to have Fields look into GPOs and buying groups in January 2016 despite McKinsey’s findings, Rogan explained Patterson’s rationale: “[I]f you're going to say no to a part of the business, you should -- at least should under- -- you know, you should have -- understand why we're going to say no, why they should, you know, maybe instead of having them join a buying group, maybe join the Patterson Advantage program where they can get a lot of advantages there, including, you know, a decrease in their spend. So I think that when you say no to part of

the market, sometimes you just need to explain it to your sales force. And I think at that point we just didn't really have a good answer because they -- if they don't bring us any value, we're not going to do business with them. . . . So I think as I remember now looking at that, I think it was just think about how we would talk about this to the field, our sales field.” (Rogan, Tr. 3476-3477).

Benco’s Response:

Benco has no specific response to the proposed finding.

1346. Rogan did not believe his suggestion that Patterson’s partner with a buying group compromised Patterson’s values or ethics. (Rogan, Tr. 3459-3460).

Schein’s Response:

No response.

Patterson’s Response:

This proposed finding is inaccurate. When Complaint Counsel asked if Rogan believed “Patterson partnering with a buying group would somehow compromise [his] company’s values or ethics,” Rogan responded: “I don't know that I can answer that. I think -- I think what I would say is we were going to -- my suggestion to Paul [Guggenheim] that we should look at it. But that doesn't mean we -- you know, we talk about lots of things that we potentially would or wouldn't do. In this case, I wouldn't say that -- you know, I think we would have to look at that before we would ever partner with, sell to, service -- we'd have to look at all that from both sides.” (Rogan, Tr. 3459-3460).

Benco’s Response:

Benco has no specific response to the proposed finding.

1347. In 2017, after the conspiracy fell apart, Patterson submitted a bid on a buying group, Smile Source. (Rogan, Tr. 3540-3541; *see also*, McFadden, Tr. 2733-2734 (Patterson did not submit a bid until after 2016 meeting with Trevor Maurer of Smile Source); Maurer, Tr. 5002-5003 (Patterson put in a bid after November 2016 meeting)).

Schein's Response:

No response, other than to note that the proposed finding improperly assumes the existence of the alleged conspiracy.

Patterson's Response:

This proposed finding is confusing and misleading. First, while Complaint Counsel labels Smile Source a buying group (Compl. ¶ 35), Smile Source views itself as a “franchise DSO” and not a buying group. (Goldsmith, Tr. 2046); *see also* (Goldsmith, Tr. 1949 (“Judge Chappell: Did you consider Smile Source or do you consider Smile Source to be a buying group or a -- what is it, GPO? . . . A: I do not consider it to be that. Judge Chappell: Either of those. A: Correct.”); Maurer, Tr. 4969 (“Mr. Maurer, if I heard your testimony right, Smile Source is not a buying group. Is that right? A. Correct.”); Goldsmith, Tr. 2040–41 (“Q. And you consider Smile Source to be a franchisor; is that right? A. That is correct.”)). Second, this finding is misleading in suggesting that 2017 was *shortly* after the alleged conspiracy allegedly fell apart, when Complaint Counsel alleges that the conspiracy ended in *April 2015*. (Kahn, Tr. 19). Moreover, Patterson had evaluated and considering bidding on Smile Source both before, during, and after the alleged conspiracy. (FOF ¶¶ 139-164).

Benco's Response:

Complaint Counsel's use of the term “conspiracy” is inaccurate and mischaracterizes the evidence in this matter. As was made clear throughout trial, Complaint Counsel have failed to establish parallel conduct by Respondents, and failed to

establish that Respondents entered into a conspiracy. Before, during and after the alleged conspiracy period, Benco followed its longstanding no-middleman policy and simply did not do business with buying groups. (Cohen, Tr. 445-46). Not only did Complaint Counsel fail to establish the existence of a conspiracy during the trial, but Complaint Counsel did not even consistently allege when it believed such a conspiracy began. In the Complaint, Complaint Counsel alleged that the conspiracy began as one between Benco and Schein “no later than July 2012.” (Complaint ¶ 32). At trial, Complaint Counsel changed tracks, and claimed that the alleged conspiracy between Benco and Schein began at some time in 2011. (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 also* Opening, Tr. 33).

1348. Rogan, and Misiak, were involved in the decision to pursue Smile Source’s business. (Misiak, Tr. 1318).

Schein’s Response:

No response.

Patterson’s Response:

Misiak also testified that Guggenheim was “perhaps” involved. (Misiak, Tr. 1318).

Otherwise, Patterson has no specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1349. The 2017 bid was the first time Patterson bid for Smile Source’s business. (Rogan, Tr. 3541).

Schein's Response:

No response.

Patterson's Response:

The correct citation for this proposed finding is: (Rogan, Tr. 3540). Additionally, Rogan testified that the 2017 bid was the first time Patterson bid for Smile Source's business "as far as [he knew]." (Rogan, Tr. 3540).

Benco's Response:

Benco has no specific response to the proposed finding.

1350. During the conspiracy, in 2013-2014, Patterson had the opportunity to bid on Smile Source but did not. (CCFF ¶¶ 600, 641-642).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's use of the term "conspiracy" is inaccurate and mischaracterizes the evidence in this matter. As was made clear throughout trial, Complaint Counsel have failed to establish parallel conduct by Respondents, and failed to establish that Respondents entered into a conspiracy. Before, during and after the alleged conspiracy period, Benco followed its longstanding no-middleman policy and simply did not do business with buying groups. (Cohen, Tr. 445-46). Not only did Complaint Counsel fail to establish the existence of a conspiracy during the trial, but Complaint Counsel did not even consistently allege when it believed such a conspiracy began. In the Complaint,

Complaint Counsel alleged that the conspiracy began as one between Benco and Schein “no later than July 2012.” (Complaint ¶ 32). At trial, Complaint Counsel changed tracks, and claimed that the alleged conspiracy between Benco and Schein began at some time in 2011. (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 also* Opening, Tr. 33).

1351. McFadden explained that the decision not to bid on Smile Source in 2013 and 2014 was in part because Patterson “didn’t understand the business model” and “didn’t believe at the time that [Smile Source] had influence and could guarantee merchandise volume.” (McFadden, Tr. 2719-2720).

Schein’s Response:

No response.

Patterson’s Response:

This finding is incomplete with respect to McFadden’s testimony about why Patterson chose not to bid on Smile Source. First, McFadden testified that: “[Goldsmith] didn’t make a very good first impression. There was no reason for us to choose to do business with him after we met together. I don’t think he represented Smile Source very well.” (McFadden, Tr. 2719). Second, McFadden also testified that Patterson “didn’t see an upside from a business perspective” to working with Smile Source. (McFadden, Tr. 2720). Otherwise, Patterson has no specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1352. Patterson bid on Smile Source in 2017 because there was potential for incremental sales. (Rogan, Tr. 3546-3547).

Schein's Response:

No response.

Patterson's Response:

This proposed finding is not supported by the cited testimony and is inaccurate. Rogan testified that he “did see that there was potential” for incremental sales to Patterson but did not say that is why Patterson bid on Smile Source. (Rogan, Tr. 3546-3547). Moreover, Patterson witnesses testified at length to the rationales for bidding on Smile Source in 2017, including that it was “well-formulated in its sales and brand,” the company has add[ed] marketing services, they “provided a lot of value to their clients,” the company’s professionalism (it had its own office, board room, management team, and around one hundred employees) and manufacturing partners vouched for Smile Source.

Benco's Response:

Benco has no specific response to the proposed finding.

1353. Patterson bid on Smile Source in 2017 even though there was the risk of “cannibalization,” *i.e.*, that some Smile Source members were already Patterson customers. (Rogan, Tr. 3547-3548).

Schein's Response:

No response.

Patterson's Response:

This finding is confusing in its description of cannibalization. Rogan explained the risk of cannibalization with respect to Smile Source at trial: “I believe their members were already spending \$3 million with Patterson. So right off the bat, if they don't bring any other customers to us and we give those customers a better deal, we have just slashed a bunch of our prices. We've cannibalized some of our business. That might make business

sense if they were going to bring another \$17 million of spend to us.” (Rogan, Tr. 3547). Moreover, the risk of cannibalization with Smile Source in 2017 was not what it was in 2013, when every Smile Source member Patterson checked was already a Patterson customer. FOF ¶ 729. Additionally, Dr. Marshall conceded at trial that he had not reviewed and was not aware of the evidence that Patterson thought Smile Source “might just be cannibalizing its existing customers.” (Marshall, Tr. 3280–83). Otherwise, Patterson has no specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1354. Rogan did not believe that the risk of cannibalization alone was a reason for Patterson not to work with a buying group. (Rogan, Tr. 3548-3549).

Schein’s Response:

No response.

Patterson’s Response:

This finding overstates Rogan’s testimony. When Complaint Counsel asked if cannibalization alone is not a reason to work with a buying group, Rogan answered: “No, but you have to believe -- if you think that they’re just going to bring the spend that you’re already getting, then you’d be crazy to do it. You have to believe that they are going to bring a bunch more spend and that it makes -- you know, if that 3 million went down to 2.8 million, are they going to bring me enough business that it’s going to be worth a \$200,000 decrease in my sales? That’s the -- you have to make a business decision.” (Rogan, Tr. 3547-3548).

Benco's Response:

Benco has no specific response to the proposed finding.

1355. Patterson's 2017 bid for Smile Source's business proposed offering discounts to Smile Source members. (Rogan, Tr. 3542).

Schein's Response:

No response.

Patterson's Response:

The correct citation for this finding is: (Rogan, Tr. 3541). Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1356. Patterson's proposal also included a payment from Patterson to Smile Source, or an amount based on the percentage of dollar spend by Smile Source members. (Rogan, Tr. 3542-3543).

Schein's Response:

No response.

Patterson's Response:

First, the correct citation for this finding is: (Rogan, Tr. 3541-3542). Second, this finding is not precise as to the nature of the payment Patterson was proposing to make to Smile Source. Rogan testified that the payment was a "sliding scale" that would be a "small number at first" and "could get bigger" if Smile Source was "able to move spend towards Patterson." (Rogan, Tr. 3541). Rogan explained that Patterson fashioned the payments this way because it was "concerned that [Smile Source] said they were going to be able to

move the spend, but [Patterson] had not seen that materialize with any other customers in the past.” (Rogan, Tr. 3451-3452).

Benco’s Response:

Benco has no specific response to the proposed finding.

1357. Patterson lost the 2017 bid on Smile Source to Schein. (Misiak, Tr. 1327; Rogan, Tr. 3556).

Schein’s Response:

There is no evidence that either Patterson or Schein knew the other was bidding on Smile Source at the time, so the evidence does not support Complaint Counsel’s characterization that Patterson “lost ... to Schein.”

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1358. On June 26, 2017, Anthony Fruehauf sent Rogan an email attaching a “state of the union” report for Patterson’s Southeastern Region. (Rogan, Tr. 3556-3557; CX3186 at 001).

Schein’s Response:

No response.

Patterson’s Response:

Rogan testified that the “*purpose*” of the reports is “giving a state of the union of all the branches in the region.” (Rogan, Tr. 3557) (emphasis added). The reports were not labeled “state of the union” reports. Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1359. In the June 2017 report, Fruehauf identified a key driver for the Nashville region that stated: "Continue to lose business to buying groups (i.e., Smile Source and Mari's List)." (CX3186 at 009; Rogan, Tr. 3557-3558).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1360. Fruehauf's report also stated: "We have had 5 more clients sign up with Smile Source..." (CX3186 at 009; Rogan, Tr. 3558).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1361. Rogan understood that Fruehauf's report was identifying 5 customers that the Patterson Nashville branch lost to competitors supplying Smile Source. (Rogan, Tr. 3558).

Schein's Response:

No response, other than to note that five dentists out of over 150,000 dentists in the U.S. is *de minimis*.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1362. Fruehauf quantified that loss as representing "\$110k annual sales." (CX3186 at 009; Rogan, Tr. 3558).

Schein's Response:

No response, other than to note that this equates to only \$22,000 per dentist, and so represents a fraction of each dentist's purchases.

Patterson's Response:

Fruehauf's report stated that four of the customers represented a "total loss merchandise at \$110k annual sales." (CX3186 at 009; *see also* Rogan, Tr. 3558).

Benco's Response:

Benco has no specific response to the proposed finding.

1363. Rogan thought it was mostly likely that Patterson's actual loss would be greater than the \$110,000, as that figure represented the loss for just for one branch and for one fiscal year. (Rogan, Tr. 3559).

Schein's Response:

No response, other than to note that any extrapolation would be speculation (especially since the document contains reports from the other branches, none of which

mention Smile Source). (CX 3186). Moreover, even if one attempted an extrapolation from these five customers, the estimated loss would still be *de minimis*.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1364. [REDACTED]

Schein's Response:

There has been no discovery about Dr. Levin's supposed buying group or the Lake Harbor group, so it is not clear what those entities are. At most, Mr. Lepley testified at his deposition that Dr. Levin has a "small" number of "national clients," the definition of which is not clear. (CX 8028 (Lepley, Dep. at 37-38)). Mr. Lepley did not even clarify whether the Lake Harbor group has ownership in its practices or not, and simply referred to it as a "group." (CX 8028 (Lepley, Dep. at 37-40)).

Patterson's Response:

This finding is misleading and inaccurate to the extent that it suggests that Patterson did not occasionally work with buying groups *before* or *during* the alleged conspiracy. Patterson did work with buying groups both before and during Complaint Counsel's alleged conspiracy period. *See, e.g.*, FOF ¶¶ 174-175; CX3081 at 001 (as of July 2014, a local Patterson representative was "deal[ing] heavily" with Orthosynetics); McFadden, Tr. 2728 ("Orthosynetics is a quasi-buying group that focus[es] on orthodontics"); RX0271 at

001 (as of May 2014, a Patterson branch had been selling to Jackson Health—“a GPO”—“for over 10 years”). Otherwise, Patterson has no specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1365. [REDACTED]

Schein’s Response:

No response, other than to note that: (i) Mr. Lepley’s testimony was equivocal, just noting his [REDACTED] and (ii) the discount offered was just [REDACTED] (CX 8028 (Lepley, Dep. at 38-41). For comparison, according to Dr. Marshall’s own analysis, at least [REDACTED] of independent dentists that are not part of a buying group receive discounts of at least [REDACTED] from Schein. (CX 7101-067).

Patterson’s Response:

Lepley testified that he [REDACTED]

Benco’s Response:

Benco has no specific response to the proposed finding.

c) Benco

1366. After the conspiracy, Benco launched its own buying group and bid on other buying groups. (CCFF ¶¶ 1367-1369, 1372).

Schein’s Response:

The proposed finding improperly assumes the existence of a conspiracy, which Complaint Counsel has failed to prove.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding. Moreover, the structure of EDA is closer to a GPO than a buying group, because there are services that are handled by EDA that go beyond just a membership and access to specials – like financial services and discounts on products and services beyond the dental supplies and equipment. (Cohen, Tr. 822).

By way of further response, Benco refers the Court to its responses to ¶¶ 1367-1369, 1372.

1367. Sometime after June 2015, Benco partnered with Cain, Watters & Associates, an accounting firm that works with dentists, to create the Elite Dental Alliance (“EDA”). (Cohen, Tr. 452-453; CX1280 at 003 (Cohen forwarding an email on June 8, 2015 from Benco sales representative to Cain Watters and asking Cain Watters if rumor from sales representative about “an effort on behalf of Cain Waters [sic] to put into place a purchasing consortium for single practitioners to gain leverage on product pricing” was true)).

Schein's Response:

In late 2015, Benco entered into a joint venture with Cain Watters to form the Elite Dental Alliance (“EDA”). (Cohen, Tr. 458-59, 814).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited evidence.

Cain Watters is the largest financial services company dealing with independent dentists and dental practices. It provides services such as accounting services, bill paying, and financial planning for dentists. (Cohen, Tr. 814-815). Since the mid-2000's, long before the formation of EDA, Cain Watters had been one of Benco's Success Partners. Benco developed an exclusive cross-referral working relationship with Cain Watters, where Benco would recommend Cain Watters' services to its clients, and Cain Watters would recommend Benco as a distributor to its clients. (Cohen, Tr. 815-816).

1368. EDA is a buying group. (Cohen, Tr. 448; CX0301 (Cohen, IHT at 107)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited evidence.

Benco's unilateral economic self-interest was not to do business with buying groups because they came between Benco and its customers and did not permit Benco to reduce its costs. (BFF ¶¶ 903-928).

Benco developed its policy in 1996 and has applied it consistently before, during, and after Complaint Counsel's alleged conspiracy period. (BFF ¶¶ 166-270; 1285-1334).

EDA is structurally different than any buying group Benco has ever seen. It is more like a DSO, but without common ownership. (Cohen, Tr. 818-22; Ryan, Tr. 1228). Based on EDA's wholly unique characteristics, which were different than any other buying group,

Benco determined that it was in its own unilateral economic interest to partner with Cain Watters on EDA. (Cohen, Tr. 469; 820-23). (See also BFF ¶¶ 232-70).

1369. EDA is the first buying group Benco has worked with and provided discounts to. (Cohen, Tr. 449; CX8015 (Cohen, Dep. at 287, 300) (Other than EDA, Benco has never partnered with another Buying Group going back to 1996)).

Schein's Response:

No response, other than to note that Benco is entitled to a share of the EDA profits. (Cohen, Tr. 816).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited evidence.

Benco's unilateral economic self-interest was not to do business with buying groups because they came between Benco and its customers and did not permit Benco to reduce its costs. (BFF ¶¶ 903-928).

Benco developed its policy in 1996 and has applied it consistently before, during, and after Complaint Counsel's alleged conspiracy period. (BFF ¶¶ 166-270; 1285-1334).

EDA is structurally different than any buying group Benco has ever seen. It is more like a DSO, but without common ownership. (Cohen, Tr. 818-22; Ryan, Tr. 1228). Based on EDA's wholly unique characteristics, which were different than any other buying group, Benco determined that it was in its own unilateral economic interest to partner with Cain Watters on EDA. (Cohen, Tr. 469; 820-23). (See also BFF ¶¶ 232-70).

1370. Working with EDA represented a change to Benco's policy regarding buying groups. (Cohen, Tr. 451).

Schein's Response:

False. EDA was formed as a joint venture between Benco and Cain Watters. (Cohen, Tr. 814). Benco announced an agreement with Elite Dental Alliance that effectively turned EDA into an affiliate of Benco. (Cohen, Tr. 816, 820-21). Mr. Cohen testified Benco has "veto power over vendors," has "control over the rules for admitting members," and receives 50% of the group's profits. (Cohen, Tr. 816-17, 820-21; CX 1282). Thus, EDA is not a typical buying group.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited evidence.

Benco's no-middlemen policy still remains in place today, but Benco has made an exception to its policy to accommodate EDA, which is a joint venture between Cain Watters and Benco. (Cohen, Tr. 451; 814; 819; 824). Although Benco may consider EDA an exception to Benco's no-middleman policy, Benco believes that EDA – due to Benco's direct involvement in EDA and EDA's unique characteristics – is not inconsistent with Benco's policy. (Cohen, Tr. 816-24; Ryan, Tr. 1228-29). Whereas, on the one hand, Benco considers EDA an exception to its no-middlemen policy, because EDA is an entity positioned between Benco and its customers – the independent dentist members of EDA, on the other hand, no exception is required because Benco is a partner in the joint venture of EDA and has a 50% stake in the profits of EDA. (Cohen, Tr. 816-24).

Benco's role in EDA is not inconsistent with its policy and does not represent any change in behavior by Benco. (Cohen, Tr. 816-24; 863). Benco's policy remains in place and Benco still believes that buying groups provide no economic value to Benco because they cannot drive compliance or deliver volume commitments. (Cohen, Tr. 445; 451; 816-24; 863).

1371. Cohen's notes from a meeting held on November 10 and 11, 2015 stated: "If Benco could start a good GPO it would be to their advantage over Schein and Patterson (Elite Dental Alliance)." (CX1239 at 002).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete. Cohen's notes also stated that while such groups have "never worked in the past," this time, Benco would "co-own" the group.

1372. Cohen created a case study titled, "Case Study: Elite Dental Alliance." in December 2015 that analyzed the pros and cons of partnering with Cain, Watters & Associates to create EDA. (Cohen, Tr. 453-454; CX1084 at 001).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1373. Cohen shared that case study with Benco's top level executives. (Cohen, Tr. 456).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1374. Cohen stated in his case study: "Currently, only two significant distributors recognize GPOs: Darby . . . and Burkhart." (CX1084 at 001-002; Cohen, Tr. 461).

Schein's Response:

CX 1084 does not purport to be an exhaustive analysis of distributors doing business with buying groups. It does not note Smile Source's contracts with Nashville Dental and Atlanta Dental, nor does it include the 25-plus buying groups Schein did business with. (SF 375-1335, 1627). The document, dated December 19, 2015, also post-dates the alleged conspiracy period. (CX 1084). Even Complaint Counsel concedes that Schein was working with buying groups at that time, including Klear Impakt.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1375. In that case study, Cohen did not identify Schein or Patterson as recognizing buying groups. (Cohen, Tr. 461; CX1084 at 001-002).

Schein's Response:

CX 1084 does not purport to be an exhaustive analysis of distributors doing business with buying groups. It does not note Smile Source's contracts with Nashville Dental and Atlanta Dental, nor does it include the 25-plus buying groups Schein did business with. (SF 375-1335, 1627).

Patterson's Response:

December 2015 is long after the alleged conspiracy ended, in April 2015. (Lynn, Tr. 19).

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited evidence.

As its title clearly indicates, the exhibit is a case study examining Benco's joint venture with Cain Watters that created EDA. (CX1084). It has absolutely nothing to do with Benco's no-middlemen policy, whether Benco should maintain its policy, or whether Schein and Patterson's conduct impacts Benco's policy; it is simply a case study on EDA. (CX1084).

Moreover, the quoted language appears under a section entitled "Our Risk" in which Cohen is listing potential risks to the formation and launch of EDA by Benco and Cain Watters, and is a reference to the potential of competition from Schein and Patterson against EDA; in context, it has absolutely nothing to do with Benco's policy. (CX1084-007).

1376. Cohen believed that one of the upsides of working with EDA is that Benco could add more than 250 customers and gain more than 25 million in sales. (Cohen, Tr. 465-466; [REDACTED]).

Schein's Response:

Benco's affiliate buying group, EDA, is a one-of-a-kind program that cannot be relied upon to make any generalized inferences. (SRF 1381, 1385-87, 1688).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1377. Cohen hoped that EDA would not only bring new customers but also bring Benco more than \$25 million in sales or purchases. (Cohen, Tr. 463, 465-466).

Schein's Response:

Benco's affiliate buying group, EDA, is a one-of-a-kind program that cannot be relied upon to make any generalized inferences. (SRF 1381, 1385-87, 1688).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1378. Cohen thought EDA was an opportunity for Benco, the third largest distributor, to build "an infrastructure to compete nationally and. . .make sure the infrastructure is profitable." (Cohen, Tr. 465).

Schein's Response:

Benco's affiliate buying group, EDA, is a one-of-a-kind program that cannot be relied upon to make any generalized inferences. (SRF 1381, 1385-87, 1688).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited evidence. Complaint Counsel misrepresents the cited testimony. Cohen states that Benco's goal is to "leverage this infrastructure that we built, so that's where we built an infrastructure to compete nationally and now we need to get more revenue to pay -- make sure the infrastructure is profitable." (Cohen, Tr. 465). Moreover, as the case study makes clear, working with EDA was only one part of Benco's overall competitive strategy, which was part of a broader effort to "re-engineer [its] customer offering." (CX1084-002).

1379. At the same time, Cohen's case study identified a risk of creating EDA - "[o]ther GPOs get started, and are recognized by Schein or PDCO." (CX1084 at 007; Cohen, Tr. 466).

Schein's Response:

This is the same quote as in CCFF 246 (quoting CX 1218, which forwards CX 1084). Schein incorporates its response to CCFF 246 here. (SRF 246; *see also* SRF 427).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibits.

As its title clearly indicates, the exhibit is a case study examining Benco's joint venture with Cain Watters that created EDA. (CX1084). It has nothing to do with Benco's no-middlemen policy, whether Benco should maintain its policy, or whether Schein and Patterson's conduct impacts Benco's policy; it is simply a case study on EDA. (CX1084). Moreover, the quoted language appears under a section entitled "Our Risk" in which Cohen is listing potential risks to the formation and launch of EDA by Benco and Cain Watters, and is a reference to the potential of competition from Schein and Patterson against EDA. (CX1084-007).

1380. Cohen believed that if Schein or Patterson worked with buying groups, Benco risked losing customers. (Cohen, Tr. 467).

Schein's Response:

This is the same assertion as CCF 426, and Schein incorporates its response to that proposed finding here. (SRF 426). As noted in SRF 426, the asserted fact misrepresents the evidence. Mr. Cohen's testimony was general in nature, simply reflects the nature of oligopolistic competition, and was not focused on buying groups. Mr. Cohen merely testified that "*any change*" by Schein or Patterson could impact Benco. (Cohen, Tr. 470, 467 (emphasis added)).

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony. Chuck Cohen's actual testimony differs substantially from Complaint Counsel's fictional paraphrase in the proposed finding. Cohen was asked

“And a change in Schein or Patterson’s strategy could be a risk for Benco to lose customers?” (Cohen, Tr. 467). Cohen responded “Any time Schein or Patterson changes their strategy there’s a risk to Benco that they – that we will lose customers.” (Cohen, Tr. 467).

1381. EDA members were not contractually required to purchase from Benco. (Cohen, Tr. 467).

Schein’s Response:

This is identical to CCFF 1688. As stated in SRF 1688, the asserted fact is incomplete. Members of EDA make a firm purchase commitment to Benco. Every EDA member practice must make a minimum purchase commitment, which is factored into the discount they receive from Benco. (Cohen, Tr. 468, 817).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and misstates the evidence in this case. Benco was able to maintain compliance in EDA and ensure that working with EDA was in Benco’s economic self-interest. Most importantly, there was a minimum volume of products that EDA members had to purchase from Benco in order to receive the Benco discount.

It only made sense to move forward with Cain Watters, if EDA could solve this core structural problem that plagued all other buying groups and made them unattractive to Benco’s unilateral economic interests. (Cohen, Tr. 818-23). Benco maintains control over EDA and drives compliance in many ways. First, members of EDA must be either (1) Cain Watters clients who have an in-person meeting at least once a year to discuss the

financial health and business planning for their dental practice (Cohen, Tr. 819-21); or (2) dentists with over \$2M in revenue who are very large independent dental practices that would qualify for significant discounts under Benco's Price Tiers, specifically, Benco's Profit Sharing (PS) Tier. (Cohen, Tr. 818; 820-22). Second, members of EDA make a firm purchase commitment to Benco. Every EDA member practice must make a minimum purchase commitment, which is factored into the discount they receive from Benco. (Cohen, Tr. 468; 817). Third, as partner in the joint venture with Cain Watters, Benco receives 50% of the profits from EDA, which helps offset the discounts provided to EDA members. (Cohen, Tr. 816). Fourth, Benco has absolute control over the selection of members and vendors of EDA. (Cohen, Tr. 817; 820-21). Accordingly, Benco believes that the structure of its arrangement with EDA allows it to drive compliance.

1382. Cohen recognized that not contractually requiring EDA member to purchase from Benco as a risk in his case study, which he identified as – "Customers sign up for EDA, and they go back to their incumbent supplier and negotiate a similar deal, and stay with the incumbent." (CX1084 at 007; Cohen, Tr. 468-469).

Schein's Response:

Complaint Counsel attempts to make a connection where there is none. As stated in SRF 1688 and 1381, EDA members make a firm purchase commitment to Benco. Every EDA member practice must make a minimum purchase commitment, which is factored into the discount they receive from Benco. (Cohen, Tr. 468, 817).

But neither a contractual requirement nor a firm commitment to purchase would prohibit a member from signing up, and then leaving to negotiate a similar deal with the incumbent. Thus, the proposed finding is nonsensical and unsupported by the evidence.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1383. Despite the risks, Benco decided to work with EDA to avoid losing the EDA partnership, and other partnerships, to Schein or Patterson. (Cohen, Tr. 471).

Schein's Response:

Benco did not simply “work with EDA.” Mr. Cohen testified Benco has “veto power over vendors,” has “control over the rules for admitting members,” and receives 50% of the group’s profits. (Cohen, Tr. 816-17, 820-21; CX 1282). Indeed, Benco described its relationship with EDA as a “virtual shareholder.” (CX 1084-001). Thus, EDA is a one-of-a-kind program that cannot be relied upon to make any generalized inferences. (SRF 1381, 1385-87).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony. Chuck Cohen actually testified that he was concerned that Cain Watters, who had been a partner of Benco for a long time, would take their partnership elsewhere. (Cohen, Tr. 470). Since the mid-2000’s, long before the formation of EDA, Cain Watters had been one of Benco’s Success Partners. Benco developed an exclusive cross-referral working relationship with Cain Watters, where Benco would

recommend Cain Watters' services to its clients, and Cain Watters would recommend Benco as a distributor to its clients. (Cohen, Tr. 815-816).

1384. In evaluating the risk of working with EDA, Cohen noted to his senior executives: "[A]s the #3 player in the market, with our infrastructure built out, it's in our best interest to break the mold in order to grow quickly and leverage our fixed investments." (CX1084 at 002; *see also* CX1218 at 002).

Schein's Response:

EDA "broke the mold" in the sense that Benco took a profit interest in it, effectively making it an affiliate, or as Benco described it, a "virtual shareholder." (CX 1084; Cohen, Tr. 816). As Mr. Cohen testified, Benco has "veto power over vendors," has "control over the rules for admitting members," and receives 50% of the group's profits. (Cohen, Tr. 816-17, 820-21; CX 1282).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited evidence. Complaint Counsel misrepresents the cited testimony. Cohen states that Benco's goal is to "leverage this infrastructure that we built, so that's where we built an infrastructure to compete nationally and now we need to get more revenue to pay -- make sure the infrastructure is profitable." (Cohen, Tr. 465). Moreover, as the case study makes clear, working with EDA was only one part of Benco's overall competitive strategy, which also included an effort to "re-engineer [its] customer offering." (CX1084-002).

1385. Discounting to EDA provided Benco with new customers. (Cohen, Tr. 471).

Schein's Response:

No response, other than to note that EDA is a one-of-a-kind program that cannot be relied upon to make any generalized inferences. (SRF 1381, 1386-87).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

EDA is structurally different than any buying group Benco has ever seen. It is more like a DSO, but without common ownership. (Cohen, Tr. 818-22; Ryan, Tr. 1228). Based on EDA's wholly unique characteristics, which were different than any other buying group, Benco determined that it was in its own unilateral economic interest to partner with Cain Watters on EDA. (Cohen, Tr. 469; 820-23). (See also BFF ¶¶ 232-70).

1386. Discounting to EDA provided Benco with new sales. (Cohen, Tr. 472).

Schein's Response:

No response, other than to note that EDA is a one-of-a-kind program that cannot be relied upon to make any generalized inferences. (SRF 1381, 1385, 1387).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

EDA is structurally different than any buying group Benco has ever seen. It is more like a DSO, but without common ownership. (Cohen, Tr. 818-22; Ryan, Tr. 1228). Based on EDA's wholly unique characteristics, which were different than any other buying group, Benco determined that it was in its own unilateral economic interest to partner with Cain Watters on EDA. (Cohen, Tr. 469; 820-23). (See also BFF ¶¶ 232-70).

1387. Cohen believes EDA is a successful buying group. (Cohen, Tr. 471).

Schein's Response:

No response, other than to note that EDA is a one-of-a-kind program that cannot be relied upon to make any generalized inferences. (SRF 1381, 1385-86).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The proposed finding purposefully misstates Cohen's testimony. (Cohen, Tr. 471). Cohen never called EDA a buying group. He only testified that he believed EDA has been successful so far. (Cohen, Tr. 417). In fact, Cohen has repeatedly testified that EDA is not a buying group, but rather is more like a DSO. (Cohen, Tr. 818-22).

EDA is structurally different than any buying group Benco has ever seen. It is more like a DSO, but without common ownership. (Cohen, Tr. 818-22; Ryan, Tr. 1228). Based on EDA's wholly unique characteristics, which were different than any other buying group, Benco determined that it was in its own unilateral economic interest to partner with Cain Watters on EDA. (Cohen, Tr. 469; 820-23). (See also BFF ¶¶ 232-70).

1388. INTENTIONALLY LEFT BLANK.

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

No response.

4. The Big Three Shared a Common Motive to Conspire.

1389. Leading up to the conspiracy, executives of the Big Three feared that buying groups would lower their, and the entire full-service industry's, pricing power and margins. CCFF ¶¶ 196-268).

Schein's Response:

False. The proposed finding improperly assumes the existence of the alleged conspiracy and interprets the evidence in light of that assumption. Complaint Counsel cites no record evidence to support this finding. It only cites to other proposed findings, which – as set forth in Schein's specific replies – also fail to support its characterization of the evidence. Schein incorporates its responses to those specific findings here. (SRF 196-268).

As noted, the documents Complaint Counsel relies on in the cited proposed findings do not express concerns over the entire industry, but rather concerns about cannibalization. The few snippets that do reference competitors or competition simply reflect lawful oligopolistic interdependence.

Patterson's Response:

Patterson refers the Court to its responses to CCFF ¶¶ 196–268.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding. None of the individual findings cited in this proposed finding contain evidence that Benco feared that buying groups would lower its, and the entire full-service industry's, pricing power and margins. By way of further response, Benco refers the Court to its responses to ¶¶ 196-268.

5. The Executives of the Big Three Communicated Regularly and Had Opportunities to Conspire.

1390. Executives of the Big Three know each other, communicated regularly, and registered for or attended the same industry events during the conspiracy period. (CCFF ¶¶ 269-393).

Schein's Response:

Irrelevant. Complaint Counsel cites no record evidence to support this finding. It only cites to other proposed findings, which – as set forth in Schein's specific replies – also fail to support its characterization of the evidence. Schein incorporates its responses to those specific findings here. (SRF 269-393).

The fact that Mr. Sullivan, Mr. Cohen, and Mr. Guggenheim know each other is unsurprising (they are competitors in a concentrated industry) and irrelevant. Knowledge of another's identity has nothing to do with an alleged anticompetitive agreement.

Registration or attendance at industry events is likewise irrelevant. There is no evidence that would support an inference that, where Mr. Sullivan and either Mr. Cohen or Mr. Guggenheim attended an industry event, such attendance precipitated a communication between Mr. Sullivan and Mr. Cohen or Mr. Guggenheim. Complaint Counsel cites no evidence that would support an inference that any such alleged industry

event would have involved a substantive communication pertaining to buying groups or anything else that is relevant to this matter. Complaint Counsel does not cite to any internal documents leading up to, memorializing, or post-dating the industry events that would bear on the substance or purpose of any alleged event communications. (SRF 355-93). Any inference that there were discussions about buying groups at such events is nothing more than pure speculation.

As to communications, the proposed finding is vague as to “regularly.” There is no evidence of any communication between Schein and Patterson about buying groups. The mere existence of communications, however, is irrelevant. Text messages and emails contain the full content of the communication, and thus do not qualify as “opportunity evidence.” To the extent that the phone calls do not reflect their content, nothing can be inferred. Where there are surrounding texts and emails, they demonstrate that such communications were legitimate, innocuous, and/or irrelevant. Such evidence is also inadmissible to prove that there were communications about buying groups. *See* Fed. R. Evid. 404(b)(1) (“[e]vidence of ... [an] other act is not admissible to ... show that on a particular occasion the person acted in accordance with the character.”).

Patterson’s Response:

The proposed finding is vague in that it applies to “executives” without saying which executives it is referring to. The only Patterson executives alleged to have known or communicated regularly with Benco or Schein executives were Scott Anderson (who communicated with Tim Sullivan) and Paul Guggenheim (who communicated with Chuck Cohen and Tim Sullivan). Patterson FOF ¶¶ 234-266.

This proposed finding is also misleading to the extent it suggests Patterson began registering for or attending trade shows at which Schein and Benco also were present at

the time Patterson allegedly joined the alleged conspiracy. Patterson has been attending trade shows that competitors also attend since well before the alleged conspiracy began. (Compl. ¶ 36; Kahn, Tr. 19; *see also, e.g.*, CX4360-001-047 (2010-2016 Chicago Dental Society Midwinter Meeting); CX4432 (2011-2017 Greater New York Dental Meeting); CX4426 (2010-2018 Hinman Dental Society Meeting); CX4350-CX4354 (2010-2015 California Dental Association Anaheim Meeting)). Paul Guggenheim testified that he has been attending Dental Trade Alliance meetings since the 1980s. (Guggenheim, Tr. 1678-1679). Sullivan testified that the Dental Trade Alliance meetings were not “a cover for [the alleged] conspiracy” and that it would be false for someone to assert that attendance was evidence of the alleged conspiracy. (Sullivan, Tr. 4320-4321). Other distributors also attended these meetings; it was not just representatives from Patterson, Benco, and Schein. (*See, e.g.*, CX4360-001-042 (2010-2015 Chicago Dental Society Midwinter Meeting)).

Finally, this finding of fact is also misleading as to the nature and time frame of communications between Patterson executives and Schein and Benco executives. The record shows that Guggenheim communicated with Cohen and Sullivan both before and during the alleged conspiracy. Patterson FOF ¶¶ 234-266. None of Guggenheim and Sullivan’s communications related to buying groups. Patterson Motion to Dismiss at 11. In fact, Sullivan testified at trial that it would be false to assert these communications as evidence of a conspiracy between Patterson and Schein relating to buying groups. (Sullivan, Tr. 4316) (“Q. It would be false for someone to take these . . . documents [CX3389, CX3390, CX3391] and assert, under penalty of perjury, that they were evidence of a buying group conspiracy, wouldn’t it? A. Yes, it would.”). *See also* (Sullivan, Tr. 4311-4319) (Sullivan repeatedly testified that it would be false to assert that the

communications between Sullivan and Guggenheim were evidence of the alleged buying group conspiracy). Only two of Guggenheim and Cohen's communications related to buying groups. Patterson FOF ¶¶ 234-314. The record also contains text messages between Scott Anderson and Sullivan. Patterson FOF ¶¶ 256-257. None of these messages, however, are related to buying groups; instead, they are personal chatter discussing topics such as sports, family, holidays, vacations, and a colleague's passing. Patterson FOF ¶¶ 256-257. Sullivan was "shocked" to see that the FTC listed these text messages as evidence of a conspiracy relating to buying groups between Schein and Patterson. (Sullivan, Tr. 4303-04). Even Complaint Counsel acknowledged at the close of its case-in-chief that the text messages between Anderson and Sullivan listed in its sworn interrogatory response (RX2934 at 15-18) were not "the basis" of Complaint Counsel's case. (Kahn, Tr. 4759).

Benco's Response:

Evidence of communication between and among Respondents is not evidence of an anticompetitive conspiracy. It is unremarkable that members of the same industry would attend industry events. Complaint Counsel has failed to provide evidence that any communications between or among Respondents indicated the existence of an agreement to boycott buying groups. By way of further response, Benco refers the Court to its responses to ¶¶ 269-393.

XVIII. RESPONDENTS' CONSPIRACY WAS ANTICOMPETITIVE.

A. Respondents' Buying Group Discounts Before And After The Conspiracy Period.

1. Smile Source Discounts

1391. Prior to 2011, Schein Special Markets originally provided Smile Source [REDACTED], and additional discounts based on Schein's formulary. [REDACTED] (Foley, Tr. 4524-4526; Steck, Tr. 3776-3777).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1392. [REDACTED] CX2571 at 001 (December 2011 email stating Smile Source customers receive discounts just above [REDACTED]); CX2454 at 001 (January 2011 email stating Smile Source customers receive [REDACTED] off catalog for non-formulary products) [REDACTED]

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1393.

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1394.

Schein's Response:

Complaint Counsel's asserted fact includes a typo. [REDACTED]

[REDACTED] (Cavaretta, Tr. 5630). Moreover, the 2017 agreement is in evidence (RX 2353), and Complaint Counsel has not established that Mr. Cavaretta's memory is the best or most accurate evidence of the discounts offered under its agreement with Smile Source. There is no evidence that Mr. Cavaretta conducted a study or knew the average discounts with mathematical precision.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1395.

Schein's Response:

(CX 2381-002).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1396. Patterson's 2017 bid for Smile Source's business proposed offering discounts to Smile Source members. (Rogan, Tr. 3542); (CX8028 (Lepley, Dep. at 37)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1397. Smile Source's President Trevor Maurer described Patterson's 2017 bid to Smile Source as "very competitive" and "similar" to Schein's bid to Smile Source. (Maurer, Tr. 4985-4986;

Schein's Response:

To the extent that Complaint Counsel is relying on Mr. Maurer's testimony for the truth of the matter asserted (that Patterson's offer was "similar" to Schein's) – and not just for Smile Source's state of mind or impression – Complaint Counsel failed to lay adequate foundation. Complaint Counsel did not introduce an expert comparison of the two offers, and did not establish that Mr. Maurer had performed such a study.

Patterson's Response:

Maurer testified that Patterson and Schein "both bid similarly." (Maurer, Tr. 4985). Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2. KlearImpakt Member Discounts

1398. Schein entered into an agreement with buying group KlearImpakt in August 17, 2015. (R. Johnson, Tr. 5479; RX2162 at 001; RX3086 at 016 (Schein's Response to IROG ¶1)). In 2015, the buying group KlearImpakt offered its dentist members formulary discounts in the range of [REDACTED] off Schein's catalog price for thousands of dentists' most commonly used items. (CX8029 (R. Johnson, Dep. at 88-89); [REDACTED])

Schein's Response:

The asserted fact does not accurately characterize the evidence. Schein entered into an agreement with Klear Impakt on August 17, 2015 that provided [REDACTED] [REDACTED] but Complaint Counsel misrepresents the discounts associated with the Klear Impakt formulary. (RX 2162-001). Dr. Johnson testified the discounts for each product varied, but "the maximum was [REDACTED] [REDACTED]." (CX 8029 (R. Johnson, Dep. at 89)). Neither Dr. Johnson, nor any other witness, testified that the discounts for all products

on the formulary were “in the range of [REDACTED].” (CX 8029 (R. Johnson, Dep. at 88-89)).

Complaint Counsel’s cite to this fact in their Post-Trial Brief is misleading. Complaint Counsel claims “Schein began discounting to the buying group[] Klear Impakt” “[a]fter the collapse of the conspiracy.” (CC Br. 76). Complaint Counsel has refused to commit to a specific end-date of the conspiracy. In its opening statement, it claimed the conspiracy ended “in April [] 2015” but in opposition to Patterson’s Motion to Dismiss, it claimed “Complaint Counsel does not allege the agreement was nullified on a specific date.” (JF 81; Kahn, Tr. 19, 54; CMTD 17-18 n.99). In any event, it is undisputed that Schein began negotiations with Klear Impakt during the alleged conspiracy “in 2014” and in January 2015, Schein told Klear Impakt it was “very impressed by the clear-eyed vision you have....” (SF 815, 822; R. Johnson, Tr. 5479, 5490; Titus, Tr. 5269; CX 2208-002).

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1399. [REDACTED]

Schein’s Response:

[REDACTED] (RX 2162-001).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

3. Teeth Tomorrow Discounts

1400. Schein began working with Teeth Tomorrow after they entered into a three-year agreement that began on May 15, 2017. (RX3086 at 013, 016 (Schein's Response to IROG ¶1);

[REDACTED]

[REDACTED]).

Schein's Response:

No response. For a fuller explanation of Teeth Tomorrow, see SF 1250-1262.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1401. [REDACTED]

Schein's Response:

No response. For a fuller explanation of Teeth Tomorrow, see SF 1250-1262.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1402.



Schein's Response:

No response. For a fuller explanation of Teeth Tomorrow, see SF 1250-1262.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

4. Mastermind Discounts

1403. Schein has been one of Mastermind Group's dental supply ordering vendors since 2017. (RX3086 at 013, 016 (Schein's Response to IROG ¶1); RX2695 at 001 (2017 Primary Vendor Agreement between Schein and Mastermind Group)).

Schein's Response:

No response. For a fuller explanation of Mastermind Group, see SF 950-962.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1404. Mastermind's formulary discount is a blended discount of 5%-25% off of catalog pricing. (CX2718 at 005).

Schein's Response:

No response. For a fuller explanation of Mastermind Group, see SF 950-962.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1405. Through its 2017 agreement with Schein, the Mastermind Group allows its members to purchase dental supplies at a discount through a formulary and receive additional discounts ranging from [REDACTED]

Schein's Response:

No response. For a fuller explanation of Mastermind Group, see SF 950-962.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

5. Elite Dental Alliance Discounts

1406. [REDACTED]

Schein's Response:

In 2016, Benco announced an agreement with Elite Dental Alliance that effectively turned EDA into an affiliate of Benco. (Cohen, Tr. 816, 820-21). Mr. Cohen testified Benco has “veto power over vendors,” has “control over the rules for admitting members,”

and receives 50% of the group's profits. (Cohen, Tr. 816-17, 820-21; CX 1282). Benco offered discounts to EDA members who met high volume thresholds that might not be available to non-members who could not meet such volume thresholds. (Cohen, Tr. 821-22). There has been no analysis of pricing for similarly situated member and non-member dentists.

Patterson's Response:

No specific response.

Benco's Response:

Benco and Cain Watters have worked together to drive compliance among EDA members. Benco and Cain Watters have secured volume commitments from EDA members, which ensure that Benco would receive increased revenue in exchange for lowering its margins on dental supplies sold to EDA members. (Cohen, Tr. 818-21).

1407. [REDACTED]

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco and Cain Watters have worked together to drive compliance among EDA members. Benco and Cain Watters have secured volume commitments from EDA members, which ensure that Benco would receive increased revenue in exchange for lowering its margins on dental supplies sold to EDA members. (Cohen, Tr. 818-21).

1408. Benco's Tier 1 pricing is equivalent to catalogue pricing. (Cohen, Tr. at 929-930).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco and Cain Watters have worked together to drive compliance among EDA members. Benco and Cain Watters have secured volume commitments from EDA members, which ensure that Benco would receive increased revenue in exchange for lowering its margins on dental supplies sold to EDA members. (Cohen, Tr. 818-21).

6. Patterson's Other Post-Conspiracy Discounts To Buying Groups.

1409. In 2017, Patterson Southeastern Regional President Anthony Fruehauf reported to Tim Rogan that buying groups were offering substantial discounts. (CX3186 at 002 (for the Atlanta Region, "[Georgia Dental Association]/GPO and competitive dealer network is continuing with substantial discounting strategy (20-35% off our pricing plus service, lab, etc.)"; CX3186 at 009 ("Continue to lose business to buying groups (i.e., SmileSource and Mari's List).").

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1410. [REDACTED]

Schein's Response:

No response.

Patterson's Response:

Lepley testified that Patterson was able to offer the group referenced in this finding of fact a discount, but that [REDACTED]

[REDACTED] Patterson entered into an agreement with this group in [REDACTED] Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1411. [REDACTED]

Schein's Response:

No response.

Patterson's Response:

Patterson contracted with the referenced group to [REDACTED]
[REDACTED] Further, Patterson entered into an agreement with this group in [REDACTED] Finally, Lepley testified that he [REDACTED] [REDACTED] [REDACTED]
Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

B. Respondents' Conspiracy Harmed Competition.

1412. Respondents' not bidding for the business with buying groups or ending relationships with buying groups resulted in elevated prices of dental supplies. (CCFF¶¶ 1413-1441; *see also* Marshall, Tr. 2894).

Schein's Response:

False. (SRF 1413-41).

First, the asserted fact assumes (i) the existence of a conspiracy; (ii) that Schein did not bid for buying groups as a result of such conspiracy; and (iii) that Schein ended relationships with buying groups as a result of such a conspiracy. None of these underlying assumptions have been proven.

Second, there is no evidence that, if there was such a conspiracy, prices were elevated. Dr. Marshall did not analyze the prices in any relevant market, even the markets he himself defined. He did not, for example, conduct any before-and-after analysis of market prices, construct any but-for model of pricing, or perform any regression or statistical analysis of pricing.

Third, Dr. Marshall performed an analysis on only two buying groups: Smile Source and the Kois Buyers Group. As Schein explained, Dr. Marshall's analysis was based on his incorrect and improper factual findings, namely that Schein terminated Smile Source in 2012, that Schein submitted a fake bid for Smile Source in 2014, that Schein was not interested in Smile Source prior to 2017, and that Schein did not engage in good faith negotiations with the Kois Buyers Group in 2014. (SF 1696-1712). Dr. Marshall's 2014 Smile Source analysis was also based on false data, improperly switching out Schein's

2012 margins for its 2011 margins. (SF 1736-41). Relatedly, Dr. Marshall failed to account for rebates and administrative fees (the latter of which are solely middleman fees) in his 2017 Smile Source analysis. (SF 1730-35).

Fourth, Dr. Marshall's analysis fails to account for fees paid to Smile Source or the Kois Buyers Group by either the distributor or the member, and thus, do not accurately reflect the net prices that members pay.

Fifth, Dr. Marshall's Smile Source analysis is flawed because it shows that, when Smile Source terminated Schein, members continued to receive the same prices from Burkhart, and thus, there was no increase in price. (CX 7100-165). Indeed, Dr. Marshall has not shown that any dentist (or member dentists on average) paid lower prices with a buying group than without it, given that most dentists split their purchases among multiple distributors.

Sixth, to the extent Dr. Marshall attempts to draw analogies from his Smile Source and Kois Buyers Group analyses to other unnamed, unidentified buying groups, the analogies are flawed because, as Dr. Marshall admits, his analyses fail anytime any other distributor can supply the buying group. (Marshall, Tr. 3132-33). The evidence shows that Burkhart was available to supply any buying group west of the Mississippi, that throughout the country there are other regional full-service distributors, and that Darby and other online distributors are also available to provide substantial discounts on supplies. (CX 0287-001; CX 1032; *see also* Kois Jr., Tr. 355-57; CX 7101-142-43; SF 76; Mason, Tr. 2405-06).

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is overly broad, inaccurate, and mischaracterizes the evidence.

Complaint Counsel presented no reliable evidence to establish that any of Respondents' alleged actions resulted in elevated prices of dental supplies. Complaint Counsel relies on the opinion of Dr. Marshall. However, Dr. Marshall never identified harm to competition in any properly defined relevant product and geographic markets. (Marshall, Tr. 3406-3408; J. Johnson, Tr. 4867-4868). And Dr. Marshall cannot define competitive impact absent properly defined relevant markets. (J. Johnson, Tr. 4867-4868).

Even if he had properly defined relevant markets, Dr. Marshall did not perform any proper analysis of the actual effects on competition. Individual dentists are the customers that actually purchase and pay for dental supplies; buying groups are just intermediaries that don't select, order, take delivery of, stockpile, use, or pay for anything. (Cavaretta, Tr. 5568-69; Cohen, Tr. 444-45, 861; Ryan, Tr. 1034-36; see also RX2928 (member "[p]urchases are made directly from the vendor"); Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65). Dr. Marshall admitted that he did not perform any analysis of the extent to which Benco, Schein and Patterson competed for the business of individual dentists who were members of buying groups. (Marshall, Tr. 3411-3412).

Dr. Marshall admitted that he observed substantial competition for the business of individual dentists. (Marshall, Tr. 3412). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The data indicate that a distributor that enters into an agreement with a buying group does not necessarily provide the lowest margins or the lowest prices to the members of that buying group, and one or more competing distributors may sell to members of the buying group at similar or lower margins and prices. For example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1413. Less bidding pressure in the full-service dental supply distribution market means dentists paid higher prices than they would have if more full-service distributors supplied buying groups. (Marshall, Tr. 2894-2895).

Schein's Response:

The asserted fact is vague, irrelevant, and unsupported. Dr. Marshall did not establish that there was “[l]ess bidding pressure in the full-service dental supply distribution market.” For instance, his analysis says nothing about whether more distributors *would have* bid on the 38 buying groups he lists in his report. (CX 7100-209-13). Moreover, Dr. Marshall did not study what prices “would have” been in a but-for world. (See, e.g., Marshall, Tr. 3026, 3056 [REDACTED] Carlton, Tr. 5394-95).

Patterson's Response:

This Proposed Finding of Fact disregards this Court’s Order dated Feb. 21, 2019, which prohibits “cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents,” Order on Post-Trial Briefs, 3, as well as this Court’s admonition: “Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That’s what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I’m letting you know today so that you don’t think you’re going to question your experts about facts and rely on

that,” (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight.

Benco’s Response:

Complaint Counsel’s proposed finding is overly broad, inaccurate, and mischaracterizes the evidence.

Complaint Counsel presented no reliable evidence to establish that any of Respondents’ alleged actions resulted in less bidding pressure to supply independent dentists, including members buying groups. First, Dr. Marshall never identified harm to competition in any properly defined relevant product and geographic markets. (Marshall, Tr. 3406-3408; J. Johnson, Tr. 4867-4868; *see also* RRFF 1412).

Even if he had properly defined relevant markets, Dr. Marshall did not perform any proper analysis of the “bidding pressure” with respect to customers. Individual dentists are the customers that actually purchase and pay for dental supplies; buying groups are just intermediaries that don’t select, order, take delivery of, stockpile, use, or pay for anything. (Cavaretta, Tr. 5568-69; Cohen, Tr. 444-45, 861; Ryan, Tr. 1034-36; *see also* RX2928 (member “[p]urchases are made directly from the vendor”); Kojs Sr., Tr. 248-49; Kojs Jr., Tr. 312-13; Maurer, Tr. 4964-65). Dr. Marshall admitted that he did not perform any analysis of the extent to which Benco, Schein and Patterson competed for the business of individual dentists who were members of buying groups. (Marshall, Tr. 3411-3412).

Dr. Marshall admitted that he observed substantial competition for the business of individual dentists. (Marshall, Tr. 3412). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The data indicate that a

distributor that enters into an agreement with a buying group does not necessarily provide the lowest margins or the lowest prices to the members of that buying group, and one or more competing distributors may sell to members of the buying group at similar or lower margins and prices. (*See* RRFF 1412).

1414. If Respondents did not bid on a buying group, and there was no other full-service distributor option in the area to supply a buying group, the buying group would not get a benefit from lower prices. (Marshall, Tr. 2894, 2899).

Schein's Response:

The asserted fact is not supported by reliable evidence.

First, Dr. Marshall concedes that, if there is a regional full-service distributor that could supply some or all of a buying group's members, then there would be no anticompetitive effect. (*See* CX 7100-156, -165, -173, -184). Dr. Marshall further concludes that there are regional distributors throughout every region of the country. (CX 7101-142-43). Thus, there is no basis for any conclusion that buying group members were deprived of lower prices.

Second, Dr. Marshall's analyses do **not** show that buying groups benefit members. Dr. Marshall's own results reveal his failure to compare actual net prices. Instead, they at most reveal that dentists sometimes switch primary distributors, and distributors charge less to customers who purchase more. Figure 60 of Dr. Marshall's report shows that Burkhart was charging margins of [REDACTED] prior to its Kois contract, and then dropped those margins to [REDACTED]. (CX 7100-156). Schein's margins, however, were in the [REDACTED] range before and after Burkhart entered the Kois contract. (CX 7100-156). As such, the evidence does not support the contention that buying groups drive prices below prevailing market prices. Similarly, Dr. Marshall's 2012 Smile Source analysis shows that

(CX 7100-165 [REDACTED])

[REDACTED]). Again, this does not show that buying groups cause prices to fall below prevailing market prices.

Likewise, when Schein signed the Smile Source contract in 2017, its margins in Dr. Marshall's sample went from [REDACTED] to [REDACTED] and its share went from [REDACTED] to [REDACTED]. (CX 7100-184). [REDACTED] its margins in the sample before Schein's Smile Source contract were [REDACTED] and [REDACTED] after. Its share went from [REDACTED] to [REDACTED]. This indicates that dentists are simply switching primary distributors from Patterson to Schein, but generally paying the same overall net prices. Both before and after the Smile Source contract, they paid around a [REDACTED] margin to their primary distributor, and around a [REDACTED] margin to their secondary distributor. The data is thus consistent with the buying group contracts not lowering overall prices to dentists, but simply causing some dentists to switch their primary distribution relationship. The fact that in both Dr. Marshall's Schein-Smile Source and Burkhart-Kois analyses, the designated distributor's margins pre-contract are [REDACTED] [REDACTED] suggests that the shift in margins is nothing but sample bias. (CX7100-156, -184).¹⁹

¹⁹ The lack of customer impact can be seen from the following hypothetical. Take two distributors, Distributor A and Distributor B. Assume dentists choose one as primary and the other as secondary, they purchase 75% of their supplies from the primary and 25% from the secondary, and distributors charge their primary customers a 20% margin and their secondary customers a 25% margin. In that case, each customer pays a net blended margin of 21.25%. Now, suppose Distributor A enters into a buying group contract in which it offers customers a 20% margin, *i.e.*, the same as it charges its primary customers. Customers that were using Distributor A as primary have no incentive to join the buying group, since they were already receiving the 20% margin. Customers that were using Distributor A as secondary, however, might want to switch it to primary, in which case, for those customers, Distributor A becomes

Third, Dr. Marshall did not analyze what happens to prices if an online distributor supplies a buying group. Notably, Darby successfully competed against Schein for Smile Source, and supplied a number of other buying groups. (SF 76, 1164). Dr. Marshall's profitability analyses – from which his anticompetitive effects analysis is derived – failed to include sales or prices offered by Darby, even though Darby beat Schein for the 2014 Smile Source contract. (SRF 1525, 1544; SF 1164-67).

Fourth, Dr. Marshall's analysis suffers from self-selection bias, as it only looks at dentists who switched to Burkhart or Atlanta Dental. Obviously, customers who could have joined the group, or could have switched to Burkhart or Atlanta Dental, but did not, are excluded from the analysis. Moreover, it is likely that only those dentists most likely to experience a price difference would have switched, and thus, the analysis does not consider the effect on the full universe of actual and potential Smile Source or Kois members.

Patterson's Response:

Patterson joins the responses of Schein and Benco. Additionally, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition:

primary and Distributor B becomes secondary. Thus, customers continue to pay a net blended margin of 21.25%, since they are just switching the names of their primary and secondary distributors. Under Dr. Marshall's methodology to identify the relevant sample, however, he would only consider the customers that actually switched primary distributors from Distributor B to Distributor A. Distributor A would increase share, and its margins would decline (reflecting the shift in status from secondary to primary), while the reverse is true for Distributor B. But the net blended margins the customer pays remains the same. This dynamic is why, in the 2104 Burkhart-Kois, the 2012 Smile Source-Burkhart analysis, and the 2017 Schein-Smile Source analyses, the designated distributor's pre-buying group margins exceed the margins of the other distributors (secondary status), but its post-buying group margins fall back in line with the others (primary status). And, it is why Patterson's post-2017 Smile Source margins increase (secondary status). Put simply, it reflects a switch in primary/secondary suppliers among a limited sample of customers, not changes in net margins.

“Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That’s what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I’m letting you know today so that you don’t think you’re going to question your experts about facts and rely on that,” (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight.

Benco’s Response:

Complaint Counsel’s proposed finding is overly broad, inaccurate, misleading, and mischaracterizes the evidence.

Whether a buying group would get the benefit of lower prices is irrelevant, because buying groups are not customers; buying groups are intermediaries that don’t select, order, take delivery of, stockpile, use, or pay for anything. (Cavaretta, Tr. 5568-69; Cohen, Tr. 444-45, 861; Ryan, Tr. 1034-36; *see also* RX2928 (member “[p]urchases are made directly from the vendor”); Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65). The issue is whether individual dentists, including members of buying groups, would get the benefit of competitive prices. And Dr. Marshall admitted that he did not perform any analysis of the extent to which Benco, Schein and Patterson competed for the business of individual dentists who were members of buying groups. (Marshall, Tr. 3411-3412).

Dr. Marshall admitted that he observed substantial competition for the business of individual dentists. (Marshall, Tr. 3412).

The data indicate that a distributor that enters into an agreement with a buying group does not necessarily provide the lowest margins or the lowest prices to the members of that buying group, and one or more competing distributors may sell to members of the buying group at similar or lower margins and prices. For example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1415. During the relevant period, most independent dentists paid catalog prices for their dental supplies. (Cohen, Tr. 414, 422 (explaining that Benco Tier 1 pricing is catalogue pricing, and that the “lion’s share” of independent dentists pay Tier 1 catalogue prices); [REDACTED] CX0301 (Cohen, IHT at 78); CX3241; Rogan, Tr. 3625-3627, 3667-3669 (referencing CX3241 and explaining that the majority of Patterson’s customers were paying catalogue prices during the relevant period and that discounts were flat during that time)).

Schein’s Response:

False. Dr. Marshall showed the opposite. Dr. Marshall’s analysis shows less than [REDACTED] of Schein’s independent dentist customers paid catalog price in 2013. (CX 7101-067 (Fig. 7)). Complaint Counsel’s overbroad claim about “most independent dentists” clearly does not apply to Schein customers. Indeed, Complaint Counsel does not cite any Schein testimony or documents in support of this proposed finding.

Patterson’s Response:

This Proposed Finding of Fact is overly broad and inaccurate as to Patterson. First, CX3241 is limited to sundries and measures purchases, not customers. Additionally, CX3241 includes a comment on its face that “[t]he amount of discounted business has increased 3.5x in the past 8 years.” That timeframe, of course, encompasses the alleged conspiracy period. In fact, CX3241 shows that during Complaint Counsel’s alleged conspiracy period, Patterson’s discounts increased both on an overall percentage basis and as a percentage of sales. (CX3241 at 2). Patterson’s margins on merchandise also declined during Complaint Counsel’s alleged conspiracy period. (CX3241 at 2).

And Mr. Rogan’s cited trial testimony discussing CX3241 also discusses the discounts on discounts on discounts that Patterson provided its customers in its daily efforts to compete tooth and nail with Benco, Schein, and other distributors for customers during the alleged conspiracy. (Rogan, Tr. 3625 (“Q. Mr. Rogan, am I right that this period that’s

depicted on here, this period from January '14 through all of 2014 and into 2015, that's during the period the Government alleges you were involved in a conspiracy with Benco and Schein? Do I have that right? A. Yes. Q. But you were -- nonetheless, your sales folks were giving 500, 1480, 603, 970, 1482 blanket discounts to customers every single month during that period? A. Yes. Q. And that's different than all the customer acquisition programs we just talked about. A. That's totally different, yes. Q. And that's different than the overrides we talked about. A. Ah, that's -- that's correct. Q. These are all discounts on discounts on discounts, thousands of them, month-in, month-out, that customers were getting during the supposed conspiracy period? A. Yes.”); Rogan Tr. 3629 (“Q. Does this mean, though, Mr. Rogan, that during the alleged conspiracy period, prices continued to degrade? A. Yes. Q. Continuing an eight-year trend of degrading, getting lower? A. Yes. Q. And roughly, if I'm reading it right, in March of '15, roughly 20 percent of all your sundry sales were sold by some sort of manual discount? A. In -- when -- in -- Q. In March of 2015, roughly 20 percent – 18 percent it says down there in the last line -- A. Yeah. Q. -- were sold at a manual discount to the list price? A. Meaning someone changed the list price, yes. Q. And then another roughly 30 percent were sold at a blanket discount, using that price change form. Is that fair? A. Yes. So that's almost half of all of our stuff. Q. And this doesn't even take into account the annual or twice yearly customer acquisition programs like Accelerator that you also mentioned? A. Correct.”); *see also* Misiak, Tr. 1472) (Patterson representatives regularly requested and obtained approval to give blanket discounts every day)). Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding – as it allegedly pertains to Benco – is unequivocally false, distorts the cited testimony, and has no evidentiary support in the

record at all. To the extent that Complaint Counsel's proposed finding pertains to Patterson, Benco has no specific response.

First, there is no evidentiary support at all in the record for the statement that "most independent dentists paid catalog prices for their dental supplies." (emphasis added). Complaint Counsel, during her examination of Cohen on pricing, did not even ask about the number of dentists that "paid" Tier 1 pricing (i.e., catalog price). (Cohen, Tr. 413-24). Instead, her questions asked about the number or percentages of independent dentists "at" or "on" Tier 1 pricing. (Cohen, Tr. 413-24 ("the lion's share is at Tier 1 pricing" (at 418); "the lion's share of your independent dentist customers are at Tier 1" (at 418); "sales to independent dentists are at Tier 1" (at 419); "sales to independent dentists are at Tier 1 pricing" (at 420); "customers are on Tier 1" (at 422); "customers are on Tier 1" (at 422)).

Chuck 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 Hug Pricing philosophy and Fair and Flexible pricing strategy, labels and generalizations regarding the prices paid by independent dentists to Benco for dental supplies are meaningless. (BFF ¶ 150). To

ultimately determine the level of discount that an independent dentist receives from Benco, you would need to look directly at Benco's transactional-level data for that particular dentist and then account for, at least, the following factors: Price Tier, product mix, purchase history, purchase volume, BluChips earned, free goods rules, and territory representative discounts. (Cohen, Tr. 653-58; 661-62).

Because Benco competes by employing a multi-factor discounting strategy, there is a significant difference between the number of customers that are "at" Tier 1 or "on" Tier 1 pricing versus customers that actually "paid" Tier 1 pricing. (BFF ¶¶ 121-157). The only way to determine the prices actually paid by independent dentists – whether on Tier 1, Tier 2, Tier 4, or Tier 6 – would be to look at Benco's transactional data. (BFF ¶ 150). Complaint Counsel never did so. But, more egregiously, Complaint Counsel never even asked Cohen that specific question during trial. (Cohen, Tr. 413-24). Therefore, the first sentence in Complaint Counsel's proposed finding lacks evidentiary support and should be disregarded by the court.

Second, Complaint Counsel in the proposed finding attempts to support its unsupportable statement by misquoting the trial transcript and omitting Cohen's entire explanation, which contradicts the substance of the proposed finding. Complaint Counsel has actually quoted from Complaint Counsel's question and mislabeled it as Cohen "explaining." It was Complaint Counsel, not Cohen, who used the phrase "lion's share." (Cohen, Tr. 418).

C. Dr. Marshall's Empirical Work Shows Harm To Competition.

1416. [REDACTED]

Schein's Response:

Dr. Marshall did not do empirical work on the question of anticompetitive harm. He cites entirely to his profitability analyses as his purported “empirical work” on the question. (CX 7100-208). But it is undisputed that none of his analyses studied the but-for world. (E.g., Marshall, Tr. 3026, 3056 [REDACTED]; Carlton, Tr. 5394-95). Consequently, Dr. Marshall has no empirical analysis, and thus no idea, of whether prices would be lower, higher, or any different at all in the alleged but-for world.

Dr. Marshall's opinion on anticompetitive effects relies on his studies of just two atypical buying groups, Smile Source and the Kois Buyers Group, and a list of 36 other buying groups that Dr. Marshall did not analyze. (CX 7100-208-13; SF 1757-71). A study of a subset of customers from just two buying groups cannot establish that prices in the relevant market were inflated.

Dr. Marshall's Smile Source and Kois Buyers Group analyses are further flawed in that they do not show how prices or profitability were affected in any relevant market. They simply compare prices in the actual world from before and after Smile Source or Kois awarded contracts to Burkhart or Atlanta Dental. Additionally, Dr. Marshall made no attempt to account for any portion of the royalties that members pay to Smile Source or the fees paid to Kois. (CX 7100-208). Those royalties and fees would be avoided if the members were not part of a buying group, so Dr. Marshall's analysis fails to show changes in *net* prices to any single dentist (particularly as dentists purchase from more than one supplier), let alone how average prices among all relevant dentists within a specific local market changed. (Marshall, Tr. 3136-37).

Patterson's Response:

For clarification, the cited trial testimony and the sole two cited paragraphs of Dr. Marshall's report address only Dr. Marshall's case study of the Schein-Smile Source relationship in 2012, prior to when Complaint Counsel contends Patterson joined the alleged Benco-Schein conspiracy. As Dr. Marshall conceded, this case study cannot speak to Patterson's conduct. Marshall, Tr. 3211 ("Q. It has nothing to do, Dr. Marshall, nothing to do with whether Patterson acted contrary to its self-interest starting in February 2013, does it? A. It doesn't speak to February 2013.")). Dr. Marshall also conceded at trial that the empirical work he did was not supported by any peer-reviewed, academic study. Marshall, Tr. 3241 ("Q. I don't see a single academic, peer-reviewed study that you cited in there endorsing the type of analysis you did of .0003 dentists and .0003 or 4 lost profits. Am I right? No academic study cited there? A. I don't know. I don't think so. I mean, I studied every dentist that was available to study in terms of these buying groups.")).

Moreover, Dr. Marshall's "empirical work" in this case consisted of five case studies, of which only three address time frames during which Complaint Counsel alleges Patterson was part of the alleged Benco-Schein conspiracy, and in which three combined Dr. Marshall studied only "a small fraction" of dentists – three-tenths of 1 percent or three one-thousandths of independent dentists. (Marshall, Tr. 3219 ("A small fraction, yes. Uh-huh.")). Dr. Marshall did not demonstrate that his study of a tiny fraction of dentists is statistically significant (Marshall, Tr. 3220-21) and so cannot show that his case studies are representative. As Dr. Wu testified, Dr. Marshall's conclusions are not economically reliable (Wu, Tr. 5036-37 ("Q. Dr. Wu, did you find Dr. Marshall's conclusions to be economically reliable? A. My conclusions are that Dr. Marshall's conclusions are not

economically reliable.”)), because his opinion relies on a number of presumptions and suffers from methodological flaws. Otherwise, Patterson has no specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is misleading.

[REDACTED]

[REDACTED]

[REDACTED]

No meaningful conclusions can be drawn from such limited data. Dr. Marshall admitted that he did not perform any analysis of the extent to which Benco, Schein and Patterson competed for the business of individual dentists who were members of buying groups. (Marshall, Tr. 3411-3412).

1417. Dr. Marshall examined whether buying group members benefited by paying lower prices for their dental supply purchases after a distributor signed up with a buying group. (Marshall, Tr. 2861; CX7100 at 150 (¶351) (Marshall Expert Report)).

Schein’s Response:

False. Dr. Marshall did not compare the prices any particular dentist paid as part of the Kois Buyers Group or Smile Source (the only two groups he studied) with what they would have paid outside of the buying group. *First*, he admitted he did not conduct any such but-for analysis. (*E.g.*, Marshall, Tr. 3026, 3056 [REDACTED]). Instead, he simply compared prices before and after Smile Source and Kois selected a distributor. *Second*, Dr. Marshall did not account for the fees and royalties Smile Source and Kois members paid, and so made no assessment of any difference in *net* prices paid. (*See* SF 117-19, 854; Goldsmith, Tr. 1971-72, 2055, 2073; Kois Sr., Tr. 239). *Third*, because dentists purchase from more than one supplier, Dr. Marshall’s analysis further fails

to study net prices by failing to study the overall or average price paid by any single dentist. (Marshall, Tr. 3136-37). *Fourth*, Dr. Marshall did not analyze any differences in price in any relevant local or regional market.

Patterson's Response:

This Proposed Finding of Fact is overly broad. For clarification, Dr. Marshall testified, and his report notes that he examined "the issue of was it profitable for the respondents in this matter and others to -- other distributors -- to bid for and obtain the business of buying groups and was it unprofitable for them not to bid for the business of buying groups. And in addition, I was able to take a look at what prices buying group dentists received after that -- a distributor had signed up with a buying group." (Marshall, Tr. 2861; CX7100 at 150 (¶351)). In his five case studies, Dr. Marshall examined the purchases of only two buying groups, which Dr. Marshall conceded were unlike any of the buying groups he opines were harmed by the alleged conspiracy. (CX7100 at 150 (¶351); Marshall, Tr. 3246-47, 3256). Additionally, Dr. Marshall studied the sales of three distributors that are unlike Patterson, something which Dr. Wu concluded was economically improper. (Wu, Tr. 5038 ("But Dr. Marshall has not shown that the economics of those three distributors line up with the economics of Patterson, so I don't think it makes economic sense to conclude that we can infer that it also would have been profitable for Patterson to work with buying groups.")). From his case studies studying a fraction of a fraction of dentists, Dr. Marshall opined that Patterson acted contrary to its economic self-interest by choosing to forego a tiny, tiny fraction of Patterson's overall revenue. (Marshall, Tr. 3228, 3231, 3236-38), something which Dr. Wu found was also economically improper (Wu, Tr. 5050). Dr. Wu testified that Dr. Marshall's conclusions are not economically reliable. (Wu, Tr. 5036-37 ("Q. Dr. Wu, did you find Dr. Marshall's

conclusions to be economically reliable? A. My conclusions are that Dr. Marshall's conclusions are not economically reliable.")). Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is overly broad, inaccurate, and mischaracterizes the evidence. Dr. Marshall examined five limited instances, involving only a tiny fraction of the overall population of dentists, in which one of three particular distributors, none of which is representative of Benco, entered into an agreement with one of two particular buying groups, neither of which is representative of buying groups in general. (See BFF 1026-1028, 1037-1057, 1060-1079; [REDACTED] [REDACTED]). Dr. Marshall's studies involved multiple other flaws that render them unreliable. (BFF 1080-1084, 1091-1100, 1126-1151, 1153, 1158, 1163-1185; [REDACTED]

1418. [REDACTED]

Schein's Response:

As noted in SRF 1417, which Schein incorporates here, comparing a dentist's prices to a single distributor before and after that distributor signs with a buying group fails to illuminate the relevant question. Dr. Marshall performed no but-for or net price analysis

across all dentists in any relevant market that would be pertinent to alleged anticompetitive effects. (SRF 1417; SF 1661, 1751-17, 1757-1761).

Patterson's Response:

This Proposed Finding of Fact is overly broad and inaccurate. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Otherwise,

Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is overly broad, inaccurate, and mischaracterizes the evidence.

Dr. Marshall examined five limited instances, involving only a tiny fraction of the overall population of dentists, in which one of three particular distributors, none of which is representative of Benco, entered into an agreement with one of two particular buying groups, neither of which is representative of buying groups in general. (See BFF 1026-1028, 1037-1057, 1060-1079; [REDACTED]). Dr. Marshall's studies involved multiple other flaws that render them unreliable. (BFF 1080-1084, 1091-1100, 1126-1151, 1153, 1158, 1163-1185; [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

1419. *Schein's Response:*

False, for many reasons. (See SRF 1417; SF 1757-61).

First, Dr. Marshall studied only the Kois Buyers Group and Smile Source. (Marshall, Tr. 2972-73). He did not study, however, whether Kois and Smile Source are actually representative of all other buying groups. They are not. As the evidence shows, each buying group is different, “like a jar of jellybeans[,] [t]hey each taste[] differently.” (CX 8004 (McFadden, Dep. at 119-20); *see also* SF 40-76). There are various different buying group structures and models. (SF 40-76). Some require a fee (or a percent of gross); some require various levels of purchasing commitments; etc. (CX 2835-008; Steck, Tr. 3746-48). Recognizing this, Dr. Marshall conceded that each buying group must “be studied each time by itself.” (Marshall, Tr. 3003). Kois described itself as “profoundly different” and “not a standard buying group.” (RX 2197-004 (emphasis omitted)). And unlike most other buying groups, Smile Source is a franchise. (Goldsmith, Tr. 2040-42; RX 0290).

Second, Dr. Marshall's analysis does not show how *net* prices to a single dentist may have changed (since most dentists purchase from more than one supplier), let alone how average prices among all relevant dentists within a specific relevant market have changed. (Marshall, Tr. 3136-37).

Third, Dr. Marshall did not account for the fees and royalties Smile Source and Kois members paid, and so made no assessment of any difference in *net* prices paid. (See SF 117-19, 854; Goldsmith, Tr. 1971-72, 2055, 2073; Kois Sr., Tr. 239).

Fourth, Dr. Marshall did not compare the prices any particular dentist paid with what they would have paid outside of a buying group. He admits he did not conduct any such but-for analysis. (*E.g.*, Marshall, Tr. 3026, 3056 [REDACTED]). Instead, he simply compared prices before and after Smile Source and Kois selected a distributor.

Fifth, the proposed finding ignores the fact that when Schein discontinued business with the Dental Co-Op of Utah, it continued to offer members the *same* prices that it had offered under the buying group agreement. (SF 618, 622-24). Dr. Marshall, however, did not do an empirical analysis of the Dental Co-Op.

Patterson's Response:

Patterson joins the responses of Schein and Benco. With regard to statements that the results of Marshall's data experiments substantiate Complaint Counsel's claims that buying groups decrease the price paid by their member dentists for dental products, and member dentists paid higher prices for dental products when one of Respondents discontinued discounts to its buying group, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr.

25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is overly broad, inaccurate, and mischaracterizes the evidence.

Complaint Counsel cites to sections of Dr. Marshall's report that claim to support a proposition far different from that asserted by Complaint Counsel. The cited sections of Dr. Marshall's report purport to show that "Respondents failed to pursue unilaterally profitable dental buying group opportunities," and have nothing to do with whether "buying groups decrease the price paid by their member dentists for dental products" or whether "member dentists paid higher prices for dental products when one of Respondents discontinued discounts to its buying group." (See CX7100 at 150, Heading V.D).

In any event, Dr. Marshall's studies were too limited and too flawed to reliably support Complaint Counsel's assertions. Dr. Marshall examined five limited instances, involving only a tiny fraction of the overall population of dentists, in which one of three particular distributors, none of which is representative of Benco, entered into an agreement with one of two particular buying groups, neither of which is representative of buying groups in general. (See BFF 1026-1028, 1037-1057, 1060-1079; [REDACTED] [REDACTED]. Dr. Marshall's studies involved multiple other flaws that render them unreliable. (BFF 1080-1084, 1091-1100, 1126-1151, 1153, 1158, 1163-1185; [REDACTED]

Furthermore, Dr. Marshall's own data demonstrate that buying groups do not necessarily decrease the price paid by their member dentists for dental products. For

example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1420. [REDACTED]

Schein's Response:

No response.

Patterson's Response:

This Proposed Finding of Fact is vague in that it does not specify the timeframe applicable for Dr. Marshall's case studies of [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The Proposed Finding of Fact is also inaccurate [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Additionally, the trial testimony cited is misleading: it presents incomplete portions of Dr. Marshall's testimony and those portions of his testimony only reference Dr. Marshall's case study of Kois members who made purchases from Burkhart and case study of Smile Source members who made purchases from Atlanta Dental; it does not speak to Dr. Marshall's two case studies with respect to Smile Source member purchases from Schein. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading.

Dr. Marshall examined five limited instances, involving only a tiny fraction of the overall population of dentists, in which one of three particular distributors, none of which is representative of Benco, entered into an agreement with one of two particular buying groups, neither of which is representative of buying groups in general. (See BFF 1026-1028, 1037-1057, 1060-1079; [REDACTED]). Dr. Marshall's studies involved multiple other flaws that render them unreliable. (BFF 1080-1084, 1091-1100, 1126-1151, 1153, 1158, 1163-1185; [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

1421. [REDACTED]
[REDACTED]

Schein's Response:

As noted in SRF 138, which Schein incorporates here, there is no evidence that buying groups actually save dentists money. Dr. Marshall's analysis does not fill the void.

Dr. Marshall did not compare the prices any particular dentist paid as part of the Kois Buyers Group or Smile Source (the only two groups he studied) with what they would have paid outside of the buying group. *First*, he admits he did not conduct any such but-for analysis. (E.g., Marshall, Tr. 3026, 3056 [REDACTED]). *Second*, Dr. Marshall did not account for the fees and royalties Smile Source and Kois members paid, and so made no assessment of any difference in *net* prices paid. (See SF 117-19, 854;

Goldsmith, Tr. 1971-72, 2055, 2073; Kois Sr., Tr. 239). *Third*, because dentists often purchase from more than one supplier, Dr. Marshall's analysis further fails to study net prices by failing to study the overall or average price paid by any single dentist. (Marshall, Tr. 3136-37). *Fourth*, Dr. Marshall did not analyze any differences in price in any relevant local or regional market.

Patterson's Response:

This Proposed Finding of Fact is overly broad and misleading in that it does not reflect that Dr. Marshall's [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED], this Proposed Finding of Fact disregards this Court's Order dated February 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25-26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is overly broad, inaccurate, and misleading.

Dr. Marshall examined five limited instances, involving only a tiny fraction of the overall population of dentists, in which one of three particular distributors, none of which is representative of Benco, entered into an agreement with one of two particular buying groups, neither of which is representative of buying groups in general. (*See* BFF 1026-1028, 1037-1057, 1060-1079; [REDACTED]). Dr. Marshall's studies involved multiple other flaws that render them unreliable. (BFF 1080-1084, 1091-1100, 1126-1151, 1153, 1158, 1163-1185; [REDACTED])

Furthermore, it is not correct that, [REDACTED]

1422. [REDACTED]

Schein's Response:

As noted, Dr. Marshall did not account for the royalties Smile Source members paid, and so made no assessment of any difference in *net* prices paid. (See SF 117-19, 854; Goldsmith, Tr. 1971-72, 2055, 2073; Kois Sr., Tr. 239). Accordingly, his 2012 Schein-Smile Source analysis does not show whether dentists actually saved any money by purchasing from Schein through Smile Source as opposed to outside of the buying group.

Moreover, Smile Source members could purchase from Burkhart beginning in 2012, and later from Darby, Atlanta Dental, or Nashville Dental as well. Thus, Smile Source members did not pay any higher prices as a result of Smile Source's decision to terminate Schein.

Patterson's Response:

With regard to the statement that [REDACTED]

[REDACTED], this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your

experts about facts and rely on that,” (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco’s Response:

Benco joins in the response of Schein.

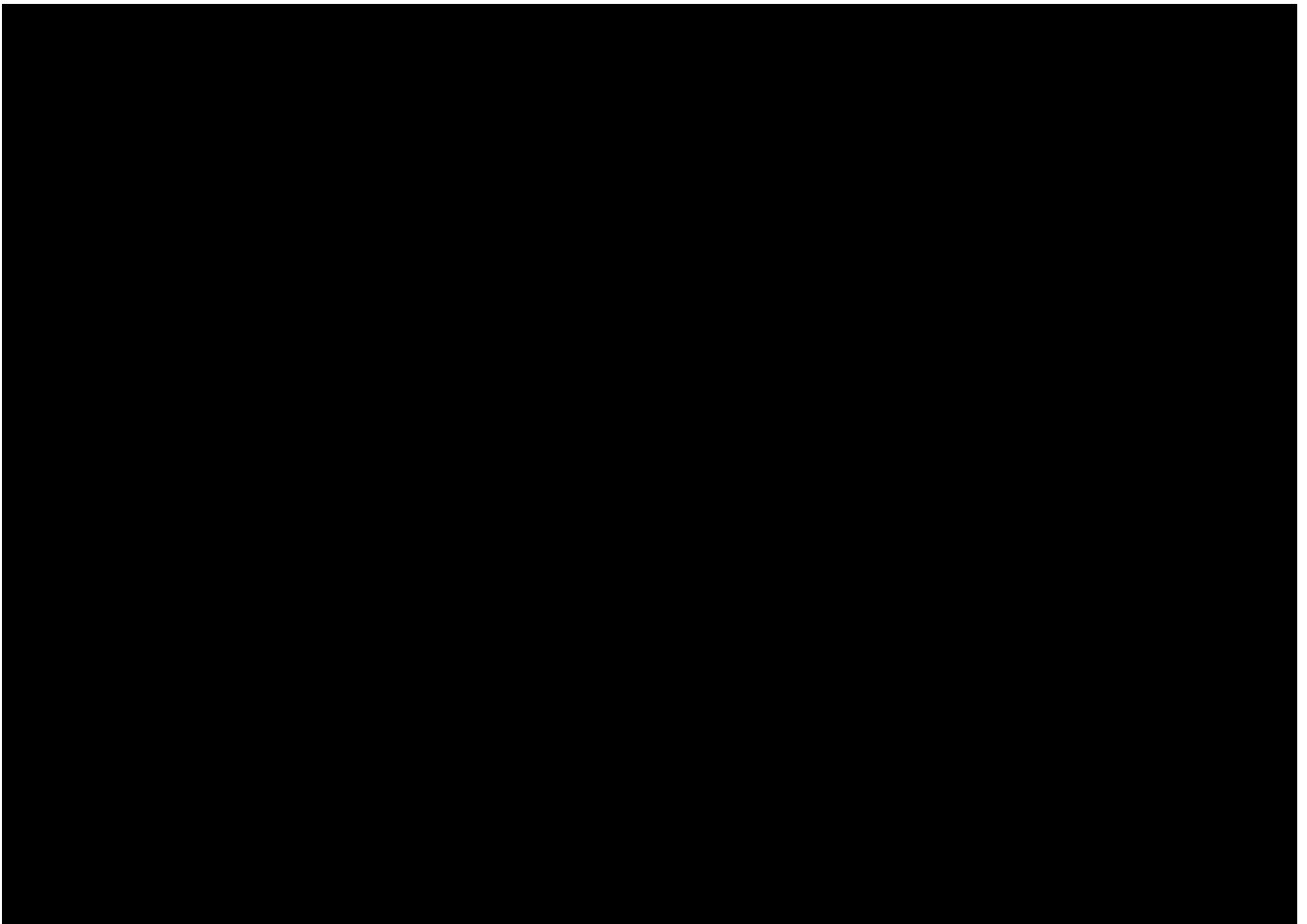
1. Prices And Margins Drop When Full-Service Distributors Discount To Buying Group Members Dentists.

1423. When a full-service distributor discounts to a buying group, prices and margins drop. (CCFF ¶¶ 1424-1433).

Schein’s Response:

Complaint Counsel cites no record evidence in support of the asserted fact and cites only to other proposed findings, which, as stated in Schein’s separate responses, also fail to support the asserted fact. (SRF 1424-33). Substantively, there is no evidence that buying groups save dentists money. (SRF 138; *see also* SF 115-19).

First, Dr. Marshall’s own analysis shows that independent dentists who are not part of a buying group can – and often do – receive substantial discounts. (CX 7101-067). As Dr. Marshall’s Figure 7 from his Rebuttal Report shows, over [REDACTED] of Schein’s independent dentists receive discounts exceeding [REDACTED], with over [REDACTED] receiving discounts exceeding [REDACTED] off of catalog prices. [REDACTED]



Dr. Marshall did not do any analysis to show how this distribution of discounts compares to the distribution of discounts available to Smile Source or Kois members, or to any other buying group members.

Second, Dr. Marshall's analysis does not show how *net* prices to a single dentist may have changed, for two reasons. Many dentists purchase from more than one supplier, and Dr. Marshall did not analyze how average prices among all relevant dentists within a specific geography or group changed. (Marshall, Tr. 3136-37). Nor did Dr. Marshall compare the average discounts buying group members receive with the average discounts non-buying group members receive.

Third, Dr. Marshall did not account for the royalties Smile Source members paid or the fees Kois members paid, and so made no assessment of any difference in *net* prices paid. (*See* SF 117-19, 854; Goldsmith, Tr. 1971-72, 2055, 2073; Kois Sr., Tr. 239).

Patterson's Response:

This Proposed Finding of Fact is overly broad and is vague in that it does not specify prices to whom drop and whose margins drop. The cited paragraphs address two specific buying groups and a specific distributor but do nothing to support this generalized broad Proposed Finding of Fact. This Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25-26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is overly broad, inaccurate, and mischaracterizes the evidence.

Complaint Counsel presented no reliable evidence to establish that when a full-service distributor discounts to a buying group, prices and margins drop. Individual dentists are the customers that actually purchase and pay for dental supplies; buying groups are just intermediaries that don't select, order, take delivery of, stockpile, use, or pay for

anything. (Cavaretta, Tr. 5568-69; Cohen, Tr. 444-45, 861; Ryan, Tr. 1034-36; *see also* RX2928 (member “[p]urchases are made directly from the vendor”); Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65). Dr. Marshall admitted that he did not perform any analysis of the extent to which Benco, Schein and Patterson competed for the business of individual dentists who were members of buying groups. (Marshall, Tr. 3411-3412). The data indicate that a distributor that enters into an agreement with a buying group does not necessarily provide the lowest margins or the lowest prices to the members of that buying group, and one or more competing distributors may sell to members of the buying group at similar or lower margins and prices. (*See* RRFF 1412).

1424. [REDACTED]

Schein’s Response:

As an initial matter, Dr. Marshall’s Smile Source and Kois Buyers Group analyses show only that Burkhart charged [REDACTED] prior to contracting with the buying group, and that, after contracting with the buying group, its margins [REDACTED] (CX 7100-156 [REDACTED])

In addition, there is no evidence buying groups actually save dentists money through discounts. (SRF 138; *see also* SF 115-19). Dr. Marshall’s analysis does not show how *net* prices to a single dentist may have changed, for two reasons. One, many dentists

purchase from more than one supplier, and Dr. Marshall did not analyze how average prices among all relevant dentists within a specific geography or group changed. (Marshall, Tr. 3136-37). Nor did Dr. Marshall compare the average discounts buying group members receive with the average discounts non-buying group members receive. Two, Dr. Marshall did not account for the royalties Smile Source members paid or the fees Kois members paid, and so made no assessment of any difference in *net* prices paid. (See SF 117-19, 854; Goldsmith, Tr. 1971-72, 2055, 2073; Kois Sr., Tr. 239).

Patterson's Response:

This Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is overly broad, misleading, and mischaracterizes the evidence.

Dr. Marshall's analyses were deeply flawed and, as a result, are unreliable. Dr. Marshall examined five limited instances, involving only a tiny fraction of the overall population of dentists, in which one of three particular distributors, none of which is

representative of Benco, entered into an agreement with one of two particular buying groups, neither of which is representative of buying groups in general. (See BFF 1026-1028, 1037-1057, 1060-1079; [REDACTED]). Dr. Marshall's studies involved multiple other flaws that render them unreliable. (BFF 1080-1084, 1091-1100, 1126-1151, 1153, 1158, 1163-1185; [REDACTED])

1425. [REDACTED]

Schein's Response:

Burkhart's margins decreased to bring its margins in line with Respondents' margins. As such, there is no analysis that shows that dentists who purchased from Respondents prior to joining the Kois Buyers Group and later switched to Burkhart saved *any* money or paid lower prices, even putting aside the substantial fees that members had to pay to Kois. For example, Burkhart earned [REDACTED] on sales through the Kois Buyers Group, and Schein earned [REDACTED] on sales to those same customers. (CX 7100-156). Since there is no evidence that the difference between [REDACTED] and [REDACTED] is statistically significant, there is no evidence that dentists would have saved any money by switching to Burkhart and away from Schein. As for cannibalized sales (*i.e.*, sales that Burkhart would

have made even absent its contract with Kois), Dr. Marshall failed to account for the fees that members paid to Kois.

With respect to the correlation between margins and price, Schein does not dispute there may be a correlation. However, the correlation is only valid if the analysis accounts for the middleman fees paid to the buying group. In that regard, fees paid by the distributor to the buying group reduce the distributor's margin, but do *not* reduce the prices paid by dentists. Similarly, fees paid by dentists to the buying group increase the effective price paid by the dentist, but do not reduce the distributor's margin. Dr. Marshall did not account for such fees when discussing the correlation between margins and pricing, and did not account at all for the substantial fees members paid to Smile Source and Kois.²⁰

Patterson's Response:

This Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on

²⁰ In a footnote, Dr. Marshall purports to adjust his numbers to account for the \$299 Kois membership fee. (CX 7100-158 n. 654 (noting that the net discount Burkhart offered to Kois members drops by about [REDACTED] if the \$299 is considered, from a [REDACTED]). But his charts and figures, on which Complaint Counsel relies, do *not* include such fees. Moreover, the \$299 fee is not accurate. Kois initially charged between \$2,400 and \$6,000 in fees to members, though it provided credit to those members when it discovered that the Kois Buyers' Group failed to deliver significant value to dentists, and was thus forced to drop its fee to \$299. (Kois Sr., Tr. 239-242). Because Dr. Marshall's supposedly purports to evaluate what Respondents' should have believed at the time of contracting (though it is all based on *post-hoc* data), the original membership fees should have been used.

that,” (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Additionally, Patterson notes that Complaint Counsel did not provide a citation to trial testimony of Dr. Marshall on this Proposed Finding of Fact. Otherwise, Patterson has no specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is misleading and mischaracterizes the evidence.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] It is impossible to draw general conclusions from such a small data set.

Dr. Marshall’s analysis was deeply flawed and, as a result, is unreliable. Burkhart was not representative of Benco or the other Respondents, and the Kois Buyers Group was not representative of buying groups in general. (*See* BFF 1037-1057, 1063-1079). Dr. Marshall’s study involved multiple other flaws that renders it unreliable. (BFF 1080-1084, 1091-1100, 1126-1151, 1153, 1158, 1163-1185; [REDACTED] [REDACTED]). Dr. Marshall’s study is not a reliable basis for drawing more general conclusions.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1426. Burkhart reduced its margins on dental supplies when it supplied the Kois Buyers Group, which translated into substantially lower prices for dentists. (Marshall, Tr. 2865-2866; *see also* [REDACTED])

Schein's Response:

The asserted fact is essentially the same as CCFF 1425, and Schein incorporates its answer to that proposed fact here. (SRF 1425)

In a nutshell, Burkhart's offer to Kois Buyers Group brought its margins in line with the Respondents' margins, which it charged to independent dentists, regardless of their membership in any buying group.

The reduction in Burkhart's margins is not necessarily correlated with reduced prices to members for two reasons. *First*, Dr. Marshall did not account for middleman fees paid by either the distributor or the member to Kois, either of which will break the correlation between the net price dentists pay and the margins distributors earn. *Second*, Dr. Marshall did not do a *net* analysis of members' total or average overall dental supply prices. For example, if a dentist switched from Schein to Burkhart, the difference in distributor margins is only [REDACTED] which has not been shown to be statistically significant, and in any event does not include the middleman fees paid to Kois. (CX 7100-156).

Patterson's Response:

[REDACTED]

[REDACTED]

[REDACTED] This Proposed Finding of Fact also disregards this Court’s Order dated February 21, 2019, which prohibits “cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents,” Order on Post-Trial Briefs, 3, as well as this Court’s admonition: “Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That’s what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I’m letting you know today so that you don’t think you’re going to question your experts about facts and rely on that,” (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is misleading and mischaracterizes the evidence.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] It is impossible to draw general conclusions from such a small data set.

Dr. Marshall’s analysis was deeply flawed and, as a result, is unreliable. Burkhart was not representative of Benco or the other Respondents, and the Kois Buyers Group was not representative of buying groups in general. (*See* BFF 1037-1057, 1063-1079). Dr. Marshall’s study involved multiple other flaws that renders it unreliable. (BFF 1080-1084,

1091-1100, 1126-1151, 1153, 1158, 1163-1185; [REDACTED]

[REDACTED]). Dr. Marshall's study is not a reliable basis for drawing more general conclusions.

1427. [REDACTED]

Schein's Response:

This proposed finding is essentially the same as CCFF 1426, and Schein incorporates its response to that proposed finding here. (SRF 1426). As noted, Burkhardt's pre-Kois margins were substantially higher than Respondents' margins, and the Kois contract merely brought Burkhardt's margins into line with Respondents'.

Patterson's Response:

[REDACTED], this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or

documents,” Order on Post-Trial Briefs, 3, as well as this Court’s admonition: “Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That’s what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I’m letting you know today so that you don’t think you’re going to question your experts about facts and rely on that,” (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Additionally, Patterson notes that Complaint Counsel did not provide a citation to trial testimony of Dr. Marshall on this Proposed Finding of Fact. Otherwise, Patterson has no specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is misleading. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] It is impossible to draw general conclusions from such a small data set.

Dr. Marshall’s analysis was deeply flawed and, as a result, is unreliable. Burkhart was not representative of Benco or the other Respondents, and the Kois Buyers Group was not representative of buying groups in general. (*See* BFF 1037-1057, 1063-1079). Dr. Marshall’s study involved multiple other flaws that renders it unreliable. (BFF 1080-1084, 1091-1100, 1126-1151, 1153, 1158, 1163-1185; [REDACTED] [REDACTED]). Dr. Marshall’s study is not a reliable basis for drawing more general conclusions.

[REDACTED]

[REDACTED]

1428. [REDACTED]

Schein's Response:

This proposed finding is essentially the same as CCFF 1426, and Schein incorporates its response to that proposed finding here. (SRF 1426).

The asserted fact is also not supported by the evidence. Dr. Marshall's conclusion is based on his construction of a Fisher price index. The Fisher price index, however, does not fully account for changes in the products dentists purchase. (SF 1650-51). Moreover, it is based solely on the prices paid to Burkhart. (CX 7100-159 (Fig. 62)). This does not say anything about whether members' overall cost of supplies decreased, since Burkhart was charging inflated prices relative to Respondents prior to entering into the Kois contract. (CX 7100-156 (Fig. 60)). Moreover, the chart does not include the membership fees that members paid to Kois.

Patterson's Response:

This Proposed Finding of Fact should read: [REDACTED]

[REDACTED] Additionally, this Proposed Finding of Fact disregards this Court's Order dated February 21, 2019, which prohibits "cit[ing] to expert testimony to support factual

propositions that should be established by fact witnesses or documents,” Order on Post-Trial Briefs, 3, as well as this Court’s admonition: “Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That’s what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I’m letting you know today so that you don’t think you’re going to question your experts about facts and rely on that,” (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Patterson also notes that Complaint Counsel did not provide a citation to trial testimony of Dr. Marshall on this Proposed Finding of Fact. Otherwise, Patterson has no specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is misleading. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] It is impossible to draw general conclusions from such a small data set.

Dr. Marshall’s analysis was deeply flawed and, as a result, is unreliable. Burkhart was not representative of Benco or the other Respondents, and the Kois Buyers Group was not representative of buying groups in general. (*See* BFF 1037-1057, 1063-1079). Dr. Marshall’s study involved multiple other flaws that renders it unreliable. (BFF 1080-1084, 1091-1100, 1126-1151, 1153, 1158, 1163-1185; [REDACTED] [REDACTED]). Dr. Marshall’s study is not a reliable basis for drawing more general conclusions.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1429. [REDACTED]

Schein's Response:

False.

There is an inconsistency between Figure 59 and Figure 60. (See CX 7100-155-56). Figure 60 shows that (i) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CX 7100-156). Figure 59 does not show Burkhart's [REDACTED]

[REDACTED] Dr. Marshall never explained the inconsistency between Figures 59 and 60.

Patterson's Response:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] this Proposed Finding of Fact disregards this Court’s Order dated February 21, 2019, which prohibits “cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents,” Order on Post-Trial Briefs, 3, as well as this Court’s admonition: “Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That’s what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I’m letting you know today so that you don’t think you’re going to question your experts about facts and rely on that,” (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is misleading. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] It is impossible to draw general conclusions from such a small data set.

Dr. Marshall’s analysis was deeply flawed and, as a result, is unreliable. Burkhart was not representative of Benco or the other Respondents, and the Kois Buyers Group was not representative of buying groups in general. (*See* BFF 1037-1057, 1063-1079). Dr. Marshall’s study involved multiple other flaws that renders it unreliable. (BFF 1080-1084, 1091-1100, 1126-1151, 1153, 1158, 1163-1185; [REDACTED])

Dr. Marshall's study is not a reliable basis for drawing more general conclusions.

1430. Similar to when Burkhart partnered with Kois, Smile Source member dentists got lower prices when Burkhart signed up to supply Smile Source, and Burkhart lowered its margins. (Marshall, Tr. 2869-2870; *see also* [REDACTED]).

Schein's Response:

False.

For the [REDACTED] customers that were members of Smile Source at the time Smile Source terminated Schein, Schein's margins were [REDACTED], and Burkhart's margins were [REDACTED]. (RX 3058). Thus, the switch to Burkhart increased the margins earned by the approved distributor, and according to Dr. Marshall's (flawed) logic based on the correlation between margins and prices, the prices increased to Smile Source members. (See Marshall, Tr. 2923). Moreover, the margins that Burkhart charged to Smile Source members after the contract [REDACTED] were essentially the same as the margins charged by the Respondents, and in fact were higher than both Patterson's and Benco's margins. (RX 3058).

Dr. Marshall's analysis based on the *post hoc* growth of Smile Source shows roughly the same thing. Smile Source margins paid to distributors increased from [REDACTED]

under Schein to [REDACTED] under Burkhart, and Burkhart's post contract margins [REDACTED] were [REDACTED] (CX 7100-165). Dr. Marshall has not shown that the difference between Burkhart's and Respondents' Smile Source margins are statistically significant. (See CX 7100-165). Moreover, Dr. Marshall's analysis confirms that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. (CX 7100-165).

In addition, the same defects that infect Dr. Marshall's Kois analysis also infect his Smile Source analysis, including that: (i) the analysis does not account for the substantial middleman fees paid to Smile Source; (ii) the analysis does not analyze net changes in dentists overall purchasing price or margin, but only focuses on Burkhart's margins/price; (iii) the analysis is subject to self-selection bias, because it is limited to customers that made the switch, and excludes all other members or potential members; and (iv) the analysis does not evaluate prices in any relevant market. (*E.g.*, SF 1661).

Patterson's Response:

This Proposed Finding of Fact is vague in that it does not specify "lower prices" as to compared to what. This Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm

letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25-26) (emphasis added).

Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, misleading, and mischaracterizes the evidence.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] It is impossible to draw general conclusions from such a small data set.

Dr. Marshall's analysis was deeply flawed and, as a result, is unreliable. Burkhart was not representative of Benco or the other Respondents, and Smile Source was not representative of buying groups in general. (See BFF 1037-1047, 1060-1079; [REDACTED] [REDACTED]). Dr. Marshall's studies involved multiple other flaws that render them unreliable. (BFF 1080-1084, 1091-1100, 1126-1151, 1153, 1158, 1163-1185; [REDACTED] [REDACTED]).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1431. Similar to when Burkhart partnered with Kois, distributor Atlanta Dental decreased its margins when it partnered with Smile Source because Atlanta Dental was offering lower prices to Smile Source member dentists. (Marshall, Tr. 2872; *see also* [REDACTED]).

Schein's Response:

Dr. Marshall's Atlanta Dental analysis is not reliable.

There are only [REDACTED] customers in the *entire* sample. (Marshall, Tr. 3115-16).

Additionally, Dr. Marshall did not identify how many of these customers Atlanta Dental

was actually selling to prior to signing up with Smile Source. Thus, Dr. Marshall's pre-Smile Source margin figure is meaningless, as is any comparison between Atlanta Dental's pre-Smile Source and post-Smile Source margins.

Moreover, Dr. Marshall cherry-picked the baseline year used to calculate Atlanta Dental's pre-Smile Source margins. He used 2012 as his baseline year, rather than looking at margins throughout the pre-Smile Source period of 2010-2012. (Marshall, Tr. 3112). This is significant for two reasons. First, it reduces the size of the sample (making it highly sensitive to outliers), as Dr. Marshall admitted when he chose to disregard the 2012 margin data for Schein. (Marshall, Tr. 3112-13; *see also* CX 7100-172 n.662). Second, it appears that 2012 may not have been a representative year. For example, Atlanta Dental's share of sales in 2010 was close to [REDACTED], but dropped to about [REDACTED] in 2012. (CX 7100-172 (Fig. 75)). As such, given the relationship between price/margin and sales volume, it would be inappropriate to use 2012 as the baseline year.

In addition, customers experienced a margin/price *increase* when Atlanta Dental signed up for Smile Source, and Dr. Marshall's analysis only shows the opposite because he used false data. Specifically, Schein's profit margins in 2012 were [REDACTED], not the [REDACTED] Dr. Marshall used to conduct his analysis. (CX 7100-172 n.662 [REDACTED]) As such, customers that switched from Schein to Atlanta Dental experienced a substantial price/margin increase, since Atlanta Dental's post-Smile Source margins were [REDACTED]. (CX 7100-173). Dr. Marshall's excuse for reaching a contrary conclusion – that Schein's 2012 margins are an outlier – just shows how unreliable an analysis based on just [REDACTED] dentists is.

Finally, the Atlanta Dental analysis is subject to the same flaws as the previous analyses, namely the failure to account for middleman fees, the failure to analyze dentists' total or average net prices/margins for all of their purchases, and the failure to analyze changes in price in any relevant market. The analysis is also subject to self-selection bias, because it is limited to customers that made the switch, and excludes all other Smile Source members or potential members.

Patterson's Response:

This Proposed Finding of Fact is vague in that it does not specify "lower prices" as to compared to what. This Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] It

is impossible to draw general conclusions from such a small data set.

Dr. Marshall's analysis was deeply flawed and, as a result, is unreliable. Atlanta Dental was not representative of Benco or the other Respondents, and Smile Source was not representative of buying groups in general. (See BFF 1037-1047, 1060-1070, 1075-1076; [REDACTED]). Dr. Marshall's studies involved multiple other flaws that render them unreliable. (BFF 1080-1084, 1091-1100, 1126-1151, 1153, 1158, 1163-1185; [REDACTED]). Dr. Marshall's study is not a reliable basis for drawing more general conclusions.

1432. Schein's transactional data show that when Schein resumed providing a discount to Smile Source members in March 2017, Smile Source members paid lower margin and prices. [REDACTED]

Schein's Response:

The asserted fact is not supported by the cited evidence.

According to Dr. Marshall's Figure 87, Schein's post-contract margins with Smile Source were roughly the same as Benco's pre-and-post contract margins, and Patterson's pre-contract margins. (CX 7100-184 [REDACTED])

Moreover, because Patterson's margins increased to [REDACTED] post-contract, many dentists paid more for supplies.

The fact that Schein's margins decreased for the dentists in the sample is simply due to self-selection bias. This is clear from the fact that, according to Dr. Marshall's analysis, Schein's margins prior contracting with Smile Source were [REDACTED] [REDACTED] the margins charged by Atlanta Dental, Benco, Burkhart, and Patterson. (CX 7100-184). After, contracting with Smile Source, Schein's margins were roughly the same as the other distributor's margins. This is the same dynamic common to Burkhart in the Kois and 2012 Smile Source analyses, demonstrating that most of the results are driven simply by self-selection bias.

Finally, Dr. Marshall's 2017 Smile Source analysis is subject to the same flaws as the previous analyses, namely the failure to account for middleman fees, the failure to analyze dentists' total or average net prices/margins for all of their purchases, and the failure to analyze changes in price in any relevant market. The analysis is also subject to self-selection bias, because it is limited to customers that made the switch, and excludes all other members or potential members.

Patterson's Response:

This Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know

today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Additionally, Patterson notes that Complaint Counsel did not provide a citation to trial testimony of Dr. Marshall on this Proposed Finding of Fact. Otherwise, Patterson has no specific response.

Benco's Response:

Benco joins in the response of Schein.

1433. [REDACTED]

Schein's Response:

False.

First, the margin comparison is meaningless because Dr. Marshall ignored the impact of Smile Source membership fees and thus failed to compare the actual net prices active and non-active Smile Source members paid. (Marshall, Tr. 3129). Non-member dentists do not have to pay [REDACTED] (SF 51, 117-19; Goldsmith, Tr. 1971-72, 2055-56, 2126, 2073).

Second, Dr. Marshall's own results reveal his failure to compare actual net prices. Instead, they at most reveal that dentists sometimes switch primary distributors, and distributors charge less to customers who purchase more. When Schein signed the Smile Source contract in 2017, its margins in Dr. Marshall's sample went from [REDACTED] to [REDACTED], and its share went from [REDACTED] to [REDACTED] (CX 7100-184). [REDACTED] its margins in the sample before Schein's Smile Source contract were [REDACTED] and [REDACTED] after. Its share went from [REDACTED] to [REDACTED]. This indicates that

dentists are simply switching primary distributors from Patterson to Schein, but generally paying the same overall net prices. Both before and after the Smile Source contract, they paid around a [REDACTED] margin to their primary distributor, and around a [REDACTED] margin to their secondary distributor. The data is thus consistent with the buying group contracts not lowering overall prices to dentists, but simply causing some dentists to switch their primary distribution relationship. The fact that in both Dr. Marshall's Schein-Smile Source and Burkhart-Kois analyses, the designated distributor's margins pre-contract are [REDACTED], suggests that the shift in margins is nothing but sample bias. (CX7100-156, -184).²¹

Third, the margin analysis is infected by self-selection bias. Figure 86 of Dr. Marshall's report compares the [REDACTED] Smile Source members that purchased from Schein in 2017 with a [REDACTED] of dentists who purchased from Schein in 2017 and were Smile Source members at some point previously but were not Smile Source members in 2017. (CX 7100-183). Dr. Marshall does not disclose in his report how many dentists are

²¹ The lack of customer impact can be seen from the following hypothetical. Take two distributors, Distributor A and Distributor B. Assume dentists choose one as primary and the other as secondary, they purchase 75% of their supplies from the primary and 25% from the secondary, and distributors charge their primary customers a 20% margin and their secondary customers a 25% margin. In that case, each customer pays a net blended margin of 21.25%. Now, suppose Distributor A enters into a buying group contract in which it offers customers a 20% margin, *i.e.*, the same as it charges its primary customers. Customers that were using Distributor A as primary have no incentive to join the buying group, since they were already receiving the 20% margin. Customers that were using Distributor A as secondary, however, might want to switch it to primary, in which case, for those customers, Distributor A becomes primary and Distributor B becomes secondary. Thus, customers continue to pay a net blended margin of 21.25%, since they are just switching the names of their primary and secondary distributors. Under Dr. Marshall's methodology to identify the relevant sample, however, he would only consider the customers that actually switched primary distributors from Distributor B to Distributor A. Distributor A would increase share, and its margins would decline (reflecting the shift is status from secondary to primary), while the reverse is true for Distributor B. But the net blended margins the customer pays remains the same. This dynamic is why, in the 2104 Burkhart-Kois, the 2012 Smile Source-Burkhart analysis, and the 2017 Schein-Smile Source analyses, the designated distributor's pre-buying group margins exceed the margins of the other distributors (secondary status), but its post-buying group margins fall back in line with the others (primary status). And, it is why Patterson's post-2017 Smile Source margins increase (secondary status). Put simply, it reflects a switch in primary/secondary suppliers among a limited sample of customers, not changes in net margins.

in this [REDACTED] and thus, it is not clear if the difference is statistically significant. Moreover, because the sample is limited to Smile Source current and former members, it says nothing about Schein's margins to independent dentists generally.

The biased nature of the sample is further illustrated by the fact that [REDACTED]

[REDACTED] suggesting that the margins that Schein made available to dentists generally – as opposed to the limited, biased sample Dr. Marshall uses – were the same as its post-contract margins to Smile Source members. (CX 7100-184 (Fig. 87)).

Patterson's Response:

[REDACTED] this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Additionally, Patterson notes that Complaint Counsel did not provide a citation to trial testimony of Dr. Marshall on this Proposed Finding of Fact. Otherwise, Patterson has no specific response.

Benco's Response:

Benco joins in the response of Schein.

2. Prices And Margins Increase When Full-Service Distributors Do Not Work With Buying Groups.

1434. [REDACTED]

Schein's Response:

The asserted fact is not supported by the cited evidence.

Figure 83, which is an extract from the green line in Figure 68, is incorrect, as it does *not* measure the margins (or prices) that Schein charged to Smile Source members before and after its termination. Dr. Marshall used a back-casting method, in which he looked at Smile Source members that ultimately purchased from Burkhart after Burkhart won the contract, some of whom may not have even been members when Schein had the Smile Source contract, and others of whom Schein never sold to. (See CX 7100-165, -180). Likewise, the green line includes customers that Schein may have sold to when it had the contract, and never sold another item to again. This is significant because Smile Source only had [REDACTED] dentists when Schein supplied Smile Source, but the green line Dr. Marshall uses in his Figures 68 and 83 includes data from [REDACTED] dentists. (CX 7100-165, -180). Thus, Dr. Marshall is comparing apples to oranges, and is not analyzing the “prices that dentists paid to a distributor for dental supplies” before and after the “distributor stopped working with a buying group.”

Moreover, Dr. Marshall's analysis is unreliable because it is based solely on Smile Source. But there are other buying groups Schein stopped working with for various reasons, including Steadfast Dental and the Dental Co-Op, for which a before-and-after analysis could be performed. (See also SF 1627, CX 7101-140 (chart identifying 8 buying

groups, in addition to Smile Source, for which a before and after analysis could be performed)). Dr. Marshall declined to analyze any of them.

The asserted fact is also unsupported because Dr. Marshall did not do any comparison of actual net prices paid by dentists because he failed to account for the fees and royalties Smile Source and Kois members paid. (*See* SF 117-19, 854).

Patterson's Response:

This Proposed Finding of Fact disregards this Court's Order dated February 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25-26) (emphasis added). Thus, it is entitled to no weight. Additionally, Patterson notes that Complaint Counsel did not provide a citation to trial testimony of Dr. Marshall on this Proposed Finding of Fact. Otherwise, Patterson has no specific response.

Benco's Response:

Benco joins in the response of Schein.

1435. In Dr. Marshall's Schein-Smile Source 2012 data analyses, Dr. Marshall examined the pricing impact on the dentists supplied by Schein during Schein's pre-2012 partnership with Smile Source and after Schein's relationship with Smile Source ended. (Marshall, Tr. 2873; *see also* [REDACTED]).

Schein's Response:

False.

The asserted fact is substantially similar to CCFF 1434, and Schein incorporates its answer to that proposed fact here.

In addition, Dr. Marshall did not analyze the *impact* on dentists. Dr. Marshall's analysis does not show how *net* prices to a single dentist may have changed for two reasons. One, many dentists purchase from more than one supplier, and Dr. Marshall did not analyze how average prices among all relevant dentists within a specific geography or group changed. (Marshall, Tr. 3136-37). Nor did Dr. Marshall compare the average discounts buying group members receive with the average discounts non-buying group members receive. Two, Dr. Marshall did not account for the royalties Smile Source members paid, and so made no assessment of any difference in actual *net* prices. (See SF 117-19, 854; Goldsmith, Tr. 1971-72, 2055, 2073; Kois Sr., Tr. 239). A simple price comparison does nothing to compare the actual *impact* of Smile Source's decision to fire Schein.

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

Benco joins in the response of Schein.

1436. In Dr. Marshall's Schein-Smile Source 2012 data analyses, Dr. Marshall found that the prices that these dentists supplied by Schein were paying for Schein products increased after Schein ended its relationship with Smile Source. (Marshall, Tr. 2873; *see also* [REDACTED]).

Schein's Response:

This is essentially the same assertion made in CCFF 1434-1435, and Schein incorporates its responses to those proposed findings here. As explained, Dr. Marshall's price comparisons do nothing to show the actual impact of Smile Source's decision to terminate Schein.

Patterson's Response:

With regard to the statement that the prices that these dentists supplied by Schein were paying for Schein products increased after Schein ended its relationship with Smile Source, this Proposed Finding of Fact disregards this Court's Order dated February 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25-26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Benco joins in the response of Schein.

1437. [REDACTED]

Schein's Response:

Not true. This is essentially the same assertion made in CCFF 1434-1436, and Schein incorporates its responses to those proposed findings here. (SRF 1434-36).

In a nutshell, Dr. Marshall's back-casting method does not compare the actual prices that Schein was charging to Smile Source members before and after Schein was terminated. It analyzes prices to [REDACTED] customers, at least [REDACTED] of whom were not Smile Source members when Schein had the contract. (SRF 1434). As such, the analysis compares apples to oranges.

In addition, Figure 84 is unreliable because it does not compare how prices for Schein changed relative to the prices charged by other distributors. (CX 7100-182). For example, it does not account for inflation or other factors.

Notably, the increase between Q3 2012 and Q4 2012 occurred nine months after the termination. (CX 7100-180). Dr. Marshall does not provide any analysis connecting that change in price to Schein's termination by Smile Source.

Finally, the analysis is also flawed because it does not analyze net prices, after factoring in the substantial membership fees members must pay to Smile Source, or the prices that dentists paid to other distributors.

Patterson's Response:

This Proposed Finding of Fact disregards this Court's Order dated February 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual*

finding in your post-trial briefs. If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Additionally, Patterson notes that Complaint Counsel did not provide a citation to trial testimony of Dr. Marshall on this Proposed Finding of Fact. Otherwise, Patterson has no specific response.

Benco's Response:

Benco joins in the response of Schein.

1438. [REDACTED]

Schein's Response:

False.

This is essentially the same assertion as CCFF 1434-1437, and Schein incorporates its responses to those proposed findings here.

First, as previously explained, the green line in Figure 83 is the same as the green line in Figure 68, and neither track Schein's margins charged to members of Smile Source prior to Schein's termination. (SRF 1434; CX 7100-165, -180). Rather, the line includes sales to at least [REDACTED] out of [REDACTED] dentist that were not members of Smile Source when Schein had the contract, and thus, the analysis says nothing about Schein's change in margins to dentists pre-versus-post termination. (SRF 1434; CX 7100-165, -180).

Second, Figures 83 and 68 are inconsistent with – and contradicted by – Figure 69, which shows that Schein's margins changed by only [REDACTED] percentage points, from

██████ to ██████, a difference that Dr. Marshall has not found to be statistically significant. (CX 7100-165). As noted, Figures 83 and 68 are not reliable because they only look at a subset of the purchases (consumable only) from that already biased sample of dentists who self-selected to purchase from Burkhart (SRF 1434), whereas Figure 69 looks at all purchases from this (biased) sample (SRF 1267).

Third, the entire analysis is subject to self-selection bias, as it only looks at dentists that later chose to buy from Burkhart. The analysis also fails to account for the fees dentists paid to Smile Source, and it does not measure the net change in dentists' prices (or distributors' margins) across all purchases.

Patterson's Response:

This Proposed Finding of Fact disregards this Court's Order dated February 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Additionally, Patterson notes that Complaint Counsel did not provide a citation to trial testimony of Dr. Marshall on this Proposed Finding of Fact. Otherwise, Patterson has no specific response.

Benco's Response:

Benco joins in the response of Schein.

1439. Economic theory predicts that the elimination of competition among rival suppliers benefits those suppliers at the expense of their customers. (CX7100 at 206 (¶ 483) (Marshall Expert Report)).

Schein's Response:

Not true.

As an academic matter, the body of merger economics and merger caselaw disprove that the “elimination of competition among rival suppliers benefits suppliers at the expense of their customers.” Indeed, in only a few cases do mergers have that effect.

Putting that aside, the assumption that the elimination of competition among suppliers benefits suppliers at the expense of customers assumes a but-for world in which there would be additional competition. Since Dr. Marshall has not shown that Schein (or any Respondent) acted contrary to its self-interest, there is no evidence to suggest that in the but-for world there would be any additional competition for buying groups.

Even if there were additional competition for buying groups, it is not clear that customers would benefit. Buying groups reduce pricing flexibility for the winning distributor, since it must charge all members the same price. This effectively prevents the designated distributor from offering individual, high-valued members lower pricing, creating an umbrella under which competing distributors (who have not signed with the buying group) are able to price. A simple example illustrates this. Suppose the designated distributor agrees to discount 10% to all buying group members. A rival distributor can win a particular customer's business by offering an 11% discount. The designated distributor would be powerless to match that offer. In contrast, absent a buying group, both distributors might offer ever increasing discounts, without the floor imposed by the buying group.

In any event, economic theory, without a showing that it applies to the facts of this case, is irrelevant. Here, Dr. Marshall has made no such showing. (SF 1757-71).

Patterson's Response:

Patterson joins in Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is overly broad, misleading, and mischaracterizes the evidence.

Complaint Counsel presented no evidence that competition among Respondents was eliminated. Individual dentists are the customers that actually purchase and pay for dental supplies; buying groups are just intermediaries that don't select, order, take delivery of, stockpile, use, or pay for anything. (Cavaretta, Tr. 5568-69; Cohen, Tr. 444-45, 861; Ryan, Tr. 1034-36; *see also* RX2928 (member "[p]urchases are made directly from the vendor"); Kojs Sr., Tr. 248-49; Kojs Jr., Tr. 312-13; Maurer, Tr. 4964-65). Dr. Marshall admitted that he observed substantial competition for the business of individual dentists. (Marshall, Tr. 3412). [REDACTED]

[REDACTED]

[REDACTED] The data indicate that a distributor that enters into an agreement with a buying group does not necessarily provide the lowest margins or the lowest prices to the members of that buying group, and one or more competing distributors may sell to members of the buying group at similar or lower margins and prices. (RRFF 1412).

Nowhere in his expert report or testimony did Dr. Marshall address a situation in which competition with respect to intermediaries or middle-men was allegedly eliminated

or restricted, but competition for customers continued unimpeded. In the paragraph of his report cited by Complaint Counsel, Dr. Marshall cites to economic materials relating to restriction of competition for customers, but does not cite to any studies, articles, publications, or other materials relating to restriction of competition with respect to intermediaries or middle-men that might be relevant to this matter. (CX7100 at 206, ¶ 483 n. 823, 824).

1440.

; *see also* CCFF ¶¶ 1416-1437).

Schein's Response:

False. (*See* SRF 1416-37). Dr. Marshall's "historical data" purported to show that buying groups presented profitable opportunities, but it in fact shows the opposite. As noted below in responses to CCFF 1637-1684, Schein lost money discounting to Smile Source in 2011 and 2017, as well as to Steadfast. (SRF 1637-84; SF 1722-35; RX 3058; Marshall, Tr. 3073, 3121-22; CX 0170; Titus, Tr. 5250-51). Moreover, Dr. Marshall's isolated studies of two non-representative buying groups have no power to "validate[]" the claimed "predictions of ... economic principles." As Dr. Marshall conceded, each buying group must [REDACTED] but he failed to do so. (Marshall, Tr. 3003; SF 1766-71).

Patterson's Response:

[REDACTED]
[REDACTED]
[REDACTED] this Proposed

Finding of Fact disregards this Court’s Order dated February 21, 2019, which prohibits “cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents,” Order on Post-Trial Briefs, 3, as well as this Court’s admonition: “Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That’s what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I’m letting you know today so that you don’t think you’re going to question your experts about facts and rely on that,” (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is overly broad, misleading, and mischaracterizes the evidence.

Complaint Counsel presented no evidence that competition among Respondents has been eliminated. (*See* RRFF 1439).

Complaint Counsel has failed to establish that historical data show any “benefits [to] suppliers at the expense of their customers.” Complaint Counsel relies on the opinion of Dr. Marshall. However, Dr. Marshall never identified effects on competition in any properly defined relevant product and geographic markets. (Marshall, Tr. 3406-3408; J. Johnson, Tr. 4867-4868). And Dr. Marshall cannot define competitive impact absent properly defined relevant markets. (J. Johnson, Tr. 4867-4868).

Even if he had properly defined relevant markets, Dr. Marshall did not perform any proper analysis of the actual effects on competition. The data indicate that a distributor that enters into an agreement with a buying group does not necessarily provide the lowest

margins or the lowest prices to the members of that buying group, and one or more competing distributors may sell to members of the buying group at similar or lower margins and prices. (*See* RRFF 1412).

1441. Dr. Marshall's data analyses show that dentists extract lower prices when they aggregate their purchases and leverage their collective bargaining power. (CX7100 at 128 (¶ 330) (Marshall Expert Report); CCF ¶¶ 1435-1433; *see also* [REDACTED])

Schein's Response:

False.

There is no evidence that buying groups "extract lower prices" than dentists on their own. According to Dr. Marshall's own analysis, [REDACTED] of independent dentists who are *not* part of a buying group receive discounts greater than [REDACTED] off catalog, more than [REDACTED] receive discounts greater than [REDACTED], and [REDACTED] receive discounts greater than [REDACTED]. (CX 7101-067 (Fig. 7)). Buying group members, in contrast, typically receive between 7% and 20%. (RX 2350-002-09 (listing 7% discount for group's members); RX 2162-001 ([REDACTED] off non-formula items); Cavaretta, Tr. 5630 [REDACTED]) Notably, Dr. Marshall did not compare the average discounts that buying group members receive to the average discounts that non-buying group members receive.

Additionally, Dr. Marshall did not compare the prices any particular dentist paid as part of the Kois Buyers Group or Smile Source (the only two groups he studied) with what they would have paid outside of the buying group. *First*, he admits he did not conduct any such but-for analysis. (*E.g.*, Marshall, Tr. 3026, 3056 [REDACTED]). *Second*, Dr. Marshall did not account for the fees and royalties that many buying group members pay, and thus made no assessment of any difference in *net* prices. (*See* SF 117-19, 854; Goldsmith, Tr. 1971-72, 2055, 2073; Kois Sr., Tr. 239). *Third*, because dentists often purchase from more than one supplier, Dr. Marshall's analysis further fails to study net pricing by failing to study the overall or average price paid by any single dentist. (Marshall, Tr. 3136-37).

And as noted in response to CCFF 67, which Schein incorporates here, very few buying groups actually "leverage ... collective purchasing power" because the group lacks the control or ability to make commitments concerning their member's purchases. (SRF 67; Cavaretta, Tr. 5568-69; Baytosh, Tr. 1907; Mason, Tr. 2394; Goldsmith, Tr. 1970; Maurer, Tr. 4964; Puckett, Tr. 2240).

Patterson's Response:

Patterson joins in Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is overly broad, misleading, and mischaracterizes the evidence.

Dr. Marshall's studies were too limited and too flawed to reliably support Complaint Counsel's assertions. Dr. Marshall examined five limited instances, involving only a tiny fraction of the overall population of dentists, in which one of three particular distributors, none of which is representative of Benco, entered into an agreement with one

of two particular buying groups, neither of which is representative of buying groups in general. (See BFF 1026-1028, 1037-1057, 1060-1079; [REDACTED])

[REDACTED] Dr. Marshall's studies involved multiple other flaws that render them unreliable. (BFF 1080-1084, 1091-1100, 1126-1151, 1153, 1158, 1163-1185; [REDACTED])

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

Furthermore, Dr. Marshall's own data demonstrate that buying groups do not necessarily decrease the price paid by their member dentists for dental products. For example, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

3. Respondents' Conspiracy Slowed The Formation And Growth Of Dental Buying Groups.

1442. [REDACTED]

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1443. [REDACTED]

Schein's Response:

False.

As an initial matter, Marshall's analysis shows only that Smile Source, which is a Texas-based entity, started in the Southwest and grew outward from there. There is no evidence that the choice of distributors had any impact on Smile Source's expansion or expansion plans. Indeed, if Dr. Marshall was correct in his assumption, then between 2010 and 2011, the distribution of Smile Source members would mirror the distribution of dentists across the United States because Schein did business throughout the United States. Moreover, the chart also shows that it is easy to expand using regional distributors, as Smile Source was able to substantially *grow* its presence in the Northeast, Southeast, and Midwest using regional distributors. There is no evidence that using a national distributor would have changed Smile Source's growth.

In addition, Dr. Marshall's "empirical analysis" simply lists the number of Smile Source members in different regions over time and makes generalized statements about the Kois Buyers Group. (CX 7100-214-15). This analysis says nothing about buying groups generally. Indeed, Dr. Marshall only studied two non-representative buying groups. Nor did Dr. Marshall conduct a but-for analysis to even estimate the speed that Smile Source, the Kois Buyers Group, or any other buying group would have expanded. (Marshall, Tr. 3026, 3056 [REDACTED])

The evidence contradicts the asserted fact. Between 2008 and 2011 when Schein discounted to Smile Source before Smile Source terminated Schein, the group experienced anemic growth. [REDACTED]

[REDACTED] (Goldsmith, Tr. 2071). Smile Source grew while partnered with Burkhart after it received private equity funding, and

implemented a strategic plan focused on growth. (SF 1106). And Smile Source continued to grow despite again rejecting Schein's business proposal in 2014, including in areas Dr. Marshall identified as areas of supposed slow growth. (CX 7100-215; Steck, Tr. 3795-96; SF 1166-67). Thus, the evidence shows that Smile Source's growth or lack of it had nothing to do with whether it was doing business with Schein at any particular point in time.

Finally, Complaint Counsel has produced no evidence of sudden post-(alleged) conspiracy buying group growth.

Patterson's Response:

Patterson joins Schein and Benco's responses. Additionally, this Proposed Finding of Fact disregards this Court's Order dated February 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25-26) (emphasis added). Thus, it is entitled to no weight.

Benco's Response:

Complaint Counsel's proposed finding is overly broad, misleading, and unsupported by the evidence.

Dr. Marshall offered pure speculation, with no data or evidence to support his statement. [REDACTED]

[REDACTED]

Dr. Marshall stated, “It is likely that the formation and growth of buying groups in these areas [the Midwest, Northeast, and Mid-Atlantic] would have been particularly impacted by Respondents’ conduct.” (CX7100 at 215, ¶ 496). Yet Dr. Marshall cited to absolutely no evidence of any kind, let alone “empirical analysis,” in support of this speculation. (CX7100 at 215, ¶ 496). Dr. Marshall could not identify any buying group that was unable to find any source of supply. (Marshall, Tr. 3409). Dr. Marshall could not identify any buying group that failed because one or more of the Respondents declined to do business with it. (Marshall, Tr. 3409-3410). Dr. Marshall admitted that he had not reviewed the financial records of any buying groups, and thus was not in a position to offer any conclusion as to why any buying group had failed. (Marshall, Tr. 3410-3411).

1444. [REDACTED]

Schein’s Response:

False. This is essentially the same assertion as CCFF 1443, and Schein incorporates its response to that proposed finding here. (SRF 1443). Dr. Marshall only observed that

Smile Source grew, not whether that growth was slow or fast. In fact, the evidence shows that Smile Source grew faster when it was not partnered with Schein than when it was partnered with Schein.

Patterson's Response:

[REDACTED]

[REDACTED]

[REDACTED] this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is overly broad, inaccurate, and mischaracterizes the evidence.

Complaint Counsel has it backwards. Smile Source had an agreement in place with Schein in 2011, but Smile Source decided to end its relationship with Schein and enter into an agreement with Burkhardt. (*See* SFF 1106-1145). Two years later, when Smile Source decide to explore additional or replacement distributor relationships, Schein bid for Smile

Source's business. (*See* SFF 1146, 1156-1179). Smile Source could have chosen Schein had it believed that doing so would have helped it expand in the Midwest, Mid-Atlantic, and Northeast; instead, Smile Source chose to stay with Burkhart over Schein and add Darby, out of loyalty to Burkhart and [REDACTED]

[REDACTED] (Maurer, Tr. 4945; [REDACTED])

And indeed, had Smile Source wished to add a regional distributor in the Midwest, the mid-Atlantic or the Northeast (much as it added Atlanta Dental and Nashville Dental in the South), there were multiple distributors available to it. Dr. Johnson listed 46 "Select Dental Supply Distributors," including in the Midwest:

Goetze Dental

Dental Health Products, Inc.

Midwest Dental Equipment & Supply

Midway Dental Supply

Careforde, Inc.

Dental City

Dental Equipment and Supply, Inc.

Med Supplier Corporation

Nexadental

Optimus Dental Supply

Popp Dental Supply

Safco Dental Supply Co.

Source Products Limited, and

Sunshine Medical Supply;

and in the Mid-Atlantic:

DC Dental

Dental Supply Depot

Carolina Dental Supply;

and in the Northeast:

DDS Dental Supplies

IQ Dental Supply

Johnson & Lund Co., Inc.

M&S Dental Supply

Parkway Dental Services

Prime Dental Supply

Tiger Supply Inc.

(RX1140 at 23, Exhibit 2). Smile Source was satisfied with its arrangements with Burkhart, Atlanta Dental, Nashville Dental and Darby until early 2017, [REDACTED]

[REDACTED]

[REDACTED]).

Indeed, Dr. Marshall's data disprove Complaint Counsel's and Dr. Marshall's assertions. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1445. [REDACTED]

Schein's Response:

False. Dr. Marshall only studied two non-representative buying groups, and neither of those groups support the proposed finding. Not only is it improper to make a generalized conclusion based off of just two buying groups, neither of the two groups Dr. Marshall studied support the proposed finding. The evidence shows that Smile Source grew faster when it was not partnered with Schein than when it was partnered with Schein. (*See* SRF 1443). And as Mr. Kois, who runs the Kois Buyers Group, testified, he does not believe the buying group was impacted at all by working with Burkhardt rather than Schein, Benco, or Patterson. (Kois Jr., Tr. 366). Similarly, Dr. Kois testified that a different distributor would have made no difference. (Kois Sr., Tr. 226; SF 936).

As noted in response to CCFF 1443, Dr. Marshall only charted the distribution of Smile Source members over time, not whether it or any other buying group had a diminished ability to come into existence or grow. (SRF 1443). Dr. Marshall does not identify a single buying group that would have been created or would have grown faster in the but-for world, as he made no study of the but-for world. (Marshall, Tr. 2940-41, 3026, 3056 [REDACTED] CX 7100-214-15).

Patterson's Response:

[REDACTED]

[REDACTED]

[REDACTED],

this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is overly broad, inaccurate, and unsupported by the evidence.

Dr. Marshall offered pure speculation, with no data or evidence to support his statement. Indeed, Dr. Marshall's data disprove Complaint Counsel's and Dr. Marshall's assertions. (*See* RRFF 1444). Complaint Counsel and Dr. Marshall ignore the multiple distributors available in the Midwest, the Northeast, and the Mid-Atlantic. (*See* RRFF 1444). Dr. Marshall cited to absolutely no evidence of any kind, let alone "empirical analysis," in support of his speculation that the formation and growth of buying groups in the Midwest, Northeast, and Mid-Atlantic was impacted by Respondents' alleged conduct.

(CX7100 at 215, ¶ 496). Dr. Marshall could not identify any buying group that was unable to find any source of supply. (Marshall, Tr. 3409). Dr. Marshall could not identify any buying group that failed because one or more of the Respondents declined to do business with it. (Marshall, Tr. 3409-3410). Dr. Marshall admitted that he had not reviewed the financial records of any buying groups, and thus was not in a position to offer any conclusion as to why any buying group had failed. (Marshall, Tr. 3410-3411).

XIX. MARKET DEFINITIONS

A. Channels of Distribution for Dental Products

1446. There are three main distribution channels for the purchase of dental products: (1) full-service distributors; (2) mail-order or internet distributors; and (3) direct-selling manufacturers. (Section XIX.A (CCFF ¶¶ 1447-1521)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1. Full-Service Distributors

1447. Full-service distributors address all of the needs of dental practices, providing consumables, durables, and installation and repair services. (Guggenheim, Tr. 1532-1533; Sullivan, Tr. 3869-3870; CX0311 (Sullivan, IHT at 45-46); CX8015 (Cohen, Dep. at 56-57) (Benco as a full-service distributor has a "full array of products"); JX0003 at 002 (Joint Stipulation of Fact No. 5)).

Schein's Response:

No response, other than to note that dental practices certainly have needs beyond the products and services provided by full-service distributors.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1448. Full-service distribution includes offering supplies and supply representatives, equipment, installation, service technicians, software, and other goods and services for running a dental office. (Mason, Tr. 2334-2335; Sullivan, Tr. 3869-3870; Rogan, Tr. 3553-3554 (full-service encompasses distributors that have service technicians and salespeople); CX0311 (Sullivan, IHT at 45-46); CX5005 at 006 (Form 10-K for Patterson Companies, 2017)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

a) National Full-Service Distributors

1449. Schein, Patterson, and Benco are the only "full-service" distributors of dental supplies and equipment with a national footprint. (Ryan, Tr. 1019; [REDACTED]; Meadows, Tr. 2418 (Schein is a national full-service distributor); Guggenheim, Tr. 1532 (Patterson is a national full-service distributor); Guggenheim, Tr. 1544 (when Guggenheim was Patterson's president, Schein and Benco were Patterson's only full-service national competitors); Cohen, Tr. 409, 430 (Benco is a national full-service distributor); CX8017 (Rogan, Dep. at 31)).

Schein's Response:

During the relevant period, Schein and Patterson had a national footprint. Benco was originally a regional distributor, and during the relevant period expanded westward. There remain areas where Benco has little or no presence. (*See* Cohen, Tr. 631-33 (“We weren’t in every market in 2011 ... We didn’t open up in Seattle until 2014. ... we could send stuff from Reno [to Seattle] but we didn’t have people on the ground. ... We had a series of independent service technicians that we outsourced to in that market.”); CX 0311 (Sullivan, IHT at 55) (“Benco, I would call them quasi national”); *see also* CX 7100-035 (mapping Benco’s local branch offices)).

Patterson's Response:

No specific response.

Benco's Response:

Benco admits that it currently is a full-service, national distributor that sells dental supplies, equipment, and services to dental practitioners throughout the United States. It further admits that it is now the third largest distributor of dental supplies and equipment throughout the United States after its rapid expansion from a “mom-and-pop” business based in a small office in Wilkes-Barre, Pennsylvania. (RX1099-003; Cohen, Tr. 618-19). When Chuck and Rick Cohen took over Benco in 1996, Benco’s territory stretched from Boston to Cleveland to Richmond, with its base located in Wilkes-Barre, Pennsylvania. (RX1127-473; RX1099-005). Benco has grown into a national, full service dental distributor as a result of the ambitious and deliberate expansion plan put in place by Chuck Cohen and Rick Cohen. (RX1127-473; Cohen, Tr. 628).

However, during much of the relevant period, Benco did not have a national footprint. (*See, e.g.,* Cohen, Tr. 646 (“Benco entered the Pacific Northwest in 2015”)). As

Figure 16 of Dr. Marshall's Rebuttal Report, demonstrates. [REDACTED]

[REDACTED]. (CX 7101-142-43 (Fig. 16)).

1450. In 2013, Schein, Patterson and Benco were the largest distributors of dental products in the United States. (Rogan, Tr. 3526).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1451. In full-service distribution, Schein, Patterson, and Benco all view one another as major competitors. (CX0301 (Cohen, IHT at 47); CX0314 (Guggenheim, IHT at 55); CX0311 (Sullivan, IHT at 55) ("Q. Sure. And I'm just trying to understand if you disagree with the statement that Patterson and Benco are Schein's primary competitors in the U.S. dental market. THE WITNESS: I don't disagree with the statement, but I would refer to them as our largest."); CX5018 at 005 (Form 10-K for Henry Schein, Inc., 2015) ("In the dental market, our primary competitors are the Patterson Dental division of Patterson Companies, Inc. and Benco Dental Supply Company."); CCF 48, 49, 50).

Schein's Response:

Schein's largest competitors are Patterson and Benco. For certain customers or products, other full-service, non-full-service, or direct-selling manufacturers may be more significant competitors. (See, e.g., JF 4-8, 15-31; see also CX 0311 (Sullivan, IHT at 54-55 (noting "in Memphis or in Knoxville ... Nashville Dental, they might be a bigger player than Patterson or Benco in that market ... every market is unique."))).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

b) Regional Full-Service Distributors

1452. In full-service distribution, in addition to Schein, Patterson, and Benco, there are regional and local full-service distributors that operate on a multi-state level, within a single state, or that cover some smaller area within a state. (Guggenheim, Tr. 1756; Reece, Tr. 4455; Goldsmith Tr. 1946 (Atlanta Dental Supply and Nashville Dental); RX2591 (Steck, Class 30b6 Dep. at 26); Rogan, Tr. 3553-3554 (Nashville Dental is a regional, full-service distributor)).

Schein's Response:

There are regional full-service distributors in every region in the country. (CX 7101-142-43).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1453. Burkhart is considered a regional distributor that does not have national coverage. (Reece, Tr. 4365-4366; Goldsmith, Tr. 1946; Kois Jr., Tr. 352-353).

Schein's Response:

No response, other than to note that Burkhart has extensive coverage in most areas west of the Mississippi and provides a "limited service" offering with sales phone support in other areas of the country. (CX 0287-001; CX 1032; *see also* Kois Jr., Tr. 355-57; CX 7101-142-43).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1454. Burkhart is a distant 4th compared to the Schein, Patterson, and Benco. (Reece, Tr. 4363-4364). Burkhart is a \$200 million dollar a year company compared to multibillion dollar Henry Schein and Patterson and \$800 million dollar Benco. (Reece, Tr. 4363-4364). Compared to Schein, Patterson, and Benco, Burkhart, the next-largest full-service distributor, [REDACTED]

Schein's Response:

The asserted fact is irrelevant because the share figures do not match the geographic markets Complaint Counsel has alleged. As Dr. Marshall testified, the relevant geographic markets in this case are “local.” (Marshall, Tr. 2902-03, 3369). In many local markets,

[REDACTED] (CX 7101-142-43 [REDACTED])
[REDACTED]). In the other regional markets, there are almost always other regional distributors with significant shares. (CX 7101-142-43).

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is misleading and Complaint Counsel's description of Burkhart as “a distant 4th” is belied by the very evidence cited elsewhere in these proposed findings. While Schein's national market share is 36-38% and Patterson's is approximately 30-34%, Benco's is only about 12%. (CCFF 1455-1457). While Benco's

market share is about 18 percentage points below Patterson's, Burkhardt's share is only 6-10 percentage points below Benco's. Benco is significantly further behind Schien and Patterson in terms of market share than Burkhardt is behind Benco. Because Complaint Counsel has cited no authority for its novel use of the phrase "a distant 4th," this finding should be disregarded.

c) Full-Service Distributor Market Shares

1455. Schein's national market share is approximately 36-38%. (Sullivan, Tr. 3876; CX0311 (Sullivan, IHT at 51); *see also* CX0082 at 008 (February 2012 Patterson Competitive Analysis, reporting that Schein "accounts for 36% of the U.S. dental market"); CX3105 at 024 (McKinsey & Company, Dental business growth strategy project: U.S. market overview, December 2015)).

Schein's Response:

The asserted fact is irrelevant because the share figures do not match the geographic markets Complaint Counsel has alleged. As Dr. Marshall testified, the relevant geographic markets in this case are "*local*." (Marshall, Tr. 2902-03, 3369). Moreover, the estimated national shares are not reliable because (i) it is not clear what data, if any, were used to generate such estimates, and (ii) Complaint Counsel did not lay the foundation necessary to show that any of the witnesses or authors of the cited documents had access to reliable data. In particular, it is not clear whether such market share estimates included sales of online/mail-order distributors and direct-selling manufacturers.

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

Benco has no specific response to the proposed finding.

1456. Patterson's national market share is roughly 30-34%. (Misiak, Tr. 1327 (Patterson has approximately 33% of the dental business in North America); CX3105 at 024 (McKinsey & Company, Dental business growth strategy project: U.S. market overview, December 2015)).

Schein's Response:

The asserted fact is irrelevant because the share figures do not match the geographic markets Complaint Counsel has alleged. As Dr. Marshall testified, the relevant geographic markets in this case are "*local*." (Marshall, Tr. 2902-03, 3369). Moreover, the estimated national shares are not reliable because (i) it is not clear what data, if any, were used to generate such estimates, and (ii) Complaint Counsel did not lay the foundation necessary to show that any of the witnesses or authors of the cited documents had access to reliable data. In particular, it is not clear whether such market share estimates include sales of online/mail-order distributors and direct-selling manufacturers.

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

Benco has no specific response to the proposed finding.

1457. Benco's national market share is roughly 12%. (Cohen, Tr. 409; CX0301 (Cohen, IHT at 61); CX1112 at 006 (Answer of Benco ¶2) (Benco currently accounts for approximately 11% of the sales of dental supplies sold through dental distributors; its percentage of sales has changed over time); CX3105 at 024 (McKinsey & Company, Dental business growth strategy project: U.S. market overview, December 2015)).

Schein's Response:

The asserted fact is irrelevant because the share figures do not match the geographic markets Complaint Counsel has alleged. As Dr. Marshall testified, the relevant geographic markets in this case are "*local*." (Marshall, Tr. 2902-03, 3369). Moreover, the estimated national shares are not reliable because (i) it is not clear what data, if any, were used to

generate such estimates, and (ii) Complaint Counsel did not lay the foundation necessary to show that any of the witnesses or authors of the cited documents had access to reliable data. In particular, it is not clear whether such market share estimates include sales of online/mail-order distributors and direct-selling manufacturers.

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

Benco has no specific response to the proposed finding.

1458. Based on Respondents' executives' testimony and documents, Benco, Patterson, and Schein's collective national market share is approximately 78-84%. (See CCFF ¶¶ 1455-1458; see also CX2742 at 032 (Henry Schein 2011-2013 Strategic Plan, in the United States, the "top three distributors have a combined market share of over 80% in the dental supplies and equipment market."); CX3105 at 024 (McKinsey & Company, Dental business growth strategy project: U.S. market overview, December 2015)).

Schein's Response:

There is no basis for aggregating the market shares of the Respondents.

The asserted fact is also irrelevant because the share figures do not match the geographic markets Complaint Counsel has alleged. As Dr. Marshall testified, the relevant geographic markets in this case are "local." (Marshall, Tr. 2902-03, 3369). Moreover, the estimated national shares are not reliable because (i) it is not clear what data, if any, were used to generate such estimates, and (ii) Complaint Counsel did not lay the foundation necessary to show that any of the witnesses or authors of the cited documents had access to reliable data. In particular, it is not clear whether such market share estimates include sales of on-line/mail-order distributors and direct-selling manufacturers.

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

Benco has no specific response to the proposed finding.

1459. The next largest full-service distributor, Burkhart, [REDACTED]
[REDACTED] Rogan, Tr. 3437
(Burkhart is fourth largest distributor); *see also* [REDACTED]
[REDACTED]).

Schein's Response:

The asserted fact is irrelevant because the share figures do not match the geographic markets Complaint Counsel has alleged. As Dr. Marshall testified, the relevant geographic markets in this case are "local." (Marshall, Tr. 2902-03, 3369). In many local markets, [REDACTED] (CX 7101-142-43 [REDACTED]
[REDACTED]. In the other regional markets, there is almost always other regional distributors with significant share. (CX 7101-142-43).

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

Benco has no specific response to the proposed finding.

d) Full-Service Distributor Offerings

(1) Comprehensive Selection Of Dental Consumable Supplies & Equipment

1460. Full-service distributors offer a comprehensive selection of dental consumable supplies and equipment from a variety of manufacturers. (Cohen, Tr. 403-404; Guggenheim, Tr. 1532 (a full-service distributor all the product lines that dentists use, along with the equipment and technology); Sullivan, Tr. 3869-3870; Meadows, Tr. 2474 (Schein has approximately 100,000 SKUs in its catalog); Misiak, Tr. 1293 (full-service distributors offer all the products that a dental office might need); [REDACTED] CX8015 (Cohen, Dep. at 56-57) (Benco as a full-service distributor has a “full array of products”); CX0311 (Sullivan, IHT at 45-46)).

Schein’s Response:

Each distributor offers a unique (though *partially* overlapping) mix of products and services. While Schein may market itself as having, and strive to offer, a “comprehensive” selection of supplies and equipment, not every dentist may agree, as there are products, equipment, and manufacturers that Schein does not offer. Moreover, dental practices certainly have needs beyond the products and services provided by full-service distributors. Schein further notes that non-full-service distributors and other service providers similarly offer many of the same products or services, and Complaint Counsel has not identified any product type that only full-service distributors provide. Nor has Complaint Counsel demonstrated that dentists only purchase products and services from a single provider, rendering allegations about the “comprehensiveness” of full-service distributors’ offerings irrelevant, especially given that buying groups focus primarily on supplies.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1461. Full-service distributors offer a comprehensive selection of products, with thousands of SKUs across all major product categories. (CX5018 at 006 (Form 10-K for Henry Schein, Inc., 2015) (Schein offers over 110,000 different SKUs to its customers, including 52,000 to its dental

customers): [REDACTED] CX8015
(Cohen, Dep. at 56-57) (Benco as a full-service distributor has a “full array of products”).

Schein’s Response:

Each distributor offers a unique (though *partially* overlapping) mix of products and services. While Schein may market itself as having, and strive to offer, a “comprehensive” selection of products, not every dentist may agree, as there are products that Schein does not offer. Schein further notes that non-full-service distributors and other service providers similarly offer many of the same products or services, and Complaint Counsel has not identified any product type that only full-service distributors provide. Nor has Complaint Counsel demonstrated that dentists only purchase products and services from a single provider, rendering allegations about the “comprehensiveness” of full-service distributors’ offerings irrelevant, especially given that buying groups focus primarily on supplies.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

(2) Full-Service Sales Representatives Add Value

1462. In addition to offering dental consumable supplies and equipment, full-service distributors also offer value-added services to customers through their sales and service teams, including equipment installation and repair, sales representative support, and business and practice-management solutions. (CX2536 at 011-013 (February 2014 Henry Schein Dental/Smile Source Partnership Proposal describing the full portfolio of Schein’s offerings); Sullivan, Tr. 3869-3870; Cohen, Tr. 404-406; Guggenheim, Tr. 1532 -1534; Reece, Tr. 4361-4362; CX5005 at 006 (Form 10-K for Patterson Companies, 2017); CX5020 at 005 (Form 10-K for Patterson Companies, 2015); CX1112 at 013-014 (Answer of Benco ¶24); CX3113 at 003 (Answer of Patterson ¶24) (admitting that full-service distributors offer a comprehensive selection of products, with thousands of SKUs across all major product categories, and value-added services to customers through their sales and service teams, including equipment installation and repair, sales

representative support, and business and practice-management solutions); CX0321 (Kois Jr., IHT at 30)).

Schein's Response:

No response, other than to note that each distributor offers a unique (though *partially* overlapping) mix of products and services. Schein further notes that non-full-service distributors and other service providers similarly offer many of the same products or services, and Complaint Counsel has not identified any product type that only full-service distributors provide. Nor has Complaint Counsel demonstrated that dentists only purchase products and services from a single provider, rendering allegations about “value-added services” irrelevant, especially given that buying groups focus primarily on supplies.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1463. The role of full-service distributor local representatives “was generally to do everyday things, to help make sure that if [a dentist] needed a repair, a repair technician got there quickly; if [a dentist was] having difficulty placing an order; if [a dentist] needed a referral to another resource. Just basically everyday things that could easily be solved.” (CX8022 (Hight, Dep. at 17-18)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1464. Full-service distributors' sales representatives help customers learn of new products, and control inventory of supplies. (Kois Sr., Tr. 169-170.)

Schein's Response:

Dr. Kois clarified what he meant by "control," saying his representative "mak[es] sure that I have the right stock of equipment so that I don't run out of anything." (Kois Sr., Tr. 169-70). There are, however, many other ways to learn of new products (to the extent a dentist is interested) or to re-order products, including websites and electronic ordering platforms operated by online/mail-order distributors.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1465. Sales representatives take orders and help arrange service for equipment. (Kois Sr., Tr. 170-171.)

Schein's Response:

Schein's sales representatives do more than just take down orders. Other competitors – such as mail-order, online, manufacturers, equipment service providers – have similar means of taking orders. There is no evidence that such order-taking procedures employed by other types of competitors are inferior, inadequate, or non-competitive. There has also been no evidence that order-taking procedures have anything to do with a seller's ability to compete for buying group contracts.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1466. Full-service company representatives offer training on equipment. (Kois Sr., Tr. 171).

Schein's Response:

No response, other than to note that manufacturers may also offer training on equipment. Moreover, equipment purchases tend be much less frequent, and there has been no showing that equipment training has anything to do with a non-full-service seller's ability to compete for buying group contracts, which tend to focus on supplies.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1467. Full-service distributors generally charge higher prices to account for these value-added services. (CX8017 (Rogan, Dep. at 44-45)).

Schein's Response:

The asserted fact is ambiguous, as it is not clear whose prices are being compared. Nor has there been any study comparing the net prices charged by full-service distributors against other competitors. That said, Schein does not dispute that maintaining an effective sales network – consisting of over 1,000 people – is expensive, and therefore, its prices may be higher than sellers that do not have such costs.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1468. A Patterson February 28, 2012, strategic document states, "Our customers derive value in their relationship with their sales representative and the value-added services we provide." (CX0082 at 008).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1469. Having a sales representative come to the office is important to dentists because the sales representative's visit "allows me to ask a lot of questions, get support on supplies, answer questions on new materials, bring samples into my office. She helps facilitate returns very easily and has been very helpful in purchasing new equipment for the office as far as directing me to manufacturers that would work well with what I have in my office." (CX8030 (Baytosh, Dep. at 60-61)).

Schein's Response:

Schein does not dispute that Dr. Baytosh testified that he values visits from his sales representative. However, the asserted fact is overbroad. Dr. Baytosh does not speak for all dentists. For example, some dentists choose to order most of their products from online distributors like Darby rather than rely on a sales representative to answer questions or handle returns. (*See, e.g.,* Mason, Tr. 2405-06). As Mr. Cohen testified at his deposition, "[i]n my experience, some dentists want the full-service experience; some dentists don't want it...." (CX 8015 (Cohen, Dep. at 142-43)).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1470. Explaining the value of the sales representative, Schein's Dave Steck (VP & General Manager) stated that "[Schein] believe[s] the value of putting in a professional salesperson and the service support behind that salesperson that is expensive to provide . . . is a value to the customer. If we didn't we wouldn't do it. It is a very expensive thing to do. So that is why we put that in, we believe [the professional representative] is a value to the customer, along with the prices we sell at." (CX0310 (Steck, IHT at 115-116)).

Schein's Response:

No response, other than to note that this does not suggest a lack of competition between full-service and non-full-service sellers. To use Mr. Steck's metaphor, some dentists prefer a Nordstrom because they prefer to have service. (Steck, Tr. 3574-75, 3611). By contrast, other dentists prefer a Walmart for the value, even though Walmart does not offer the same service as Nordstrom.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1471. According to Benco's Managing Director Chuck Cohen, "Dentists value the sales rep. They value the service tech, as evidenced by the fact that GPOs can work with Darby [a telesales/Internet distributor] all day long, and they choose not to because dentists want the service that a Benco or full-service dealer would provide." (CX0301 (Cohen, IHT at 384)).

Schein's Response:

Mr. Cohen's statement that GPOs choose not to work with Darby is contradicted by the evidence. A number of Complaint Counsel's buying groups choose to work with Darby, including [REDACTED]. (See RX 2086; RX 3079; RX 3080; RX 3081; RX 3083). Mr. Cohen's testimony about full-service is also overbroad. Not all dentists value full-service the way Mr. Cohen described. For example, Dr. Mason purchased approximately 85-90% of his supplies from Darby through the Synergy buying group. (Mason, Tr. 2405-06). And as Mr. Cohen testified at his deposition, "In my experience, some dentists want the full-service experience; some dentists don't want it...." (CX 8015 (Cohen, Dep. at 142-43)).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1472. Some full-service distributors offer inventory management as a service to their dentist customers. (CX0321 (Kois Jr., IHT at 30) ("A lot of the reps of these companies will come in and manage the inventory for the dentist and tell them when products are low, when they need to order. If they don't have one of those reps, the staff has to do that. Depending on how good their staff is, that can either be a plus or a minus.")).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

(3) Full-Service Technical Services Add Value

1473. In addition to price, dentists care about “[v]alue, service, support, breadth of product, the ordering system, the quality and relation – quality of the sales rep, the quality of the service technician . . .” (CX8015 (Cohen, Dep. at 142)).

Schein’s Response:

No response, other than to note that the asserted fact is a broad generalization, and the extent to which dentists “care about” value, service, etc., if at all, varies by dentist. As Mr. Cohen noted, “In my experience, some dentists want the full-service experience; some dentists don’t want it; and there are dentists who lie everywhere along a continuum of full service versus not.” (CX 8015 (Cohen, Dep. at 142-43)).

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1474. Schein’s Michael Porro (Zone Manager, Atlantic Coast) testified that “[f]ull service means everything. Equipment, technology, consultation services. We can help design their offices. We have a group of business solutions and value-added pieces that will, again, as noted before, help their practice grow so they can be successful in their profession. We have service. So all those things, in our definition of it, is full service.” (CX8000 (Porro, Dep. at 58-59, 79-80) (further describing full-service value to customer stating that “we need to go out there and educate them on what we have to offer . . . that just makes us have to spend a little more time to help them understand the aspects that they have not seen because they’ve typically bought online, so we have to educate them higher.”)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

(4) Full-Service Prompt Supply Delivery and Equipment
Service Add Value

1475. A major factor affecting independent dentists' buying decisions is confidence in obtaining supplies quickly and frequently; storage is an issue in some cases. (CX8037 (Steck, Dep. at 143-144)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1476. Full-service distributors have large distribution facilities across the country. (Cohen, Tr. 404 (Benco has five distribution centers across the country); Sullivan, Tr. 4040 (Schein has five distribution centers across the country); CX8017 (Rogan, Dep. at 69) (Patterson has seven distribution centers across the country)).

Schein's Response:

No response, other than to note that (i) this is not necessarily unique to full-service distributors (*i.e.*, Darby and other online/mail-order distributors likely have large distribution facilities across the country), and (ii) the size, number, and location of distribution facilities depends on the distributor (*i.e.*, there is no evidence that Atlanta Dental has "large distribution facilities across the country.").

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1477. Patterson's Tim Rogan (VP of Marketing, Merchandise) testified that Patterson's "real value" is that Patterson can take better care of its customers because it has better service technicians and is able to service equipment quickly so that if a dentist's office is down, Patterson can get the office up quickly. (CX0317 (Rogan, IHT at 92-93)).

Schein's Response:

There is no evidentiary value to Mr. Rogan's testimony. Most dentists are already in operation, so there is no issue about "get[ting] the office up quickly." There is also no evidence that equipment service influences supply purchases. Moreover, Complaint Counsel cherry-picks Mr. Rogan's testimony. Mr. Rogan was asked "how does Patterson differentiate itself from its competitors?" and he responded by listing a number of Patterson's value propositions. (CX 0317 (Rogan, IHT at 92-93)).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1478. Schein has service techs at every location at every branch across the country and that the speed at which a repairman can fix broken equipment is important to dentists because "the quicker you can get something fixed, the better. If it's something they use every day in their practice, possibly, depending on what it was, the sooner you can get it fixed intuitively, the better." (CX8000 (Porro, Dep. at 72, 71) (explaining that equipment repair is not a "perk" but a "need.")).

Schein's Response:

The concept that "the quicker you can get something fixed, the better" is a broad platitude that has no evidentiary foundation in this case. Complaint Counsel has not

introduced any evidence that having a service tech available in regions where Schein does business has any bearing on dentists' supply purchases.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1479. When a dentist's equipment breaks down, he needs it serviced right away because he cannot operate without some of the pieces of equipment. (CX8030 (Baytosh, Dep. at 63-64)).

Schein's Response:

Complaint Counsel cites this proposition for the claim that dentists value and rely on the services of full-service distributors. (CC Br. 81, 87). However, Dr. Baytosh testified he doesn't rely on full-service distributors for his repair needs. At his deposition, Dr. Baytosh noted, "I usually deal with three different entities to repair work. Henry Schein. There's a new company called Dental Fix. And there is a gentleman who is basically, I guess, an independent. And then I had another person who was like an independent repair – dental repair service." (CX 8030 (Baytosh, Dep. at 63)). Of these options, he testified he "probably use[d] this Dental Fix more than the others." (CX 8030 (Baytosh, Dep. at 63)). Complaint Counsel made no effort to show that independent dentists like Dr. Baytosh do not have options outside of full-service distributors when they need equipment fixed. (See also SRF 88).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1480. A full-service distributor sales representative helps a dentist notify the company that something is broken and get faster equipment repair. (CX8007 (Kois Sr., Dep. at 24)).

Schein's Response:

The asserted fact lacks foundation. Dr. Kois testified he does use “the rep to help notify when something is broken to help speed the service.” (CX 8007 (Kois Sr., Dep. at 24)). However, this testimony does not establish that all, or even most, dentists rely on their full-service representatives for similar services or that repairs are accomplished more quickly via a full-service dealer.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1481. 

Schein's Response:

No response, other than to note that Mr. Guggenheim was illustrating an extreme hypothetical, with no evidence concerning the frequency with which it occurs or its impact on dentists' choice of *supply* distributors.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

(5) Full-Service "One Stop" Shopping Adds Value

1482. Full-service distributors provide dentists with a one-stop shop for supplies, and they typically deliver within a day or two. (Cohen, Tr. 403-408; Guggenheim, Tr. 1532-1534; CX3299 at 006 (In a 2014 Patterson presentation, Patterson describes a full-service distributor as "A distributor can add value by aggregating products and becoming a one stop shop for the customer"); Sullivan, Tr. 4040-4041 (Schein provides one to two day delivery from five distribution centers across the country); CX8015 (Cohen, Dep. at 56-57) (Benco delivers within one or two days shipping time to the customers)).

Schein's Response:

There is no evidence that any dentist actually engages in one-stop shopping. The evidence shows the opposite, that most dentists purchase from a number of full-service, non-full-service, and direct-selling distributors or manufacturers. (*See, e.g.,* Kois Sr., Tr. 175-76; *see also* RX 2821-004 (the "average dental practitioner purchases supplies from more than one supplier"); RX 2933; SRF 1488). Complaint Counsel also did not introduce any evidence that full-service distributors have faster shipping times than non-full-service distributors.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1483. Dentists prefer working with a full-service distributor. (Mason Tr. 2334; CX8023 (Guggenheim, Dep. at 229) (Guggenheim testified that dentists prefer to do business with a "value-added" distributor like Patterson because "[w]e deliver tremendous resources and value to dentists in the markets. Technology resources, service support resources, information reporting resources, sales resources.")).

Schein's Response:

False. As Mr. Cohen testified, "In my experience, some dentists want the full-service experience; some dentists don't want it; and there are dentists who lie everywhere along a continuum of full service versus not." (CX 8015 (Cohen, Dep. at 142-43)).

Dr. Mason does not prefer working with full-service distributors. Even though Dr. Mason was a founder of the New Mexico Dental Co-Op, and Schein offered the New Mexico Dental Co-Op discounts, Dr. Mason chose to purchase most of his supplies from Schein's business affiliate, Darby, through a different buying group, Synergy Dental. (Mason, Tr. 2405-06 (noting that 10-15% of products were purchased from Schein or Patterson, with the remaining 85-90% purchased from Darby)).

Complaint Counsel's reliance on Mr. Guggenheim's testimony does not support the asserted fact. Mr. Guggenheim was discussing Patterson's business model and "the reasons why customers do business with us," not the preferences of all dentists everywhere. (CX 8023 (Guggenheim, Dep at 229)). Simply put, Mr. Guggenheim observed that Patterson customers value Patterson's services. This self-evident observation says nothing about the preferences of the majority of dentists who choose not to buy from Patterson.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1484. Dentists see efficiencies in purchasing from dental products distributors because a distributor can aggregate shipments more efficiently. (Rogan, Tr. 3560-3561).

Schein's Response:

The asserted fact is vague and overbroad. *First*, it refers only to “distributors” not “full-service distributors.” Indeed, Mr. Rogan was not asked about full-service distributors; he was asked if he “believe[d] that dentists see efficiencies to purchasing their supplies from *a distributor*.” (Rogan, Tr. 3560). Nevertheless, Complaint Counsel cites this proposition in support of claims about full-service distributors specifically. (CC Br. 81-82).

Second, the asserted fact notes “a distributor can aggregate shipments *more efficiently*,” but does not specify whom distributors are more efficient than. Complaint Counsel seeks to imply that full-service distributors aggregate packages more efficiently than non-full-service distributors. But there is no foundation for this inference, and indeed no reason to believe it. The “efficiencies” Mr. Rogan noted were “[a] distributor can aggregate all its packages, can ship all the manufacturer’s products in one box, get it there the next day, can do it very efficiently....” (Rogan, Tr. 3560). Complaint Counsel cites no reason why Patterson should be able to consolidate packages from one manufacturer but Darby, or any other non-full-service distributor, cannot. Nor does Complaint Counsel offer any reason to believe that only full-service distributors offer next-day shipping. The evidence shows the opposite. For example, a 2015 Patterson “Current Market Assessment” for the Memphis area noted Darby was a competitor in the region and “Patterson is the only company in town *without* standard next day shipping.” (RX 0265-015 (Slide 6)). Internal Schein emails discussing why Schein was “losing business to GPOs,” note that Darby offered the “[s]ame products, next day shipping everywhere, [and] lower price.” (CX 2373-001).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1485. Dentists prefer working with a full-service distributor. (Mason, Tr. 2334).

Schein's Response:

As noted in response to CCFF 1483, the asserted fact is overbroad and Dr. Mason's own testimony indicates he had no qualms switching from a full-service distributor to Darby, a non-full-service distributor. (SRF 1483).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1486. Buying groups also prefer working with national full-service distributors. [REDACTED]; CX4253 at 002 (a March 2014 letter to Burkhart from the Catapult Group, in which the Catapult GPO notes that it is looking for a national distributor to service its members and is turning down a willing Burkhart); CX0320 (Capaldo, IHT at 73-74) (the GDA wanted to work with a national distributor or a local full-service distributor in setting up its buying group); see RX2951 (Steck, Class 30b6 Dep. at 34) ("If you're going to sell dental equipment, you have to have a service component or the doctors won't buy it from you.")).

Schein's Response:

The asserted fact is overbroad and not supported by the weight of the evidence. That some buying groups sought out full-service distributors as partners does not establish that all buying groups, or buying groups generally, preferred full-service distributors. Indeed, a number of Complaint Counsel's buying groups chose to work with Darby,

including Smile Source, Synergy, Florida Dental Association, Unified Smiles, and Dental Purchasing Group. (See RX 2086; RX 3079; RX 3080; RX 3081; RX 3083; SF 755). In 2014, Smile Source chose Darby over Schein. (SF 1108-86).

Complaint Counsel's evidence does not support this broad claim. Complaint Counsel cites to Dr. Goldsmith's testimony. But Dr. Goldsmith's preferences did not stop Smile Source from deciding to [REDACTED] in early 2012. (Goldsmith, Tr. 2098). Nor did Smile Source's preferences stop it from rejecting Schein's proposal in 2014 to continue working with Burkhardt, and to partner with Darby, a national non-full-service distributor. (Steck, Tr. 3794; Sullivan, Tr. 4171-73; Goldsmith, Tr. 2156-57; CX 2591-002; Maurer, Tr. 4942-43, 4945; *see also* SF 1108-86).

Complaint Counsel next points to a letter from the Catapult Group to Burkhardt in which Catapult notes, "we are looking for a more nationally located company to assist the program." (CX 4253-002). There is no evidence, however, that Catapult was limiting its search to full-service distributors. Mr. Graham, the founder of Catapult, wrote that they are looking at "either national or *online* companies who understand the dynamics of our changing market." (CX 3287-002). As for the national footprint point, Complaint Counsel introduced no evidence about Catapult to show why it wanted such a geographic reach, or whether it was important to all or most buying groups. Indeed, as Dr. Marshall notes, markets are inherently local. (Marshall, Tr. 2902-03, 3369). Thus, national footprints are not necessarily important, especially where, for example, (i) the buying group is local, or (ii) the buying group can contract with more than one regional distributor (as Smile Source did). In that regard, Complaint Counsel does not allege that Schein boycotted the Catapult Group, and cites no evidence that the Catapult Group ever reached out to Schein. (RX

3087-004; *see also* CX 7100-211). If Catapult preferred a national full-service distributor, it failed to contact the largest such distributor.

Complaint Counsel then cites testimony from Mr. Capaldo who testified that the GDA wanted *either* a national distributor or “a more localized distributor like Atlanta Dental” as a partner for its buying group. (CX 0320 (Capaldo, IHT at 73-74)). This is not evidence that the GDA preferred a *national* full-service distributor.

Finally, Complaint Counsel cites testimony from Dave Steck about service. Again, service is not specific to *national* full-service distributors. Complaint Counsel does not dispute that regional full-service distributors like Burkhart and others offer service.

Patterson’s Response:

Patterson joins Schein’s response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1487. The “convenience of full-service capabilities” allows dentists to spend more time with patients and generate additional revenue. (CX5030 at 005 (Form 10-K for Patterson Companies, 2015)).

Schein’s Response:

The cited evidence is not reliable evidence of the time savings, if any, associated with full-service distributors compared to other sources of supply. Indeed, the proposed finding – which focuses only on time savings – cites only a single sentence in Patterson’s 10-K, does not reflect any analysis or study, and does not identify which aspects, if any, of full-service distribution are responsible for any time savings, or whether non-full-service distributors are also able to save customers time.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

(6) Distinct Full-Service Distribution Business Model

1488. Schein's senior executive James Bewslawski recognizes full-service dental distribution as a distinct line of business, noting that:

Most dentists will contract with one or two full service dental distributors, and fill any remaining needs from various other supply and equipment providers. To be a primary or secondary dealer, the dealer must be able to offer a broad array of products and services, including equipment, equipment repair, supplies, and (increasingly) technology products and related I.T. services.

(RX2933 at 006 (Declaration of James Bewslawski)).

Schein's Response:

Mr. Breslawski's statement clarifies that dentists do not exclusively rely on one source of supply, something Dr. Marshall confirmed. Even when buying group members purchase from their designated buying group distributor, dentists continue to purchase around 50% of their supplies from other full-service distributors and untold amounts from online/mail-order, and other sources. (CX 7100-153, -163, -171, -178).

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

Benco has no specific response to the proposed finding.

1489. Because dentists use mechanical dental equipment with virtually every patient visit – and because such equipment gets heavy use resulting in significant wear and tear – timely equipment

service is important component of the package of full-service for dental distribution that Schein provides. (RX2933 at 006-007 (Declaration of James Bewslawski)).

Schein's Response:

No response, other than to note that this asserted fact does not mean that non-full-services competitors are not competitive, especially with respect to purchases of supplies.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1490. Schein's senior executive James Bewslawski explained that Schein spends "tens of millions of dollars each year" to provide its services to its dental customers because equipment and service is a "significant driver in [Schein's] dental business." (RX2933 at 006-007 (Declaration of James Bewslawski)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2. Non-Full-Service Distributors (Mail-Order, Telesales, and Online Distributors)

1491. In addition to purchasing products from full-service distributors, dentists can also purchase products from mail-order, telesales, or online distributors ("non-full-service distributors"). (Goldsmith, Tr. 1947, [REDACTED] Steck, Tr. 4050-5051, Kois Sr., 172-174).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

a) Non-Full-Service Distributors Are Based On A Fundamentally Different Business Model Than Full-Service Distributors.

1492. Non-full-service distributors are based on a fundamentally different business model than full-service distributors. (CX0311 (Sullivan, IHT at 69-70)).

Schein's Response:

The asserted fact is false and unfairly quotes Mr. Sullivan. Mr. Sullivan did not say the two models were “fundamentally different.” (CX 0311 (Sullivan, IHT at 69-70)). Mr. Sullivan testified the two are different segments of the same market: “We’re all going, you know, approaching the same customer, but our go-to-market strategies are different.” (CX 0311 (Sullivan, IHT at 69-70)). Mr. Sullivan confirmed that Schein competes with non-full-service distributors for the same customers. (CX 0311 (Sullivan, IHT at 69-71)).

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit. Sullivan never stated that non-full-service distributors are based on a fundamentally different business model than full-service distributors. Rather, Sullivan testified that while the structure and go-to-market strategies of full-service distributors are different from those of non-full-service distributors the two types of businesses compete for the same customers.

1493. Non-full-service distributors, such as Darby, usually offer lower prices than full-service distributors because they have different cost and overhead structures. (CX8023 (Guggenheim, Dep. at 324-325); CX0311 (Sullivan, IHT at 69-70); CX0301 (Cohen, IHT at 42); [REDACTED]).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

While non-full-service distributors typically offer lower prices than full-service distributors, Benco competes vigorously against non-full-service distributors. For example, Benco regards Darby and Safco as significant competitors in many local markets. (RX0380 at 31 ("I'm a good rep, but I'm not so good that I can compete with 20% off the Darby catalog."); J. Johnson, Tr. 4805-4807). In at least some markets, Benco uses "selective price overrides to make Benco's prices competitive with low-priced competitors like Darby and Safco." (CX1100 at 3; RX2834 at 22).

1494. Schein's President, Tim Sullivan, explained that non-full-service distributors are based on a fundamentally different business model than full-service distributors: "[T]here's the full-service dealers and then the non-full-service dealers. We're all [] approaching the same customer, but our go-to-market strategies are different Our cost structure is different; the services that we provide is [*sic*] different. So our cost structure is higher in order to provide all the services that we provide." (CX0311 (Sullivan, IHT at 69-70)).

Schein's Response:

As explained in response to CCFF 1492, Mr. Sullivan did not testify there are two "fundamentally different" business models. Full-service and non-full-service distributors sell the same products to the same customers. Indeed, competition from non-full-service

distributors allows independent dentists to source products from many different distributors at the same time.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

By way of response, Benco refers the Court to its response to ¶ 1492.

b) Non-Full-Service Distributors Generally Do Not Offer As Many Products As Full-Service Distributors.

1495. Non-full-service distributors generally do not offer as many products and services as full-service distributors. (CX1112 at 014 (Answer of Benco ¶25); CX6026 at 006 (Answer of Schein ¶25); CX3113 at 003-004 (Answer of Patterson ¶25)).

Schein's Response:

The asserted fact is overbroad. Schein's Answer states that "mail-order and Internet distributors do not provide the breadth of *services* available through Schein[.]" but that Schein lacked sufficient knowledge or information to form a belief about the number of products offered by non-full-service distributors. (CX 6026-006 (emphasis added)). Every distributor offers a different array of products and services. Complaint Counsel did not present evidence showing that non-full-service distributors offered an inadequate or non-competitive array of supplies. (See SRF 1541).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

c) Non-Full-Service Distributors Do Not Generally Employ Sales Or Technical Service Representatives.

1496. Unlike the full-service distributors, non-full-service distributors do not generally employ sales representatives or service technicians. [REDACTED]; CX0319 (Reece, IHT at 28-29); CX8023 (Guggenheim, Dep. at 324-325); CX0305 (Cavaretta, IHT at 48); RX2591 (Steck, Class 30b6 Dep. at 27)).

Schein's Response:

While non-full-service distributors do not generally employ in-person sales representatives or service technicians, Complaint Counsel has not shown that dentists had any difficulty getting technical service from non-full-service providers. For example, Dr. Baytosh testified that he used independent technicians and a company called Dental Fix to service his equipment more than any of the Respondents. (CX 8030 (Baytosh, Dep. at 63)).

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is overbroad. The evidence makes clear that certain non-full-service distributors employ salespeople. [REDACTED]
[REDACTED]).

1497. Online distributors do not have a technical service team and do not normally sell equipment. (Cohen, Tr. 1046-1047; Sullivan, Tr. 4050-4051; Guggenheim, Tr. 2008-2009 (Darby); CX0319 (Reece, IHT at 28-29)).

Schein's Response:

Mr. Cohen's testimony is mis-cited. Mr. Cohen's testimony ends on page 1003 of the hearing transcript. To the extent Complaint Counsel intended to cite Mr. Ryan's testimony at pages 1046-47, that testimony contradicts the asserted fact. Mr. Ryan

described Darby as a “mail-order distributor,” meaning “they sell consumable supplies *and small equipment...*” (Ryan, Tr. 1046-47).

Though online distributors *generally* do not offer technical service, some do. For example, Darby Dental has a partnership with Dental Fix Rx “the fastest growing service franchise in the country, to bring dental equipment service and repair to their customers.” (CX 2593-002). Indeed, Dr. Marshall cited Darby’s relationship with Dental Fix Rx when noting, “While many dentists rely on full-service distributors for their repair and maintenance needs, dentists can also utilize independent service technicians.” (CX 7100-056).

Additionally, as Mr. Ryan noted, some online distributors do sell equipment. (Ryan, Tr. 1046-47). Mr. Sullivan testified that some online-only distributors sell equipment and confirmed that Darby sells equipment. (Sullivan, Tr. 4050-51; CX 8025 (Sullivan, Dep. at 25-26)).

As noted in response to CCFF 1496, dentists had service and equipment options outside of Respondents and the evidence shows that they used independent service providers to service their equipment.

Patterson’s Response:

Patterson joins Schein’s and Benco’s responses.

Benco’s Response:

Complaint Counsel’s proposed finding is overbroad. The evidence makes clear that certain non-full-service distributors sell equipment. (([REDACTED]

[REDACTED]

d) Non-Full-Service Distributors Do Not Offer Value-Added Services.

1498. Non-full-service distributors do not offer value-added services akin to full-service distributors, such as technology and business solutions. (CX8025 (Sullivan, Dep. at 25); CX8031 (Steck, Dep. at 141); CX0305 (Cavaretta, IHT at 48); see also CX5005 at 008-009 (Form 10-K for Patterson Companies, 2017); CX0304 (Ryan, IHT at 37) (Darby generally only distributes consumables)).

Schein's Response:

Each distributor offers a unique (though partially overlapping) mix of products and services. Non-full-service distributors and other service providers offer many of the same products or services as Respondents, and Complaint Counsel has not identified any service that only full-service distributors provide. Nor has Complaint Counsel demonstrated that dentists only purchase products and services from a single provider.

Patterson's Response:


Patterson joins Schein's and Benco's responses.

Benco's Response:

Dentists that purchase dental products from non-full-service distributors do not have to forego value-added services because there are independent companies and full-service distributors that provide such services. (J. Johnson, Tr. 4804-4806).

e) Non-Full-Service Distributors Do Not Have Distribution Facilities Across The Country.

1499. Non full-service distributors do not have distribution facilities across the country.



Schein's Response:

False.

For example, Darby, a non-full-service distributor, operates five distribution centers nationwide. (CX 3105-026 [REDACTED] [REDACTED]).

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is misleading and overbroad. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

f) Full-Service Distributors Do Not Benchmark Prices Against Non-Full-Service Distributors.

1500. [REDACTED]
[REDACTED]

Schein's Response:

The asserted fact is overbroad and irrelevant. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (Reece, Tr. 4420). [REDACTED]
[REDACTED]

Similarly, Mr. Cohen testified as to what Benco does to set catalog prices, not what it does not do, or even what it does specifically to set final prices that dentists actually paid. (CX 8015 (Cohen, Dep. at 466-67)).

Even if there was evidence to support it, the asserted fact is irrelevant because, as Complaint Counsel concedes, full-service and non-full-service distributors have different cost structures. (CCFF 1493). That does not mean, however, that full-service distributors do not compete with non-full-service distributors, including on price. They do. (CX 0311 (Sullivan, IHT at 69-71)).

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited evidence. [REDACTED]

[REDACTED]

[REDACTED]

1501. Schein does not consider non-full-service distributor market prices in setting its catalog prices. (CX0311 (Sullivan, IHT at 67-69); CX0310 (Steck, IHT at 60-61) (if Schein was competing for an account with Darby, Steck would tell account they have to pay more for extra services Schein would provide); [REDACTED]

[REDACTED]

Schein's Response:

The asserted fact has little to no evidentiary value. As Complaint Counsel concedes, full-service and non-full-service distributors have different cost structures. (CCFF 1493). As such, there is little point in comparing *catalog* prices for full-service with *market* prices for non-full-service. That does not mean, however, that full-service distributors do not compete with non-full-service distributors, including on price. They do. (CX 0311 (Sullivan, IHT at 69-71)).

Moreover, as Schein's Dave Steck noted, the "list price ... is pretty much meaningless," because few if any dentists actually pay catalog price. (CX 0310 (Steck, IHT at 62)). Schein FSCs have discretion to discount directly to dentists and can match offers, including from non-full-service distributors, on the spot. (SF 15-16).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

g) Darby, A Non-Full-Service Online Distributor, Is Distinct From Full-Service Distributors.

1502. Darby is the largest non-full-service (online) distributor. (CX0301 (Cohen, IHT at 46)).

Schein's Response:

Benco's Mr. Cohen lacks foundation to support the asserted fact regarding Darby. Mr. Cohen offered only guesses of market shares. (CX 0301 (Cohen, IHT at 46 ("Would you say Burkhardt is the fourth largest U.S. dental distributor? A. Interesting question. I don't know. They're either number four or five. Darby is quite large as well. So probably four and five is Darby and Burkhardt."))).

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

Benco has no specific response to the proposed finding.

1503. Darby is an online distributor of dental supplies that sells merchandise – supplies and equipment – but not larger equipment, and it does not provide in-office services. (Ryan, Tr. 1046-

1047; Goldsmith, Tr. 1947; CX0310 (Steck, IHT at 60); CX0315 (McFadden, IHT at 72-73); CX0314 (Guggenheim, IHT at 52-54)).

Schein's Response:

Darby Dental offers services through its partnership with Dental Fix Rx, "the fastest growing service franchise in the country, to bring dental equipment service and repair to their customers." (CX 2593-002). Indeed, Dr. Marshall cited Darby's relationship with Dental Fix Rx when noting, "While many dentists rely on full-service distributors for their repair and maintenance needs, dentists can also utilize independent service technicians." (CX 7100-056).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1504. Darby does not sell products face-to-face, meaning that it does not have local level sales representatives. (CX8023 (Guggenheim, Dep. at 324-325); CX9005 (Cohen, SourceOne Dep. at 485) ("There is also a range of competitors, like Darby and Safco, that don't have full, you know, face-to-face selling people."); CX0314 (Guggenheim, IHT at 52-54); CX0310 (Steck, IHT at 60)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1505. Darby also did not have equipment service capabilities prior to its partnership with Dental Fix RX in February 2016. (CX8023 (Guggenheim, Dep. at 324-325); CX0304 (Ryan, IHT at 192); CX2593 at 002 (announcement of Darby's partnership with Dental Fix Rx)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1506. Patterson's Guggenheim described Darby as "more of a price position offering" and that "[Darby's] value offer is that they're a low-priced provider in the market. They don't provide technical service, they don't provide sales presence, they don't provide local connection to customers, and we spend hundreds of millions of dollars on infrastructure to do things that they've elected not to do provide and sell at a lower cost . . ." (CX 8023 (Guggenheim, Dep. at 324-325)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1507. In a March 15, 2013 email, Benco's Chuck Cohen wrote, "[A] good sales rep adds value to a dental practice, value that can't be matched by a catalog or even a robust website - - - and value that far exceeds the amount of money the average dental practice can save without a catalog. . . . There's a reason that Schein adopted the full-service model about 12 years ago, when they OWNED the mail-order end of the market, and it's the same reason that Darby isn't growing today: a full-service experience is what dentists want." (CX1053 at 001; Steck, Tr. 4050-4051 ("So the difference – the big difference between full service...and the online companies is they only talk about the supplies piece...[w]e don't believe the non-full-service business has grown much more than, I don't know, 12, 14, 15 percent of the market, I don't know, but it's a small space.")).

Schein's Response:

The asserted fact lacks foundation. Complaint Counsel has not established that Mr. Cohen knew whether Darby was “growing” or even what Mr. Cohen meant by the phrase. Similarly, Mr. Steck’s testimony was about his beliefs as to “the non-full-service business,” and as such, cannot support the truth of the matter asserted. (Steck, Tr. 4050-51).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1508. Benco’s Patrick Ryan was not as concerned when non-full service distributors such as Darby were supplying buying groups, but he grew more concerned when full-service distributors started servicing buying groups due to “tougher competition” from full-service distributors’ “value-added services.” (Ryan, Tr. 1043-1049; CX0304 (Ryan, IHT at 188-194); CX0015 (“Shit. I know Burkhardt got Nashville and Atlanta involved [with Smile Source]. If it’s just Darby, I don’t care as much...but when full service guys get in....”)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Pat Ryan is a Benco employee, not a Benco executive. Pat Ryan is not a member of Benco’s Senior Leadership Team. (CX8015 (Cohen, Dep. at 347); CX0304 (Ryan, IHT at 11)). The cited exhibit and testimony contains only the statements and impressions of Pat Ryan, not Benco as a whole. Benco itself is not concerned about competition from buying groups because, as the evidence in this matter clearly shows, Benco believes that

buying groups “are a failed business model in dentistry.” (CX0301 (Cohen, IHT at 377); *see also* CX0303 (McElaney, IHT 80-81 (“I’ve never seen a [buying group] model that works.”))). Chuck Cohen testified, of the buying group model, “I don’t view it as a threat to our business or a driver in [sic] any change in our business.” (CX0301 (Cohen, IHT at 377)).

3. Direct-Selling Manufacturers.

1509. Dentists can also purchase some dental supply products from direct-selling manufacturers. (Kois Sr., Tr. 168, 175; Cohen, Tr. 602; Ryan, Tr. 1140-1141; Goldsmith, Tr. 1950-1951 (discussing discounts to Smile Source dentists from direct sale)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1510. Direct-selling by manufacturers represent a small segment of the dental market. Estimates for this segment range from 10% to 25%, but these are typically niche and specialty products, such as root canal supplies, rotary supplies, and bleaching products. (CX8030 (Baytosh, Dep. at 57-58); CX0301 (Cohen, IHT at 47); CX0317 (Rogan, IHT at 278-279); CX0304 (Ryan, IHT at 28); CX0082 at 008; CX3280 at 019; CX3105 at 024 (McKinsey & Company, Dental business growth strategy project: U.S. market overview, December 2015, 75% of dental products go through distributors Patterson and Schein)).

Schein’s Response:

The asserted fact is irrelevant and vague, as the share figures do not match any market Complaint Counsel has alleged. Further, the estimated market shares are not reliable because (i) it is not clear what data, if any, were used to generate such estimates,

and (ii) Complaint Counsel did not lay the foundation necessary to show that any of the witnesses or authors of the cited documents had access to reliable data or conducted a reliable market share analysis.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is misleading. As much as 25% of dental products are sold directly to dentists by manufacturers. (J. Johnson, Tr. 4800). Because all dentists regularly source products across multiple suppliers—including both distributors and direct-selling manufacturers—direct selling manufacturers compete with distributors.

**a) Direct-Selling Manufacturers Offer Limited Dental Supplies
And Do Not Sell Dentists A Full Line Of Dental Products**

1511. Direct-selling manufacturers offer limited dental supplies and do not typically offer or directly sell the full range of products a dentist needs to run a dental practice. (Ryan, Tr. 1140-1141); Kois Sr., Tr. 176; [REDACTED] CX0304 (Ryan, IHT at 27-28); CX8030 (Baytosh, Dep. at 57-58)).

Schein's Response:

The asserted fact is irrelevant. Complaint Counsel has not presented evidence that any dentists purchase everything needed to run a dental practice from a single source. Rather, dentists purchase their supplies and equipment from a host of sources and even the largest dental distributors may not have all the products a single dentist wants. (*See, e.g.*, Kois Sr., Tr. 175-76; *see also* RX 2821-004 (“the average dental practitioner purchases supplies from more than one supplier”)). Neither has Complaint Counsel shown that there are any categories of products that cannot be obtained through direct-selling manufacturers. Indeed, Dr. Kois believed it would be possible, if inconvenient, to satisfy the supply needs

of a dental practice exclusively through direct-selling manufacturers. (CX 8007 (Kois Sr., Dep. at 164)). Nor has Complaint Counsel shown that products sold by direct-selling manufacturers are not competitive with similar products sold through distributors.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding misinterprets the cited evidence. While witnesses testified that a relationship with any single direct-selling manufacturer would not be sufficient to supply a dental practice, the testimony does not support Complaint Counsel's implication that a dentist could not rely on a series of direct-selling manufacturers. Dr. Baytosh, in the testimony cited by Complaint Counsel, states, when asked "whether you could purchase all of the supplies that you need from a direct selling manufacturer," replied, "I think you probably could." (CX8030 (Baytosh, Dep. at 57)). In response to a question as to whether a dentist can rely "solely on *a* direct-selling manufacturer to run a practice," Mr. Ryan responded, "No, not solely. Not *on any one*." (Ryan, Tr. 1141 (emphasis added)). Mr. Ryan was testifying that a practitioner cannot rely on a single direct-selling manufacturer. He was not testifying that dentists cannot rely on multiple direct-selling manufacturers, as Complaint Counsel's proposed finding implies. This is consistent with Mr. Ryan's testimony, during his investigational hearing, that he could not think of any *one* distributor that a dentist could rely on to run a practice. (CX0304 (Ryan, IHT at 27:21 ("None that I can think of."))).

Mr. Kois, similarly, stated that he could not rely on the "use of *a single manufacturer*" to supply all the needs of his practice, not that he could not rely on direct-selling manufacturers as a whole. (Kois Sr., Tr. 176). While Mr. Reece testified that

██ he did not testify that a dentist could not rely on direct-selling manufacturers.

1512. Instead, many dental supply products are only available through distributors. (CX0321 (Kois Jr., IHT at 84); Ryan, Tr. 1141 (direct selling manufacturers do not carry a full line of products)).

Schein's Response:

The asserted fact restates CCFF 1511, and Schein incorporates its response to CCFF 1511 here. Dr. Kois – a practicing dentist – believed it would be possible, if inconvenient, to satisfy the supply needs of a dental practice exclusively through direct-selling manufacturers. (CX 8007 (Kois Sr., Dep. at 164)). Indeed, some dental products are only available through direct-selling manufacturers.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited evidence. In response to a question as to whether a dentist can rely "solely on *a* direct-selling manufacturer to run a practice," Mr. Ryan responded, "No, not solely. Not *on any one*." (Ryan, Tr. 1141 (emphasis added)). Mr. Ryan's testimony was that any single direct-selling manufacturer does not carry a full line of products.

1513. No direct-selling manufacturer offers the full range of dental products necessary to run a dental practice. (Ryan, Tr. 1141; Kois Sr., Tr. 176; Misiak, Tr. 1293 (Young Innovations does not offer all the products a dentist's office would require); CX0304 (Ryan, IHT at 28)).

Schein's Response:

The asserted fact restates CCFF 1511, and Schein incorporates its response to CCFF 1511 here. Dr. Kois – a practicing dentist – believed it would be possible, if inconvenient, to satisfy the supply needs of a dental practice exclusively through direct-selling manufacturers. (CX 8007 (Kois Sr., Dep. at 164)).

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

While no single direct-selling manufacturer offers a full slate of products, Dentists regularly purchase dental products from multiple sources. (RX2834 at 19, ¶ 27; RX2834 at 20, Exhibit 2; J. Johnson, Tr. 4799-4800; J. Johnson, Tr. 4802-4803; RX2967 (Wu, Dep. 240-241)). In fact, the seven independent dentists named as plaintiffs in the class litigation each purchased from a combination of distributors and direct-sale manufacturers. (RX2834 at 20-21, Exhibit 2; J. Johnson, Tr. 4799-4800; J. Johnson, Tr. 4803-4804 (“ . . . dentists do, all of them, regularly source across multiple suppliers, including both distributors and direct-selling manufacturers.”)). In total, the seven independent dentists named as plaintiffs in the class litigation purchased products directly from over 40 different direct-sale manufacturers, dental labs, and independent suppliers of products and services. (RX2834 at 20-21, Exhibit 2; J. Johnson, Tr. 4799-4800). These seven dentists studied by Dr. Johnson can be expected to be representative of dentists in general because they were selected to represent the large class of dentists in the class litigation. (J. Johnson, Tr. 4906).

1514. A dental practice doing business only with manufacturers would be unable to purchase the full set of products available from full-service distributors. Dentist Joseph Baytosh testified that he asked manufacturers whether he could purchase supplies directly from them, but they informed

him that they sell through dental supply companies. (CX8030 (Baytosh, Dep. at 57)). Dr. Baytosh further stated that the direct-selling manufacturers that he purchases from only sells specialty items like endodontic supplies, orthodontic supplies. (CX8030 (Baytosh, Dep. at 57-58)).

Schein's Response:

The asserted fact restates CCFF 1511, and Schein incorporates its response to CCFF 1511 here.

The asserted fact also lacks foundation and is unsupported by the cited testimony. Dr. Baytosh testified that he never tried to buy all of his supplies directly from manufacturers: “Q. Could you buy everything that you need as a dentist in terms of supplies from a direct selling manufacturer, to your knowledge? ... A. I would think, but *I’ve never attempted to do that.*” (CX 8030 (Baytosh, Dep. at 56) (emphasis added)). And when asked, “do you know either way whether you could purchase all of the supplies that you need from a direct selling manufacturer?” Dr. Baytosh responded, “*I think you probably could.*” (CX 8030 (Baytosh, Dep. at 57) (emphasis added)). Dr. Kois had the same opinion – he believed it would be possible, if inconvenient, to satisfy the supply needs of a dental practice exclusively through direct-selling manufacturers. (CX 8007 (Kois Sr., Dep. at 164)).

Each distributor and manufacturer has its own unique mix of products and services. Complaint Counsel has not shown that there are any categories of products that cannot be obtained through direct-selling manufacturers. Nor has Complaint Counsel shown that products sold by direct-selling manufacturers are not competitive with similar products sold through distributors.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit. In fact, the very exhibit cited by Complaint Counsel contradicts Complaint Counsel's proposed finding. Dr. Baytosh, when asked "whether you could purchase all of the supplies that you need from a direct selling manufacturer," replied, contrary to Complaint Counsel's proposed finding "I think you probably could." (CX8030 (Baytosh, Dep. at 57)). Complaint Counsel also ignores the fact that "dentists do multisource," and "regularly source across multiple suppliers." (J. Johnson, Tr. 4803).

The portions of Dr. Baytosh's testimony that Complaint Counsel does cite do not stand for the propositions that Complaint Counsel asserts. Complaint Counsel's assertion that "manufacturers . . . informed [Dr. Baytosh] that they sell through dental supply companies" misrepresents Dr. Baytosh's actual testimony. (CX8030 (Baytosh, Dep. at 57)). Dr. Baytosh actually testified that "most" of the times that he has "asked a direct selling . . . manufacturer whether you could purchase supplies directly from them," he received a response that "most of them sell through a dental supply company." (CX8030 (Baytosh, Dep. at 57)). Dr. Baytosh simply did not provide the testimony that Complaint Counsel claims.

Similarly, although Complaint Counsel claims Dr. Baytosh testified "that the direct-selling manufacturers that he purchases from only sell specialty items like endodontic supplies, orthodontic supplies," Dr. Baytosh actually testified "[m]ost of the companies that I have dealt with deal with specific . . . supplies." (CX8030 (Baytosh, Dep. at 58)). Dr. Baytosh simply did not provide the broad testimony that Complaint Counsel argues he did, and Dr. Baytosh's testimony does not support the sweeping finding that Complaint Counsel proposes.

1515. According to Benco's Patrick Ryan, dentists cannot only rely on manufacturers to run a practice. (CX0304 (Ryan, IHT at 27-28) ("Q. Okay. So there are no full-line manufacturers that sell direct that carry a full line of products for dentists? A. No.")).

Schein's Response:

The asserted fact is overbroad and lacks foundation. Mr. Ryan is not a practicing dentist. The two practicing dentists that were asked whether they could rely on manufacturers for their supply needs both testified in the affirmative. (CX 8030 (Baytosh, Dep. at 57 ("*I think you probably could.*")); CX 8007 (Kois Sr., Dep. at 164 (same))).

Complaint Counsel has not shown that there are any categories of products that cannot be obtained through direct-selling manufacturers. Nor has Complaint Counsel shown that products sold by direct-selling manufacturers are not competitive with similar products sold through distributors. And as stated in response to CCFF 1511, Complaint Counsel has not shown that dentists ever buy through only one source or type of source. (SRF 1511).

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes Mr. Ryan's testimony. The testimony quoted by Complaint Counsel clearly states that there is no single direct-sale manufacturer that sells a full slate of products to dentists. It does not support Complaint Counsel's assertion that dentists cannot, rely on manufacturers in general to run a practice. In response to a question as to whether a dentist can rely "solely on a direct-selling manufacturer to run a practice," Mr. Ryan responded, "No, not solely. Not *on any one.*" (Ryan, Tr. 1141 (emphasis added)). Mr.

Ryan's testimony was that a dental practice cannot rely on any *single* direct-selling manufacturer.

1516. Direct-selling manufacturers do not offer dentists the convenience of "one-stop-shopping" offered by distributors. (CX8000 (Porro, Dep. at 55 ("Q. and if I'm a dentist, can I source everything I need through direct selling from manufacturers?... A. No."), at 57 ("Q. But as far as you know, there are no one-stop shops direct manufacturers to dentists with all the supplies? A. As far as I know, no."))).

Schein's Response:

Complaint Counsel has not shown that there are any categories of products that cannot be obtained through direct-selling manufacturers. Nor has Complaint Counsel shown that products sold by direct-selling manufacturers are not competitive with similar products sold through distributors. Complaint Counsel has not demonstrated that dentists typically purchase from a single distributor or source. As noted in response to CCFF 1511, even though full-service distributors have a broad selection of products and services, dentists will often purchase from multiple sources. (SRF 1511).

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

While direct-selling manufacturers often do not offer the same value-added service that distributors do, dentists that purchase dental products from direct-selling manufacturers do not have to forego these value-added services because there are independent companies that provide such services. (J. Johnson, Tr. 4804-4805). Additionally, such dentists can purchase repair and other services from full-service distributors without also purchasing consumables or equipment from them. (RX2833 at 45, ¶ 107).

1517. Direct-selling manufacturers were not a viable avenue for dentists and buying groups to secure supply agreements for a full line of dental products because dental product manufacturers typically do not sell directly to dentists. (CX8030 (Baytosh, Dep. at 57); CX8017 (Rogan, Dep. at 85-86); CX0321 (Kois Jr., IHT at 84)).

Schein's Response:

The asserted fact is illogical and internally inconsistent. Complaint Counsel begins by talking about “direct-selling manufacturers” that, by definition, sell directly to dentists, but seeks to support its assertion with the claim that “dental product manufacturers typically do not sell directly to dentists.”

Complaint Counsel's citations do not save the assertion. As noted in response to CCFF 1514, Dr. Baytosh never actually tried to purchase all of his supplies from direct-selling manufacturers, but he thought it was possible. (CX 8030 (Baytosh, Dep. at 56-57)). So did Dr. Kois. (CX 8007 (Kois Sr., Dep. at 164)). In the cited testimony, Mr. Rogan did not discuss whether direct-selling manufacturers were a viable avenue for buying groups.²² And Mr. Kois Jr., who is not a dentist, testified, “There are a number of products that distributors sell that are not available unless you go through a distribution company.” (CX 0321 (Kois Jr., IHT at 84)). This just means distributors may have some “exclusives,” but it does not mean direct-selling manufacturers “were not a viable avenue.”

Patterson's Response:

Patterson joins Schein's and Benco's responses.

²² In the cited testimony, Mr. Rogan was asked: “Whether other vendors for whom Patterson was distributing products started selling those products directly simultaneously, in a sense competing with you, can you think of other situations other than the Dentsply one?” Mr. Rogan responded that he did not know of a manufacturer who went from selling through distributors to selling direct. (CX 8017 (Rogan, Dep. at 85-86)).

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited evidence. Many dentists who are members of buying groups purchase dental supplies from direct-selling manufacturers. (Kois, Sr. Tr. 174-77; J. Johnson, Tr. 4800-4801; RX2834 at 21-22, ¶ 28). Moreover, many buying groups partner with direct-selling manufacturers. (RX1100 (listing multiple direct-selling manufacturers among the vendors participating in the Kois Buyers Group); J. Johnson, Tr. 4800-4802; RX2834 at 18, ¶ 26). Many buying groups view it as important to include direct-selling manufacturers among the suppliers that they offer to their members. (J. Johnson, Tr. 4800-4801). In fact, Kois and Smile Source, the two buying groups that Dr. Marshall chose to study, each partner with direct-selling manufacturers. (Kois, Sr., Tr. 174-77; J. Johnson, Tr. 4799-4800; Maurer, IHT at 66-67; RX2834 at 18, ¶ 26).

b) Direct-Selling Manufacturers Do Not Sell The Same Products Through Distributors

1518. Direct-selling manufacturers that sell directly to dentists generally do not also sell the same products through distributors, and direct-selling manufacturers that sell through distributors do not typically sell the same products directly to dentists. (Kois Sr., Tr. 176; CX0082 at 008; CX0304 (Ryan, IHT at 26-28)).

Schein's Response:

The asserted fact is illogical and internally inconsistent. By definition, "direct-selling manufacturers" are manufacturers that *do* sell directly to dentists. Nevertheless, the asserted fact is irrelevant. Complaint Counsel has not shown that there are any categories of products that cannot be obtained through direct-selling manufacturers. Nor has Complaint Counsel shown that products sold by direct-selling manufacturers are not competitive with similar products sold through distributors.

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

Benco has no specific response to the proposed finding.

1519. Most of the direct-selling manufacturers that Patterson works with sell only through distributors and do not sell directly to dentists. (Rogan, Tr. 3561-3562).

Schein's Response:

The asserted fact is illogical and internally inconsistent. By definition, "direct-selling manufacturers" *do* sell directly to dentists. Perhaps Complaint Counsel meant to refer to "manufacturers" with whom Patterson works. (Rogan, Tr. 3561-62). Nevertheless, the asserted fact is irrelevant. Complaint Counsel has not shown that there are any categories of products that cannot be obtained through direct-selling manufacturers. Nor has Complaint Counsel shown that products sold by direct-selling manufacturers are not competitive with similar products sold through distributors.

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

Benco has no specific response to the proposed finding.

c) Direct-Selling Manufacturers Sell Primarily Niche Or Specialty Products Directly To Dentists

1520. Direct-selling manufacturers typically specialize in niche products, such as root canal supplies. (Guggenheim, Tr. 1756-1757; Ryan, Tr. 1141; CX8030 (Baytosh, Dep. at 57-58); CX0304 (Ryan, IHT at 28) ("Q. . . . If a dentist is only relying on direct-selling manufacturers, what they would be missing that they would need? A. Direct-selling manufacturers typically are niche products."); CX0317 (Rogan, IHT at 279) ("We don't have manufacturers decide to sell

direct very often.”); CX3280 at 019 (“Some of the largest ‘direct sales’ categories occur in the specialty markets . . .”).

Schein’s Response:

This is a restatement of CCFF 1510, and Schein incorporates its response to CCFF 1510 here. (SRF 1510). While some direct-selling manufacturers sell products that might be considered “niche,” Complaint Counsel has not shown that there are any categories of products that cannot be obtained through direct-selling manufacturers. Nor has Complaint Counsel shown that products sold by direct-selling manufacturers are not competitive with similar products sold through distributors.

Patterson’s Response:

Patterson joins Schein’s response.

Benco’s Response:

Benco has no specific response to the proposed finding.

d) Direct-Selling Manufacturers Do Not Have Distribution Capabilities

1521. Direct-selling manufacturers also do not have the distribution or service capabilities of full-service distributors. According to a Patterson strategic analysis, direct selling manufacturers cannot compete with the distribution networks of full-service distributors. (CX0082 at 008 (attachment to February 28, 2012 email from Guggenheim to Love) (“Direct companies continue to hit a wall at a certain volume as they cannot compete with the coverage of the distribution network.”)).

Schein’s Response:

The cited document does not discuss direct-selling manufacturers’ service capabilities. While the Patterson consultant’s document observes (without any citation to data or analysis) that distributors have a more developed distribution network than manufacturers, it confirms that, contrary to Complaint Counsel’s asserted market definition

limited to full-service distribution, the “competitive landscape of the U.S. dental business” includes large distributors, “regional distributors,” “small local players,” and “significant direct-to-dentist companies.” (CX 0082-008).

Patterson’s Response:

Patterson joins Schein’s and Benco’s responses.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited evidence. Dentists that purchase dental products from direct-selling manufacturers do not have to forego value-added services because there are independent companies that provide such services. (J. Johnson, Tr. 4804-4805). Moreover, such dentists can also purchase repair and other services from full-service distributors without also purchasing consumables or equipment from them. (RX2833 at 45, ¶ 107).

B. The Relevant Product Market Is Dental Products And Services Sold Through Full-Service Distributors To Independent Dentists.

1522. The relevant product market is the dental products and services sold through full-service distributors to independent dentists. (CCFF ¶¶ 1525-1566).

Schein’s Response:

Complaint Counsel cites no record evidence to support its finding, and only cites its other proposed findings, which – as set forth in the specific replies – also fail to support Complaint Counsel’s characterization of the evidence.

Substantively, to the extent the court reaches the question of market definition (which is unnecessary in Schein’s case because there is no evidence Schein entered the alleged agreement), the relevant product market consists of dental distribution services by full-service distributors, online/mail-order distributors, direct-to-dentist manufacturers,

and other means by which dentists obtain access to any supplies, equipment, or other services.

Patterson's Response:

Patterson agrees with Schein that there is no reason to reach the question of market definition because there is no evidence Patterson entered the alleged agreement. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and contrary to the evidence.

Complaint Counsel failed to establish that the relevant product market is the dental products and services sold through full-service distributors to independent dentists. In fact, the evidence demonstrates that there are likely separate and distinct markets for the distribution of dental equipment and dental consummables, and the relevant markets likely include equipment, products and services sold directly by manufacturers as well as through non-full-service and on-line distributors. (BFF 659-780; RRFF ¶¶ 1525-1566).

1523. Dr. Carlton declined to do any analysis of the market definition because the "definition of the relevant product and geographic markets has no bearing on whether Respondents' behavior could be deemed anticompetitive." (RX2832 at 010-011 (¶12, n.15) (Carlton Expert Report); *see also* Carlton, Tr. 5470).

Schein's Response:

Dr. Carlton noted that Dr. Marshall's market definition improperly "excludes online/mail-order distributors" and therefore, "ignores any competitive constraint on Schein from these excluded distributors in dealing with buying groups of independent dentists." (RX 2832-011 (¶12 n.15)). While Dr. Carlton stated his understanding that market definition is not relevant, he made clear he is "not a lawyer" and is not opining or

conceding the relevance or irrelevance of market definition. (RX 2966 (Carlton, Dep. at 229)).

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is misleading. Dr. Carlton wrote footnote 15 of his expert report "in the context of the conspiracy as alleged by the FTC," not the evidence actually presented at trial. (RX2832 at 010-011, ¶ 12 n. 15). The FTC alleged a conspiracy that was *per se* unlawful, inherently suspect or unlawful pursuant to a truncated analysis. Complaint ¶¶ 80-88. In fact, the evidence at trial demonstrated that buying groups are not customers, but rather are intermediaries or middle-men that do not choose, order, purchase, take delivery of, pay for, or use dental equipment, products or services. (Cavaretta, Tr. 5568-69; Cohen, Tr. 444-45, 861; Ryan, Tr. 1034-36; *see also* RX2928 (member "[p]urchases are made directly from the vendor"); Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65). As such, the purported conspiracy alleged by the FTC is not *per se* unlawful, inherently suspect or unlawful pursuant to a truncated analysis. *See* Benco's Post-Trial Brief at 41-49; JFFL at ¶¶ 97-98. 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. (RX2832 at 010-011, ¶ 12 n. 15).

1524. Dr. Carlton describes the market definition as "superfluous" to this matter and explains that is the reason that he does not address it in his report. (RX2966 (Carlton, Dep. at 228-229)).

Schein's Response:

The asserted fact is irrelevant. Dr. Carlton is “not a lawyer.” (RX 2966 (Carlton, Dep. at 229)). His testimony is irrelevant to the legal question of whether market definition is relevant to this case.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is misleading. Dr. Carlton was deposed before any evidence was presented at trial, and in the same context as that in which he wrote his expert report. Footnote 15 of his expert report specifies that his statement was made “in the context of the conspiracy as alleged by the FTC,” not the evidence actually presented at trial. (RX2832 at 010-011, ¶ 12 n. 15). The FTC alleged a conspiracy that was *per se* unlawful, inherently suspect or unlawful pursuant to a truncated analysis. Complaint ¶¶ 80-88. And in his deposition, Dr. Carlton confirmed that his understanding that a debate on market definition would be superfluous was “based on what the lawyers have told me.” (RX2966 (Carlton, Dep. at 229)). In fact, the evidence at trial demonstrated that buying groups are not customers, but rather are intermediaries or middle-men that do not choose, order, purchase, take delivery of, pay for, or use dental equipment, products or services. (Cavaretta, Tr. 5568-69; Cohen, Tr. 444-45, 861; Ryan, Tr. 1034-36; see also RX2928 (member “[p]urchases are made directly from the vendor”); Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65). As such, the purported conspiracy alleged by the FTC is not *per se* unlawful, inherently suspect or unlawful pursuant to a truncated analysis. *See* Benco's Post-Trial Brief at 41-49; JFFL at ¶¶ 97-98. 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. (RX2832 at 010-011, ¶ 12 n. 15).

1. Qualitative Evidence Demonstrates That No Reasonable Substitute Exists For Products and Services Offered By Full-Service Distributors To Independent Dentists.

a) No reasonable substitute exists for the products and services offered by full-service distributors to independent dentists.

1525. No reasonable substitute exists for the products and services offered by full-service distributors to independent dentists. (Section XIX.A (CCFF ¶¶ 1447-1448, 1460-1521); CCFF ¶¶ 1526-1551).

Schein's Response:

Complaint Counsel cites no record evidence to support its finding, and only cites its other proposed findings, which – as set forth in the specific replies – also fail to support Complaint Counsel's characterization of the evidence.

Substantively, dentists purchase supplies and equipment from a host of other sources, and thus, such other sources provide competitive constraints. Complaint Counsel has not identified a single product or service that is not available from some other non-full-service distributor or vendor. Nor has Complaint Counsel established that dentists purchase exclusively from a single vendor (or type of vendor). Importantly, for purposes of this case, the evidence establishes that online/mail order distributors, such as Darby, compete successfully for the business of buying groups, their members, and other independent dentists. (*See* SF 76, 216, 632, 755, 1164-65, 1167, 1271; *see also* SF 1685).

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and contrary to the evidence.

Multiple substitutes exist for, and actually compete with, the products and services offered by full-service distributors to independent dentists, including the products offered directly by manufacturers to independent dentists and the products and services offered by non-full-service, on-line and mail-order distributors. (BFF 659-780). And the implication that one single substitute must act as a replacement for all the products and services offered by full-service distributors to independent dentists is false; dentists regularly purchase dental products from multiple sources. (RX2834 at 19, ¶ 27; RX2834 at 20, Exhibit 2; J. Johnson, Tr. 4799-4800; J. Johnson, Tr. 4802-4803; RX2967 (Wu, Dep. 240-241)).

1526. Full-service distributors provide independent dentists with a distinctive offering of products and services that independent dentists value. (Section XIX.A.1 (CCFF ¶¶ 1447-1448, 1460-1490)).

Schein's Response:

Each distributor has its own mix of products and services that it provides. The differences mean that dental distribution is a differentiated services market, not that the market is limited to particular types of distributors.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading.

Full-service distributors provide independent dentists with a distinctive offering of products and services that many independent dentists value. But many other independent dentists choose to forego the offerings of full-service distributors and purchase products

and supplies from other sources. (Goldsmith, Tr. 2161-2162; RX2833 at 49, ¶ 119; RX2834 at 20-21, Exhibit 2). And many independent dentists choose to purchase dental products and supplies from a combination of sources, including both full-service distributors and other sources. (Kois Sr., Tr. 285; RX2834 at 19, ¶ 27; RX2834 at 20-21, Exhibit 2; J. Johnson, Tr. 4799-4800; J. Johnson, Tr. 4802-4803; RX2967 (Wu, Dep. 240-241)).

1527. Full-service distributors offer independent dentists a comprehensive selection of dental supplies and equipment from a variety of manufacturers. (CCFF ¶¶ 1447, 1460-1461, 1476, 1482, 1484, 1487, 1527).

Schein's Response:

No response.

Patterson's Response:

Patterson joins Benco's response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading.

Non-full-service, on-line and mail-order distributors also offer independent dentists a comprehensive selection of dental supplies and equipment from a variety of manufacturers. (RX2833 at 49, ¶ 119).

1528. Full-service distributors provide independent dentists with a one-stop shop for supplies, and they typically deliver within a day or two – prompt and efficient delivery is an important component of full-service distribution because it allows dentists to avoid carrying large inventories in their office space. (CCFF ¶¶ 1475, 1476, 1482, 1484, 84-86).

Schein's Response:

Complaint Counsel has not demonstrated that dentists typically purchase only from a single distributor or source. To the contrary, even though full-service distributors have a broad selection of products and services, dentists will often purchase from multiple sources. For example, Dr. Marshall's own analysis shows that, even when buying group members purchase from their designated buying group distributor, dentists continue to purchase around 50% of the suppliers from other full-service distributors and untold amounts from online/mail order, and other types of distributors. (CX 7100-153, -163, -171, -178). With respect to prompt delivery, Complaint Counsel has not established that other vendors – such as mail order or Internet vendors – are unable to provide timely delivery.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading.

Non-full-service, on-line and mail-order distributors also offer independent dentists with a one-stop shop for a sufficiently broad selection of products to satisfy most dentists, as demonstrated by dentists' willingness to purchase dental products and supplies from non-full-service distributors. (RX2833 at 47, ¶¶ 112-113; *id.* at 48, ¶¶ 115, 117; *id.* at 49 ¶ 118; *id.* at 50, ¶ 124; *id.* at 52, ¶ 129; RX2834 at 20-22; RX0380 at 31; J. Johnson, Tr. 4805-4807; CX1100 at 3). Non-full-service, on-line and mail-order distributors typically deliver within several days, which might require dentists to maintain slightly higher inventories of certain frequently-used products in exchange for lower prices. (RX2833 at 14 ¶ 22; RREF 1491-1508).

1529. In addition to supplies and equipment, full-service distributors also offer a variety of value-added services, including sales representatives, equipment servicing and training, equipment installation and repair, sales professional support, and practice management software. (CCFF ¶¶ 1447-1448, 1462-1474, 1483).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1530. The convenience of these full-service distribution services and capabilities allows dentists to spend more time with patients and generate additional revenue. (CCFF ¶ 1487).

Schein's Response:

This proposed finding is virtually identical to CCFF 1487, and Schein incorporates its response to that finding here. Substantively, Schein does not dispute that its services have value to dentists. Nonetheless, Complaint Counsel has not shown that this value is sufficient to render all other forms of distribution non-competitive. Indeed, the proposed finding – which focuses only on time savings – is supported only by a single sentence in Patterson's 10-K, does not reflect any analysis or study, and does not identify which aspects, if any, of full-service distribution are responsible for any time savings, or whether non-full-service distributors are also able to save customers time.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1531. Full-service distributors also have the ability to provide prompt and reliable equipment maintenance that is crucial for dental practices. (CCFF ¶¶ 87-88, 1479-1481, 1532, 1533).

Schein's Response:

No response, other than to note that this fact is irrelevant to whether dentists consider non-full-service distributors competitive when purchasing supplies or equipment. Complaint Counsel has not shown that there are no other sources of prompt and reliable equipment maintenance, or that any Respondent ties equipment *maintenance* to supplies and equipment *purchases*. Nor has Complaint Counsel established that equipment maintenance services is relevant to the selection of buying group partners.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading.

Dentists that purchase dental products from direct-selling manufacturers or non-full-service distributors do not have to forego value-added services because there are independent companies that provide such services. (J. Johnson, Tr. 4804-4805). Dentists that purchase dental products from direct-selling manufacturers or non-full-service distributors also can purchase repair and other services from full-service distributors without also purchasing consumables or equipment from them. (RX2833 at 45, ¶ 107). Indeed, Patterson had up to 10,000 customers, over 95% of whose purchases were services. (RX2833 at 45, ¶ 107). Customers that purchased almost exclusively services from

Patterson included Dental Dreams, Ocean Dental, Dr. Zachary Lechner (Root River Dental), Dr. Howard Henry (Arizona Orthodontics Exclusively), and JT Herres Dental Association. (RX2833 at 45-46, ¶ 108).

1532. Prompt equipment repair is crucial for dental practices because an out-of-service compressor or chair can instantly shut down a practice and prevent a dentist from seeing patients (and in turn, generating revenue). (CCFF ¶¶ 87-88, 1479, 1481).

Schein's Response:

This proposed finding is virtually identical to CCFF 88, and Schein incorporates its response to that finding here. Complaint Counsel has not introduced sufficient evidence to establish this proposition. The fact that, for some hypothetical dental practice, a hypothetical “out-of-service compressor or chair” might have some effect on the dental practice is pure speculation. Schein, however, does not dispute that dentists generally would prefer to have operable equipment.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1533. A full-service distributor sales representative helps a dentist get faster equipment repair and informs him about new products. (CCCF ¶¶ 1480).

Schein's Response:

The evidence is not sufficient to establish this asserted fact. Complaint Counsel cites only CCFF 1480, which in turn only cites the deposition testimony of a single dentist, Dr. Kois. (See CCFF 1480, citing CX 8007 (Kois Sr., Dep. at 24)). Dr. Kois simply noted

that, when he has a problem, he calls his FSC who then interacts with other Burkhart personnel. This hardly establishes that other service providers do not provide similarly prompt service or that dentists need an FSC to help them place a call.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. There are also other sources to help a dentist get fast equipment repair. (J. Johnson, Tr. 4804-4806).

1534. Independent dentists have expressed that they value the prompt service, breadth and diversity of offerings, as well as the relationships with sale and technical representatives that are distinct value-added offerings of full-service distributors. (CCCF ¶¶ 1464, 1469, 1483, 1471, 1473).

Schein's Response:

Complaint Counsel only cites other proposed findings, which themselves merely note that dentists value full-service distribution. This does not suggest that other forms of distribution – including online or direct-to-dentist distribution – are not competitive.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading.

Many independent dentists value the prompt service, breadth and diversity of offerings, and relationships with sales and technical representatives that full-service distributors offer. But many other independent dentists choose to forego the offerings of full-service distributors and purchase products and supplies from other sources.

(Goldsmith, Tr. 2161-2162; RX2833 at 49, ¶ 119; RX2834 at 20-21, Exhibit 2). And many independent dentists choose to purchase dental products and supplies from a combination of sources, including both full-service distributors and other sources. (Kois Sr., Tr. 285; RX2834 at 19, ¶ 27; RX2834 at 20-21, Exhibit 2; J. Johnson, Tr. 4799-4800; J. Johnson, Tr. 4802-4803; RX2967 (Wu, Dep. 240-241)).

1535. Buying groups also prefer working with full-service national distributors. (CCFF ¶ 1535).

Schein's Response:

The asserted fact cites itself. Complaint Counsel cites no evidence in support of this claim, and therefore has not borne its burden of proving it.

Moreover, the asserted fact is essentially the same as CCFF 1486 and Schein hereby incorporates its response to that proposed finding here. In short, the asserted is contradicted by the weight of the evidence. Many buying groups work with Darby. Indeed, when Schein and Darby competed head-to-head for Smile Source's business in 2014, Smile Source chose Darby. (SF 1164-67).

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. Buying groups typically prefer working with full-service distributors because most buying groups fail to provide any service or assistance to their members – they are just intermediaries or middle-men who take a cut. (*See, e.g.*, Cavaretta, Tr. 5568-69; Cohen, Tr. 444-45, 861; Ryan, Tr. 1034-36; RX2928 (member “[p]urchases are made directly from the vendor”); Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65). Unless they have national

membership, buying groups are equally willing to work with local or regional distributors. For a number of years, for example, Smile Source was willing to work with Burkhart, although it was a regional distributor; in 2014, Smile Source chose to accept a bid from Burkhart over a comparable bid from Schein. (Maurer, Tr. 4945).

1536. Respondents also recognize full-service distribution as its own line of business because independent dentists value the services that Respondents offer as well as their relationships with Respondents' sales representatives. (CCFF ¶¶ 1469-1471, 1483, 1486, 1488-1490, 1492-1494, 1501, 1500, 1506-1508, 1511, 1516).

Schein's Response:

Schein does not dispute that it considers itself to be a full-service distributor, and that it believes that dentists value the mix of products and services it offers.

To the extent Complaint Counsel seeks to draw an inference from this that other distributors are not competitive, Complaint Counsel cites no record evidence to support its finding, and only cites their other proposed findings, which – as set forth in the specific replies – also fail to support Complaint Counsel's characterization of the evidence.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Benco does not understand what Complaint Counsel means by "recognize full-service distribution as its own line of business." Respondents recognize that many independent dentists value the prompt service, breadth and diversity of offerings, and relationships with sales and technical representatives that full-service distributors offer, but many other independent dentists choose to forego the offerings of full-service distributors and purchase products and supplies from other sources. (Goldsmith, Tr. 2161-2162;

RX2833 at 49, ¶ 119; RX2834 at 20-21, Exhibit 2). And many independent dentists choose to purchase dental products and supplies from a combination of sources, including both full-service distributors and other sources. (Kois Sr., Tr. 285; RX2834 at 19, ¶ 27; RX2834 at 20, Exhibit 2; J. Johnson, Tr. 4799-4800; J. Johnson, Tr. 4802-4803; RX2967 (Wu, Dep. 240-241)).

(1) Non-full-service distributors are not adequate substitutes for national full-service distributors.

1537. Non-full-service distributors, such as Darby, are not an adequate substitute for full-service distributors to independent dentists. (CCFF ¶¶ 1492-1508, 1538-1534).

Schein's Response:

Witnesses at trial, such as Dr. Mason, testified that they use Darby as their primary supplier. (Mason, Tr. 2405-06). Complaint Counsel has not introduced any evidence to support a finding that Darby is not an adequate substitute for full-service distributors. Nor has Complaint Counsel addressed the fact that, to be competitive, a firm does not necessarily need to offer the full mix of products and services as another firm, especially where customers routinely purchase from multiple sources. In fact, the evidence contradicts Complaint Counsel's assertion. In 2014, Schein and Darby competed for the Smile Source business, and Darby won. (SF 1164-67; CX 2591-002). This demonstrates that Darby is an adequate substitute, and that non-full-service distribution can be an adequate substitute for full-service distribution.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

This proposed finding of fact is both misleading and wrong. It is misleading to the extent that it implies that a supplier can be in the relevant market only if it, standing alone, provides a complete substitute for full-service distributors. In fact, a supplier can be in the relevant market if it provides a partial substitute for full-service distributors because dentists routinely purchase dental products and supplies from multiple sources. (RX2834 at 19, ¶ 27; RX2834 at 20, Exhibit 2; J. Johnson, Tr. 4799-4800; J. Johnson, Tr. 4802-4803; RX2967 (Wu, Dep. 240-241)). Diversion of sales from full-service distributors to on-line distributors indicates that they impose a competitive constraint on full-service distributors. (RX2833 at 48, ¶ 117). Non-full-service distributors should be included in the relevant product market. (J. Johnson, Tr. 4805-4807; RX2833 at 46-47, ¶ 111).

The proposed finding is wrong because non-full-service distributors, including brick-and-mortar non-full-service distributors, on-line distributors such as Darby, and mail-order distributors, are adequate substitutes for full-service dentists.

Taking Darby as an example, the dental supplies that Darby sells overlap to a significant degree with the dental supplies sold by full-service distributors. (RX2833 at 49, ¶ 119). In 2016, Darby supplied over 24% of all purchases of dental supplies made by Smile Source members. (RX2833 at 49 ¶ 18). Four of the seven individual dentists named as plaintiffs in the class litigation purchased dental supplies from Darby. (RX2834 at 20-21). Benco regards Darby as a significant competitor in many local markets. (RX0380 at 31 (“I’m a good rep, but I’m not so good that I can compete with 20% off the Darby catalog.”); J. Johnson, Tr. 4805-4807). In at least some markets, Benco uses “selective price overrides to make Benco’s prices competitive with low-priced competitors like Darby and Safco.” (CX1100 at 3; RX2834 at 22).

Schein and Patterson regard Darby and other non-full-service distributors to be significant competitors. (RX2833 at 47, ¶¶ 112-113). Patterson price change class forms list Darby and Safco as both offensive and defensive reasons to grant discounts. (RX2833 at 47, ¶ 112). The data show that online distributors are effective in taking sales away from full-service distributors. (RX2833 at 48, ¶ 115). There is substantial diversion of sales from the full-service distributors to Darby, indicating that online distributors could be a competitive constraint on the full-service distributors. (RX2833 at 48, ¶ 117).

Dr. Marshall's own data shows that there was significant diversion of sales from Darby to Benco following Benco's entry in Southern California. (RX2833 at 52, ¶ 129). Dr. Marshall's own data shows that, following Benco's entry into Southern California, Darby lost 37.7% of its 2012 sales by 2015. (RX2833 at 52, ¶ 129). From 2010 to 2015, when Benco increased its share in Southern California, no full-service distributor experienced a percentage decrease in sales as dramatic as Darby. (RX2833 at 50, ¶ 124).

1538. Non-full-service distributors have a different business strategy and cost structure than full-service distributors. (CCFF ¶¶ 1492-1494, 1488-1490, 1506, 1538).

Schein's Response:

No response, other than to note that the difference in cost structure gives non-full-service distributors a competitive advantage when it comes to price.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1539. Full-service distributors do not benchmark prices against non-full-service distributors. (CCFF ¶¶ 1500, 1501).

Schein's Response:

The asserted fact cites no record evidence, only Complaint Counsel's other proposed findings. Schein has responded to both of the cited paragraphs separately. (SRF 1500-01).

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and contrary to the evidence. Record evidence establishes that full-service distributors *do* benchmark prices against non-full-service distributors. Benco regards Darby and Safco as significant competitors in many local markets and are acutely aware of Darby's pricing. (RX0380 at 31 ("I'm a good rep, but I'm not so good that I can compete with 20% off the Darby catalog."); J. Johnson, Tr. 4805-4807). In at least some markets, Benco uses "selective price overrides to make Benco's prices competitive with low-priced competitors like Darby and Safco." (CX1100 at 3; RX2834 at 22). Patterson price change class forms list Darby and Safco as both offensive and defensive reasons to grant discounts. (RX2833 at 47, ¶ 112).

1540. Non-full-service distributors do not offer dentists as comprehensive a selection of products or the breadth of additional value-added services that are available through full-service distributors. (CCFF ¶¶ 1471, 1495-1498, 1503, 1506-1508).

Schein's Response:

The asserted fact cites no record evidence, only Complaint Counsel's other proposed findings. Substantively, every distributor offers a different array of products and services.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and misleading. Non-full-service distributors offer dentists a sufficiently broad selection of products to satisfy most dentists, as demonstrated by dentists' willingness to purchase dental products and supplies from non-full-service distributors. (RX2833 at at 47, ¶¶ 112-113; *id.* at 48, ¶¶ 115, 117; *id.* at 49 ¶ 118; *id.* at 50, ¶ 124; *id.* at 52, ¶ 129; RX2834 at 20-22; RX0380 at 31; J. Johnson, Tr. 4805-4807; CX1100 at 3).

Non-full-service distributors are able to compensate for not providing the range of value-added services because their lower cost structure allows them to offer lower prices to dentists. There is substantial evidence that non-full-service distributors are effective at taking sales away from full-service distributors, that they provide a competitive constraint on full-service distributors, and that they belong in the relevant market. (RX2833 at 46-47, ¶ 111; *id.* at 48, ¶¶ 115, 117; Johnson, Tr. 4805-4807).

1541. The products sold by Darby, the largest non-full-service distributor, did not cover the full-line of products and services sold by full-service distributors. (CCFF ¶ 1503).

Schein's Response:

Complaint Counsel cites no record evidence to support its finding, and only cites another proposed finding, which also fails to support Complaint Counsel's characterization of the evidence.

Substantively, every distributor offers a different array of products and services. Complaint Counsel did not present evidence showing that Darby offered an inadequate array of supplies.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. Darby offers dentists a sufficiently broad selection of products to satisfy most dentists, as demonstrated by dentists' willingness to purchase dental products and supplies from Darby. (RX2833 at 47, ¶¶ 112-113; *id.* at 48, ¶¶ 115, 117; *id.* at 49 ¶ 118; *id.* at 50, ¶ 124; *id.* at 52, ¶ 129; RX2834 at 20-22; RX0380 at 31; J. Johnson, Tr. 4805-4807; CX1100 at 3).

Darby is able to compensate for not providing the range of value-added services because their lower cost structure allows them to offer lower prices to dentists. The significant evidence is that Darby is effective at taking sales away from full-service distributors, it provides a competitive constraint on full-service distributors, and it belongs in the relevant market. (RX2833 at 46-47, ¶ 111; *id.* at 48, ¶¶ 115, 117; Johnson, Tr. 4805-4807).

1542. Non-full-service distributors typically do not employ sales and service teams as part of their standard business model, nor do they offer other business and practice-management solutions. (CCFF ¶¶ 1496, 1497, 1504, 1505, 1507).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. Non-full-service distributors are able to compensate for not providing sales and service teams or offering business and practice-management solutions because their lower cost structure allows them to offer lower prices to dentists. The evidence confirms that non-full-service distributors are effective at taking sales away from full-service distributors, they provide a competitive constraint on full-service distributors, and they belong in the relevant market. (RX2833 at 46-47, ¶ 111; *id.* at 48, ¶¶ 115, 117; Johnson, Tr. 4805-4807).

1543. Non-full-service distributors are not a substitute for full-service distributors because independent dentists would lose the convenience and time savings associated with "one-stop-shopping" through a distributor if they worked with a non-full-service distributor. (*See* CCFF ¶¶ 1482, 1495, 1499, 1619).

Schein's Response:

The asserted fact is not supported by substantial or reliable evidence. Complaint Counsel has not explained what constitutes "a substitute," and whether the convenience of "one-stop-shopping" affects the substitutability of different kinds of suppliers.

Substantively, the fact that full-service and non-full-service distributors offer different value propositions does not mean that one is "not a substitute" for the other. Moreover, Complaint Counsel has not demonstrated that dentists typically purchase only from a single distributor or source. To the contrary, even though full-service distributors

have a broad selection of products and services, dentists will often purchase from multiple sources. For example, Dr. Marshall's own analysis shows that, even when buying group members purchase from their designated buying group distributor, dentists continue to purchase around 50% of supplies from other full-service distributors, and untold amounts from online/mail order and other types of distributors. (CX 7100-153, -163, -171, -178).

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

This proposed finding of fact is both misleading and wrong. It is misleading to the extent that it implies that a supplier can be in the relevant market only if it, standing alone, provides a complete substitute for full-service distributors. In fact, a supplier can be in the relevant market if it provides a partial substitute for full-service distributors because dentists routinely purchase dental products and supplies from multiple sources. (RX2834 at 19, ¶ 27; RX2834 at 20, Exhibit 2; J. Johnson, Tr. 4799-4800; J. Johnson, Tr. 4802-4803; RX2967 (Wu, Dep. 240-241)). Diversion of sales from full-service distributors to on-line distributors indicates that they impose a competitive constraint on full-service distributors. (RX2833 at 48, ¶ 117). Non-full-service distributors should be included in the relevant product market. (J. Johnson, Tr. 4805-4807; RX2833 at 46-47, ¶ 111).

The proposed finding is wrong because non-full-service distributors, including brick-and-mortar non-full-service distributors, on-line distributors such as Darby, and mail-order distributors, are adequate substitutes for full-service dentists.

Taking Darby as an example, the dental supplies that Darby sells overlap to a significant degree with the dental supplies sold by full-service distributors. (RX2833 at 49, ¶ 119). In 2016, Darby supplied over 24% of all purchases of dental supplies made by

Smile Source members. (RX2833 at 49 ¶ 18). Four of the seven individual dentists named as plaintiffs in the class litigation purchased dental supplies from Darby. (RX2834 at 20-21). Benco regards Darby as a significant competitor in many local markets. (RX0380 at 31 (“I’m a good rep, but I’m not so good that I can compete with 20% off the Darby catalog.”); J. Johnson, Tr. 4805-4807). In at least some markets, Benco uses “selective price overrides to make Benco’s prices competitive with low-priced competitors like Darby and Safco.” (CX1100 at 3; RX2834 at 22).

Schein and Patterson regard Darby and other non-full-service distributors to be significant competitors. (RX2833 at 47, ¶¶ 112-113). Patterson price change class forms list Darby and Safco as both offensive and defensive reasons to grant discounts. (RX2833 at 47, ¶ 112). The data show that online distributors are effective in taking sales away from full-service distributors. (RX2833 at 48, ¶ 115). There is substantial diversion of sales from the full-service distributors to Darby, indicating that online distributors could be a competitive constraint on the full-service distributors. (RX2833 at 48, ¶ 117).

Dr. Marshall’s own data shows that there was significant diversion of sales from Darby to Benco following Benco’s entry in Southern California. (RX2833 at 52, ¶ 129). Dr. Marshall’s own data shows that, following Benco’s entry into Southern California, Darby lost 37.7% of its 2012 sales by 2015. (RX2833 at 52, ¶ 129). From 2010 to 2015, when Benco increased its share in Southern California, no full-service distributor experienced a percentage decrease in sales as dramatic as Darby. (RX2833 at 50, ¶ 124).

(2) Direct-selling manufacturers are not adequate substitutes for national full-service distributors.

1544. Direct-selling manufacturers are also not an adequate substitute for full-service distributors. (CCFF ¶¶ 1510-1521, 1545-1551).

Schein's Response:

Complaint Counsel cites no record evidence to support its finding, and only cites other proposed findings, which – as set forth in the specific replies – also fail to support Complaint Counsel's characterization of the evidence.

Substantively, direct-selling manufacturers compete against products sold through distribution. For example, Schein recognizes direct-selling by manufacturers to be a significant competitive constraint. Indeed, direct selling by P&G through the Dental Co-Op of Utah led to significant losses to Schein, which resulted in Schein first proposing an exclusive relationship with the Dental Co-Op, followed by termination when the Dental Co-Op rejected that offer. Complaint Counsel has not performed any analysis to show that direct-selling manufacturers (which they exclude from the relevant market) impose less of a competitive constraint on Respondents' pricing than tiny full-service distributors (which they include). As such, there is no basis for excluding them.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, incomplete, and misleading. A supplier can be in the relevant market if it provides a partial substitute for full-service distributors because dentists routinely purchase dental products and supplies from multiple sources. (RX2834 at 19, ¶ 27; RX2834 at 20, Exhibit 2; J. Johnson, Tr. 4799-4800; J. Johnson, Tr. 4802-4803; RX2967 (Wu, Dep. 240-241)). Dentists purchase as much as 25 percent of dental products directly from manufacturers. (CX3285 at 24; CX7100 at 15, ¶ 20; J. Johnson, Tr. 4799-4800; Kois, Sr. Tr. 285).

1545. During the relevant time period, relatively few independent dentists would substitute from a full-service distributor to a direct-selling manufacturer because direct-selling manufacturers do not sell the same range of products sold by full-service distributors. (CCFF ¶¶ 1511-1517).

Schein's Response:

Complaint Counsel cites no record evidence to support its finding, and only cites other proposed findings, which – as set forth in the specific replies – also fail to support Complaint Counsel's characterization of the evidence.

Substantively, Complaint Counsel has not shown that there are any categories of products that cannot be obtained through direct-selling manufacturers. Nor has Complaint Counsel shown that products sold by direct-selling manufacturers are not competitive with similar products sold through distributors. Whether a *single* direct-selling manufacturer carries a full line of products is irrelevant, as dentists typically purchase supplies and equipment from multiple sources.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, incomplete, and misleading. A supplier can be in the relevant market if it provides a partial substitute for full-service distributors because dentists routinely purchase dental products and supplies from multiple sources. (RX2834 at 19, ¶ 27; RX2834 at 20, Exhibit 2; J. Johnson, Tr. 4799-4800; J. Johnson, Tr. 4802-4803; RX2967 (Wu, Dep. 240-241)). Dentists purchase as much as 25 percent of dental products directly from manufacturers. (CX3285 at 24; CX7100 at 15, ¶ 20; J. Johnson, Tr. 4799-4800; Kois, Sr. Tr. 285).

1546. Direct-selling manufacturers offer only limited dental supplies and do not typically offer or directly sell independent dentists the comprehensive selection of products and brands that a dentist needs to run a dental practice. (CCFF ¶¶ 1511-1520, 1545-1548).

Schein's Response:

Complaint Counsel cites no record evidence to support its finding, and only cites other proposed findings, which – as set forth in the specific replies – also fail to support Complaint Counsel's characterization of the evidence.

Substantively, Complaint Counsel has not shown that there are any categories of products that cannot be obtained through direct-selling manufacturers. Nor has Complaint Counsel shown that products sold by direct-selling manufacturers are not competitive with similar products sold through distributors. Whether a *single* direct-selling manufacturer carries a full line of products is irrelevant, as dentists typically purchase supplies and equipment from multiple sources.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, incomplete, and misleading. A supplier can be in the relevant market if it provides a partial substitute for full-service distributors because dentists routinely purchase dental products and supplies from multiple sources. (RX2834 at 19, ¶ 27; RX2834 at 20, Exhibit 2; J. Johnson, Tr. 4799-4800; J. Johnson, Tr. 4802-4803; RX2967 (Wu, Dep. 240-241)). Dentists purchase as much as 25 percent of dental products directly from manufacturers. (CX3285 at 24; CX7100 at 15, ¶ 20; J. Johnson, Tr. 4799-4800; Kois, Sr. Tr. 285).

1547. Direct-selling manufacturers generally only sell niche and specialty products directly to independent dentists. (CCFF ¶¶ 1510-1511, 1514, 1520).

Schein's Response:

Complaint Counsel cites no record evidence to support its finding, and only cites other proposed findings, which – as set forth in the specific replies – also fail to support Complaint Counsel's characterization of the evidence.

Substantively, Complaint Counsel has not shown that there are any categories of products that cannot be obtained through direct-selling manufacturers. Nor has Complaint Counsel shown that products sold by direct-selling manufacturers are not competitive with similar products sold through distributors. Whether a *single* direct-selling manufacturer carries a full line of products is irrelevant, as dentists typically purchase supplies and equipment from multiple sources.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, incomplete, and misleading. A supplier can be in the relevant market if it provides a partial substitute for full-service distributors because dentists routinely purchase dental products and supplies from multiple sources. (RX2834 at 19, ¶ 27; RX2834 at 20, Exhibit 2; J. Johnson, Tr. 4799-4800; J. Johnson, Tr. 4802-4803; RX2967 (Wu, Dep. 240-241)). Dentists purchase as much as 25 percent of dental products directly from manufacturers. (CX3285 at 24; CX7100 at 15, ¶ 20; J. Johnson, Tr. 4799-4800; Kois, Sr. Tr. 285).

1548. An independent dentist doing business only with direct-selling manufacturers would not be able to purchase a full array of products needed to run his dental practice from direct-selling manufacturers. (CCFF ¶¶ 1511-1517).

Schein's Response:

Complaint Counsel cites no record evidence to support its finding, and only cites other proposed findings, which – as set forth in the specific replies – also fail to support Complaint Counsel's characterization of the evidence.

Substantively, Complaint Counsel has not shown that there are any categories of products that cannot be obtained through direct-selling manufacturers. Nor has Complaint Counsel shown that products sold by direct-selling manufacturers are not competitive with similar products sold through distributors. Whether a *single* direct-selling manufacturer carries a full line of products is irrelevant, as dentists typically purchase supplies and equipment from multiple sources. Dr. Kois – a practicing dentist – believed it would be possible, if inconvenient, to satisfy the supply needs of a dental practice exclusively through direct-selling manufacturers. (CX 8007 (Kois Sr., Dep. at 164)).

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, incomplete, and misleading. Complaint Counsel's proposed findings makes no practical sense because dentists routinely purchase dental products and supplies from multiple sources. (RX2834 at 19, ¶ 27; RX2834 at 20, Exhibit 2; J. Johnson, Tr. 4799-4800; J. Johnson, Tr. 4802-4803; RX2967 (Wu, Dep. 240-241)).

1549. Direct-selling manufacturers do not offer independent dentists the same value-added sales and technical services that full-service distributors offer. (CCFF ¶ 1521).

Schein's Response:

Complaint Counsel cites no record evidence to support its finding, and only cites another proposed finding, which – as set forth in the specific reply – also fails to support Complaint Counsel's characterization of the evidence.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, incomplete, and misleading. Dentists that purchase dental products from direct-selling manufacturers do not have to forego value-added services because there are independent companies that provide such services. (J. Johnson, Tr. 4804-4805). Dentists that purchase dental products from direct-selling manufacturers do not have to forego value-added services because they can purchase repair and other services from full-service distributors without also purchasing consumables or equipment from them. (RX2833 at 45, ¶ 107).

1550. Direct-selling manufacturers do not have and cannot offer independent dentists the distribution or service capabilities of full-service distributors. (CCFF ¶ 1521).

Schein's Response:

Complaint Counsel cites no record evidence to support its finding, and only cites another proposed finding, which – as set forth in the specific reply – also fails to support Complaint Counsel's characterization of the evidence.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, incomplete, and misleading. Dentists that purchase dental products from direct-selling manufacturers do not have to forego value-added services because there are independent companies that provide such services. (J. Johnson, Tr. 4804-4805). Dentists that purchase dental products from direct-selling manufacturers do not have to forego value-added services because they can purchase repair and other services from full-service distributors without also purchasing consumables or equipment from them. (RX2833 at 45, ¶ 107).

1551. Direct-selling manufacturers do not offer independent dentists the same product breadth and variety or the convenience of "one-stop-shopping." (CCFF ¶¶ 1511-1516).

Schein's Response:

Complaint Counsel cites no record evidence to support its finding, and only cites other proposed findings, which – as set forth in the specific replies – also fail to support Complaint Counsel's characterization of the evidence.

Substantively, Complaint Counsel has not shown that there are any categories of products that cannot be obtained through direct-selling manufacturers. Nor has Complaint Counsel shown that products sold by direct-selling manufacturers are not competitive with similar products sold through distributors. Whether a *single* direct-selling manufacturer carries a full line of products is irrelevant, as dentists typically purchase supplies and equipment from multiple sources.

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, incomplete, and misleading. Non-full-service, on-line and mail-order distributors also offer independent dentists with a one-stop shop for a sufficiently broad selection of products to satisfy most dentists, as demonstrated by dentists' willingness to purchase dental products and supplies from non-full-service distributors. (RX2833 at 47, ¶¶ 112-113; *id.* at 48, ¶¶ 115, 117; *id.* at 49 ¶ 118; *id.* at 50, ¶ 124; *id.* at 52, ¶ 129; RX2834 at 20-22; RX0380 at 31; J. Johnson, Tr. 4805-4807; CX1100 at 3). There is substantial evidence that non-full-service distributors are effective at taking sales away from full-service distributors, that they provide a competitive constraint on full-service distributors, and that they belong in the relevant market. (RX2833 at 46-47, ¶ 111; *id.* at 48, ¶¶ 115, 117; Johnson, Tr. 4805-4807).

b) Respondents Viewed Each Other As Each Other's Primary Competitors.

1552. Schein, Patterson, and Benco are the only "full-service" distributors of dental supplies and equipment with a national footprint, and they identify each other as their primary or largest competitors. (Section II.D; CCFF ¶¶ 552, 1449-1451).

Schein's Response:

Complaint Counsel cites no record evidence to support its finding, and only cites to other proposed findings, which – as set forth in Schein's specific replies – also fail to support Complaint Counsel's characterization of the evidence.

Substantively, Schein has many competitors. Schein does not consider any single competitor to be "primary." (CX 0311 (Sullivan, IHT at 54-55 ("It varies by market even within the U.S. dental business. ... [E]very market is unique."))). Rather, for a given customer, any distributor that the customer would consider using as his or her distributor

would be a primary competitor of Schein's. (CX 0311 (Sullivan, IHT at 54 ("[I]n Memphis or in Knoxville, you know, Nashville Dental, they might be a bigger player than Patterson or Benco in that market."))). At his Investigational Hearing, Mr. Sullivan confirmed that Schein competes with non-full-service distributors for the same customers. (CX 0311 (Sullivan, IHT at 69-71)).

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. Respondents face competition from multiple sources of distribution. Regional full-service distributors can compete toe-to-toe with Respondents in the territories they choose to cover. Indeed, Burkhart was substantially larger than Benco in the Pacific Northwest, and Atlanta Dental was comparable in size to Benco in Georgia. (CX7100 at 103, Figure 47; *id.* 108 Figure 51). Dr. Johnson identified 46 regional dental supply distributors in his SourceOne report, all of which compete with Respondents. (RX1140 at 23, Exhibit 2.) Non-full-service, on-line and mail-order distributors also compete vigorously against Respondents, and there is substantial evidence that they are effective at taking sales away from full-service distributors. (RX2833 at 46-47, ¶¶ 111-113; *id.* at 48, ¶¶ 115, 117; *id.* at 49 ¶ 118; *id.* at 50, ¶ 124; *id.* at 52, ¶ 129; RX2834 at 20-22; RX0380 at 31; J. Johnson, Tr. 4805-4807; CX1100 at 3).

2. The Hypothetical Monopolist Test Further Confirms That The Relevant Product Market Is Dental Products And Services Sold Through National Full-Service Distributors To Independent Dentists.

1553. Complaint Counsel's economic expert, Dr. Marshall, concluded that the appropriate relevant market in this matter is the full line of dental products and services sold through full-service distributors to independent dentists. (CX7100 at 010, 072-073 (¶¶10, 176-179) (Marshall Expert Report)).

Schein's Response:

To the extent the Court reaches the question of market definition (which is unnecessary in Schein's case because there is no evidence Schein entered the alleged agreement), the relevant product market consists of dental distribution services by full-service distributors, online/mail-order distributors, direct-to-dentist manufacturers, and other means by which dentists obtain access to any supplies, equipment, or other services.

As stated above in response to CCFF 1537-1551, non-full-service distributors and direct-selling manufacturers are part of the relevant product market.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and contrary to the evidence. Dr. Marshall made multiple errors in his definition of the relevant product market. (J. Johnson, Tr. 4790-91). Dr. Marshall erred by failing to include direct-selling manufacturers in the relevant product market. (CX0311 (Sullivan, Dep. 53 (" . . . some of our manufacturers we partner with, but they also have a direct selling component to their business . . . so those segments we view as competitors.")); CX0314 (Guggenheim, Dep. 48-49 ("There's hundreds of competitors, including manufacturers, who sell direct, compete with us.")); Kois, Sr. Tr. 174-77; RX2834 at 18-22 ¶¶ 26-28, Exhibit 2; J. Johnson,

Tr. 4799-4805; RX2833 at 54, ¶ 135; RX2967 (Wu, Dep. 240-241)). Dr. Marshall erred in lumping together the distribution of dental equipment and the distribution of dental consumables. (J. Johnson, Tr. 4812-4815; RX2834 at 23-24, ¶¶ 30-34). Dr. Marshall erred in excluding non-full-service distributors from the relevant product market. (J. Johnson, Tr. 4805-4807; RX2834 at 20-22, Exhibit 2; CX1100 at 3; RX2833 at 46-49, ¶¶ 111-119).

1554. Dr. Marshall concluded that direct-selling manufacturers are not in the relevant product market. (Marshall, Tr. 2908-2909; [REDACTED]).

Schein's Response:

To the extent the Court reaches the question of market definition (which is unnecessary in Schein's case because there is no evidence Schein entered the alleged agreement), the relevant product market consists of dental distribution services by full-service distributors, online/mail-order distributors, direct-to-dentist manufacturers, and other means by which dentists obtain access to any supplies, equipment, or other services.

As stated above in response to CCFF 1537-1551, non-full-service distributors and direct-selling manufacturers are part of the relevant product market.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and contrary to the evidence. Dr. Marshall erred by failing to include direct-selling manufacturers in the relevant product market. (CX0311 (Sullivan, Dep. 53 (" . . . some of our manufacturers we partner with, but they also have a direct selling component to their business . . . so those segments we view as competitors.")); CX0314 (Guggenheim, Dep. 48-49 ("There's hundreds of

competitors, including manufacturers, who sell direct, compete with us.”)); Kois, Sr. Tr. 174-77; RX2834 at 18-22 ¶¶ 26-28, Exhibit 2; J. Johnson, Tr. 4799-4805; RX2833 at 54, ¶ 135; RX2967 (Wu, Dep. 240-241)).

1555. Dr. Marshall also concluded that non-full-service distributors, such as Darby, are not in the relevant product market. (Marshall, Tr. 2905; [REDACTED])

Schein’s Response:

To the extent the Court reaches the question of market definition (which is unnecessary in Schein’s case because there is no evidence Schein entered the alleged agreement), the relevant product market consists of dental distribution services by full-service distributors, online/mail-order distributors, direct-to-dentist manufacturers, and other means by which dentists obtain access to any supplies, equipment, or other services.

As stated above in response to CCF 1537-1551, non-full-service distributors and direct-selling manufacturers are part of the relevant product market. Complaint Counsel has not demonstrated that dentists typically purchase from only a single distributor or source. To the contrary, even though full-service distributors have a broad selection of products and services, dentists will often purchase from multiple sources. For example, Dr. Marshall’s own analysis shows that, even when buying group members purchase from their designated buying group distributor, dentists continue to purchase around [REDACTED] of their supplies from other full-service distributors, and untold amounts from online/mail-order and other types of suppliers. (CX 7100-153, -163, -171). Moreover, Schein competed directly with Darby for buying group business throughout the alleged conspiracy. Darby won the Smile Source contract over Schein in 2014, and Dr. Mason

switched from the New Mexico Chapter of the Dental Co-Op, served by Schein, to the buying group Synergy, served by Darby. (SF 76, 1164-67).

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and contrary to the evidence. Dr. Marshall erred in excluding non-full-service distributors from the relevant product market. (J. Johnson, Tr. 4805-4807; RX2834 at 20-22, Exhibit 2; CX1100 at 3; RX2833 at 46-49, ¶¶ 111-119).

1556. Dr. Marshall based his product market findings on both the qualitative evidence identified in Section XIX.B.1 (CCFF ¶¶ 1525-1552), *supra*, as well as the analytical framework in the U.S. Department of Justice & Federal Trade Commission Horizontal Merger Guidelines (2010) ("Merger Guidelines"). [REDACTED]

Schein's Response:

As noted in response to CCFF 1525-1552, Dr. Marshall relied on faulty "qualitative evidence." (SRF 1525-52).

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and contrary to the evidence. Dr. Marshall based his product market findings on erroneous interpretations of qualitative evidence (RRFF ¶¶ 1525-1552 *supra*), and his quantitative analysis contained multiple flaws. (J. Johnson, Tr. 4808-4810; BFF 722-780).

1557. Dr. Marshall also conducted a Hypothetical Monopolist Test to determine the relevant product market. (CX7100 at 071-073 (¶¶172-179) (Marshall Expert Report)).

Schein's Response:

Dr. Marshall purported to conduct a Hypothetical Monopolist Test ("HMT"), but he did not do so properly.

Dr. Marshall's HMT is based on a logical fallacy. He first *assumed* small regional full-service distributors exert greater pricing constraints than either national (or regional) online distributors or direct-to-consumer manufacturers. (See CX 7100-072-73) Based on that *assumption*, he defined a candidate market around full-service distribution, and then analyzed whether adding Darby alone would be sufficient to negate a price increase among that group. (CX 7100-074-90; *see also* Marshall, Tr. 2904-08, 3338 ("I'm looking at the full-service distributors ... and comparing that to Darby")). In doing so, Dr. Marshall *assumed* – rather than proved – that Darby exerts less of a competitive constraint than other full-service distributors. Dr. Marshall's analytical flaw is particularly important, since Darby has repeatedly and successfully competed for the business of buying groups, and has even won contracts in direct competition with Schein. (SF 581-632, 749-55, 1164-67, 1263-71).

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and contrary to the evidence. Dr. Marshall's hypothetical monopolist analysis contained multiple flaws. (J. Johnson, Tr. 4808-4810; BFF 722-780).

1558. The Hypothetical Monopolist Test is well-established for assessing a relevant product market. (CX7101 at 18 (¶36) (Marshall Expert Rebuttal Report) (citing Merger Guidelines, § 4.1.4); *see also* CX7100 at 071-073 (¶¶172-175, 179) (Marshall Expert Report)).

Schein's Response:

When properly applied, the Hypothetical Monopolist Test can be used to assess a relevant product market. Dr. Marshall did not properly apply it.

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

Benco has no specific response.

1559. The Merger Guidelines state that “[m]arket definition focuses solely on demand substitution factors, i.e., on customers’ ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service.” (CX7101 at 024 (¶57) (Marshall Expert Rebuttal Report) (quoting the Merger Guidelines, p. 7)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1560. The hypothetical monopolist is the union of all firms in the candidate product market, i.e., there is a single seller of products in the candidate market. (CX7101 at 018 (¶36) (Marshall Expert Rebuttal Report)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1561. The Hypothetical Monopolist Test asks if the hypothetical monopolist can profitably increase price in a small but significant manner. (CX7101 at 018 (¶36) (Marshall Expert Rebuttal Report)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1562. If substitution by customers to products outside the candidate market would make the price increase unprofitable, then the candidate market fails. (CX7101 at 018 (¶36) (Marshall Expert Rebuttal Report)). A new candidate market is then considered by adding additional products and then conducting the exercise again. (CX7101 at 018 (¶36) (Marshall Expert Rebuttal Report)). If this second candidate market also fails, more products are added until the hypothetical monopolist can profitably increase price. (CX7101 at 018 (¶36) (Marshall Expert Rebuttal Report)). At that point, the candidate market is validated under the hypothetical monopolist test. (CX7101 at 018 (¶36) (Marshall Expert Rebuttal Report)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1563. A hypothetical monopolist may have many product lines under its control. (CX7101 at 018 (¶36) (Marshall Expert Rebuttal Report)).

Schein's Response:

Though the asserted fact is true in the abstract, Dr. Marshall has not shown that it applies in this case. As stated above in response to CCFF 1525-1551, each distributor has its own mix of products and services that it provides. (SRF 1525-51). These differences mean that dental distribution is a differentiated services market, not that the market is limited to particular types of distributors. Complaint Counsel has not demonstrated that dentists typically purchase from only a single distributor or source. To the contrary, even though full-service distributors have a broad selection of products and services, dentists will often purchase from multiple sources. For example, Dr. Marshall's own analysis shows that, even when buying group members purchase from their designated buying group distributor, dentists continue to purchase around 50% of the suppliers from other full-service distributors and untold amounts from online/mail-order, and other types of distributors. (CX 7100-153, -163, -171).

Patterson's Response:

No specific response

Benco's Response:

Benco has no specific response.

a) Dr. Marshall Performed Two Types Of Hypothetical Monopolist Tests To Determine The Relevant Product Market

1564. In defining the relevant product market in this matter, Dr. Marshall performed two kinds of natural experiments that applied the Hypothetical Monopolist Test (“HMT”) to study customer switching patterns in response to price increases:

- The hypothetical monopolist has a uniform percentage price increase across all of its product lines that fall under the umbrella of the candidate product (based on Darby’s relationship as a supplier for Smile Source).
- The hypothetical monopolist has a price increase in one of the product lines (based on Benco’s entry into southern California).

_____ see
also CX7101 at 018 (¶37) (Marshall Expert Rebuttal Report)).

Schein’s Response:

Dr. Marshall purported to conduct a HMT, but he did not do so properly.

Dr. Marshall’s HMT test is based on a logical fallacy. He first *assumed* small regional full-service distributors exert greater pricing constraints than either national (or regional) online distributors or direct-to-consumer manufacturers. (See CX 7100-072-73). Based on that *assumption*, he defined a candidate market around full-service distribution, and then analyzed whether adding Darby alone would be sufficient to negate a price increase among that group. (CX 7100-074-90; *see also* Marshall, Tr. 2904-08, 3338 (“I’m looking at the full-service distributors ... and comparing that to Darby”)). In doing so, Dr. Marshall *assumed* – rather than proved – that Darby exerts less of a competitive constraint than other full-service distributors. Dr. Marshall’s analytical flaw is particularly important, since Darby has repeatedly and successfully competed for the business of buying groups, and has even won contracts in direct competition with Schein. (SF 581-632, 749-55, 1164-67, 1263-71).

As stated above in response to CCFF 1525-1551, each distributor provides its own unique mix of products and services. (SRF 1525-51). These differences mean that dental distribution is a differentiated services market, not that the market is limited to particular types of distributors.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, misleading, and contrary to the evidence. Each of Dr. Marshall's hypothetical monopolist analyses contained multiple flaws. (See BFF 722-780).

1565. Both of Dr. Marshall's HMT analyses confirmed that the relevant product market was limited to full-service distribution. [REDACTED]

Schein's Response:

Dr. Marshall purported to conduct a HMT, but he did not do so properly.

Dr. Marshall's HMT test is based on a logical fallacy. He first *assumed* small regional full-service distributors exert greater pricing constraints than either national (or regional) online distributors or direct-to-consumer manufacturers. (See CX 7100-072-73). Based on that *assumption*, he defined a candidate market around full-service distribution, and then analyzed whether adding Darby alone would be sufficient to negate a price increase among that group. (CX 7100-074-90; *see also* Marshall, Tr. 2904-08, 3338 ("I'm looking at the full-service distributors ... and comparing that to Darby")). In doing so, Dr. Marshall *assumed* – rather than proved – that Darby exerts less of a competitive constraint than other full-service distributors. Dr. Marshall's analytical flaw is particularly important,

since Darby has repeatedly and successfully competed for buying groups, and has even won contracts in direct competition with Schein. (SF 581-632, 749-55, 1164-67, 1263-71).

To the extent the court reaches the question of market definition (which is unnecessary in Schein's case because there is no evidence Schein entered the alleged agreement), the relevant product market consists of dental distribution services by full-service distributors, online/mail-order distributors, direct-to-dentist manufacturers, and other means by which dentists obtain access to any supplies, equipment, or other services. As stated above in response to CCFF 1525-1551, each distributor provides its own unique mix of products and services. (SRF 1525-51). These differences mean that dental distribution is a differentiated services market, not that the market is limited to particular types of distributors.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, misleading, and contrary to the evidence. Each of Dr. Marshall's hypothetical monopolist analyses contained multiple flaws. (See BFF 722-780).

b) Dr. Marshall Performed An Additional Empirical Analysis To Determine The Relevant Product Market.

1566. In addition to the HMT analyses he conducted, Dr. Marshall did one other analysis of Darby to define the relevant market. (Marshall, Tr. 2908; [REDACTED]). This analysis studies how much independent dentists purchased from Darby. (Marshall, Tr. 2908; [REDACTED]). From this empirical analysis, Dr. Marshall found that almost no dentists purchased all of its products from Darby, and that most dentists only bought a small percentage of their purchases from Darby, if anything at all, confirming Dr. Marshall's findings that Darby and

other non-full-service distributors are not in the relevant market. (Marshall, Tr. 2908: [REDACTED]).

Schein's Response:

Dr. Marshall's Darby analysis is logically unsound. That "almost no dentists purchased all of [their] products from Darby" simply reflects the fact that dentists generally do not purchase all of their products from a single source. Dr. Marshall's own analyses show this. (CX 7100-153, -163, -171 (showing that even when discounting through a buying group, Schein, Burkhardt, and Atlanta Dental were not able to obtain all dentists' purchases)). The facts do show, however, that Darby competed directly with Schein for buying group business (*e.g.*, Smile Source), as well as the business of buying group members (*e.g.*, Dr. Mason). (SF 76, 1164-67). Complaint Counsel has not demonstrated that dentists typically purchase from *any* single distributor or source, let alone Darby.

Thus, to the extent the Court reaches the question of market definition (which is unnecessary in Schein's case because there is no evidence Schein entered the alleged agreement), the relevant product market consists of dental distribution services by full-service distributors, online/mail-order distributors, direct-to-dentist manufacturers, and other means by which dentists obtain access to any supplies, equipment, or other services.

As each distributor provides its own unique mix of products and services, dental distribution is a differentiated services market.

Patterson's Response:

With regard to statements that almost no dentist purchased all of its products from Darby, and that most dentists only bought a small percentage of their purchases from Darby, if anything at all, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions

that should be established by fact witnesses or documents,” Order on Post-Trial Briefs, 3, as well as this Court’s admonition: “Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That’s what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I’m letting you know today so that you don’t think you’re going to question your experts about facts and rely on that,” (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is inaccurate, misleading, and contrary to the evidence. Dr. Marshall’s analysis was based on two very small samples. First, Dr. Marshall looked at a group of 323 Kois Buyers Group members that had selected Burkhart as their supplier, and recorded how much they purchased from Darby. (CX7100 at 076 ¶ 192.). This is hardly an objective or representative sample. Second, Dr. Marshall tested Smile Source members. (CX7100 at 077 at ¶ 194). Dr. Marshall’s own data showed that Darby’s share of sales to active Smile Source members was 19% in 2015 and 24% in 2016, far larger than Benco’s share of sales of Smile Source members. (RX2834 at 22-23, ¶ 30; RX2834 at 33, Exhibit 4; J. Johnson, Tr. 4808-4810).

C. The Relevant Geographic Markets Are No Larger Than the United States and Local in Nature.

1567. The relevant geographic markets are no larger than the United States, and regional geographic markets contained therein. (CCFF ¶¶ 1568-1592).

Schein's Response:

The asserted fact is overbroad. The relevant geographic market is local, *not* national. Dentists operate locally, and have their supplies delivered to their location. Complaint Counsel's own expert, Dr. Marshall, affirmatively testified as such. (Marshall, Tr. 3369 ("Q. Now, you concluded that the relevant geographic markets are local in nature; correct? A. That's fair. Local, regional in nature, yes.")). There is no evidence that, if prices in, say, California were to increase, dentists would travel to New York to get cheaper supplies. Under the Horizontal Merger Guidelines, therefore, markets are local. While many distributors (including online distributors) operate nationally, such supply-side considerations go to the identification of competitors, market shares, and market power, not geographic market definition.

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

Benco has no specific response.

1. Respondents' Experts Do Not Dispute That The Relevant Geographic Markets Are No Larger Than The United States And Local In Nature.

1568. Benco's economic expert, Dr. John H. Johnson, IV, agrees with Dr. Marshall that the geographic markets are no larger than the United States and local in nature. (J. Johnson, Tr. 4788-4789; RX2834 at 013 (¶17) (Johnson Expert Report); RX2965 (J. Johnson, Dep. at 29)).

Schein's Response:

Complaint Counsel mischaracterizes the evidence.

Dr. Johnson agreed with Dr. Marshall that the relevant geographic markets are *local* in nature, he did *not* agree that the relevant market is “no larger than the United States.” (J. Johnson, Tr. 4788-89; RX 2834-013 (¶17); RX 2965 (J. Johnson, Dep. at 29)).

Patterson’s Response:

Patterson joins Schein’s response.

Benco’s Response:

Benco has no specific response.

1569. Patterson’s economic expert, Dr. Lawrence Wu, does not disagree with Dr. J. Johnson’s opinion that the relevant geographic markets are no larger than the United States and local in nature. (RX2967 (Wu, Dep. at 245)).

Schein’s Response:

Dr. Wu did not render an opinion on market definition, and attempts by Complaint Counsel to use his non-opinion as a concession is improper. (RX 2967 (Wu, Dep. at 244 (“I don’t define a geographic market.”))).

Patterson’s Response:

Patterson joins Schein’s response.

Benco’s Response:

Benco has no specific response.

1570. Schein’s economic expert, Dr. Carlton concedes that a market definition is irrelevant to this case and offers no opinion that he disagrees with Dr. Marshall’s geographic market definition. (RX2832 at 010-011 (¶12, n. 15) (Carlton Expert Report); RX2966 (Carlton, Dep. at 228-231); Carlton, Tr. 5470).

Schein’s Response:

Dr. Carlton did not analyze Dr. Marshall’s market definition, except to note it improperly “excludes online/mail-order distributors” and therefore, “ignores any

competitive constraint on Schein from these excluded distributors in dealing with buying groups of independent dentists.” (RX 2832-011 (¶11 n.15)). While Dr. Carlton stated his understanding that market definition is not relevant, he made clear he is “not a lawyer” and is not opining or conceding the relevance or irrelevance of market definition. (RX 2966 (Carlton, Dep. at 229)).

Patterson’s Response:

Patterson joins Schein’s and Benco’s responses.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete and misleading. Dr. Carlton wrote footnote 15 of his expert report “in the context of the conspiracy as alleged by the FTC,” not the evidence actually presented at trial. (RX2832 at 010-011, ¶ 12 n. 15). Dr. Carlton was deposed before any evidence was presented at trial, and in the same context as that in which he wrote his expert report. (RX2966 (Carlton, Dep. (Oct. 5, 2018))). The FTC alleged a conspiracy that was *per se* unlawful, inherently suspect or unlawful pursuant to a truncated analysis. Complaint ¶¶ 80-88. In fact, the evidence at trial demonstrated that buying groups are not customers, but rather are intermediaries or middle-men that do not choose, order, purchase, take delivery of, pay for, or use dental equipment, products or services. (Cavaretta, Tr. 5568-69; Cohen, Tr. 444-45, 861; Ryan, Tr. 1034-36; *see also* RX2928 (member “[p]urchases are made directly from the vendor”); Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65). As such, the purported conspiracy alleged by the FTC is not *per se* unlawful, inherently suspect or unlawful pursuant to a truncated analysis. *See* Benco’s Post-Trial Brief at 41-49; JFFL at ¶¶ 97-98. 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. (RX2832 at 010-011, ¶ 12 n. 15).

1571. Respondents' experts have not identified any alternative relevant geographic markets that are more appropriate in this case than local markets. (*See generally* [REDACTED])

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

2. Qualitative Evidence Supports That The Relevant Geographic Markets Are Local In Nature.

a) Respondents Recognize That Local Markets Are Distinct.

1572. Benco, Patterson, and Schein all view markets at the local or regional levels, not at the national level. (CX0311 (Sullivan, IHT at 53-55); CX0301 (Cohen, IHT at 58-59); CX8023 (Guggenheim, Dep. at 140-141) (Patterson is a decentralized organization, all customer engagement happens at the branches in the markets)).

Schein's Response:

The asserted fact mischaracterizes Mr. Sullivan's testimony. Mr. Sullivan did not testify to whether Schein views markets at the local or regional levels, not at the national level. Mr. Sullivan testified about Schein's many competitors, both at the national and regional level, including "[o]ther full-service dental dealers, other direct sellers ... [and] merchandise-only compan[ies]." (CX 0311 (Sullivan, IHT at 53)).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1573. Schein's President Tim Sullivan testified that while Patterson and Benco are the company's largest competitors, "every market is unique" locally. (CX0311 (Sullivan, IHT at 53-55)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1574. Benco's Chuck Cohen described markets in a local sense when he testified that while the company does not divide markets, "when you look at markets, you can look at MSAs like cities, you can look at states, you can look at regions." (CX0301 (Cohen, IHT at 58-59)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

b) Respondents Manage Their Businesses On A Local Level.

1575. Patterson President Paul Guggenheim described that Patterson operates a decentralized business model where "[w]e provide branch or individual business entities in each of the significant markets around the country, so there's roughly 70-some, 70 of those branches today. And that largely we have entirely operating business unit [*sic*] inside those branches, meaning

customers that are in a particular market are served entirely—almost entirely by that local presence.” (CX0314 (Guggenheim, IHT at 34-35)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response.

1576. Patterson manages the business of independent dental practices at the local branch level. (CX0314 (Guggenheim, IHT at 34-36) (“customers that are in a particular market are served entirely -- almost entirely by that local presence,” excepting things like shared support services, logistics, and shipping, which are provided by the corporate office); CX0314 (Guggenheim, IHT at 62-63) (the business of private practices is handled by Patterson’s local branches, with some facilitation by the corporate office for items such as financing a large equipment purchase)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response.

1577. Similar to Patterson, Schein also makes decisions related to bidding on customers and buying groups, pricing, and vendor chargebacks locally. (CX0311 (Sullivan, IHT at 33-34, 172, 109)).

Schein’s Response:

Many of Schein’s decisions concerning customers, buying groups, pricing, and vendor chargebacks are made centrally, not locally. (See Meadows, Tr. 2472 (noting FSCs

cannot “write centralized purchaser contracts” and “a contract for a centralized purchaser across a large region” would need approval from “a vice president or above”), 2475, 2585-86; CX 0310 (Steck, IHT at 70) (noting Schein prices are set centrally); CX 0309 (Muller, IHT at 36-37) (noting Schein Special Markets has a “bid team” that “put[s] together a pricing proposal for a potential customer.”); *see also* SF 223-341. General pricing, including the creation of Prime Vendor Agreements (“PVAs”), used by Special Markets, or the general parameters of Volume Pricing Agreements (“VPAs”), used by HSD, are determined centrally, not locally. (Steck, Tr. 3791-92; CX2828). Vendor chargebacks are generally negotiated centrally by Special Markets, not locally. ((Meadows, Tr. 2558 (“Special markets will negotiate customer-specific discounts”); CX 0310 (Steck, IHT at 78-81); CX 0311 (Sullivan, IHT at 109-10 (noting Mid-Market does not negotiate chargebacks with manufacturers because chargebacks are “predetermined”)). In some cases, local field sales representatives have discretion (subject to certain limits or with requisite approval) to offer discounts or enter into Volume Purchase Agreements with customers or buying groups. (SF 16, 111). In other cases, such decisions are made by Special Markets (which is not a “local” decision), or by HSD’s Mid-Market group (which is also not a “local” decision), or by more senior HSD leadership. (*See* CX 0248 (requesting Schein FSCs *not* offer additional discounts to buying group members saying “[b]ringing up pricing options for any of the above [buying groups] can put our Agreements in jeopardy.”)).

Complaint Counsel’s cite to Mr. Sullivan’s IHT testimony does not support the asserted fact. Mr. Sullivan simply testified that he personally does not “really get involved” in most customer-specific bidding situations, and that “a lot of our decision-making will

happen locally, and there's a lot of it is relationship-driven based on who might be the president of the group." (CX 0311 (Sullivan, IHT at 33, 172)). This does not suggest that all relevant decisions are made locally. To the contrary, the fact that Special Markets and Mid-Market makes decisions centrally, and had responsibility for buying groups, disproves asserted fact. (SF 237-68).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

c) Independent Dentists Value Full-Service Distribution Services Provided Promptly And Locally.

1578. The need for same or next-day product delivery and same-day servicing to the customer's office or member location(s) typically limits the scope of regional markets. (CCFF ¶¶ 1476-1482).

Schein's Response:

Complaint Counsel cites no record evidence to support this wholly irrelevant finding, and only cites their other proposed findings, which – as set forth in the specific replies – also fail to support Complaint Counsel's characterization of the evidence.

Substantively, the scope of regional markets is limited by the fact that dentists purchase supplies locally. Supply-side considerations (such as shipping time) do not factor into geographic market definition. Even if they did, there is no evidence that shipping time constrains distributors' ability to compete. As for technical service, Complaint Counsel has not defined a technical service market.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is misleading. Not all dentists need or desire next-day delivery, and many, if not most, dentists are willing to forego next-day delivery on at least some of the products they purchase in exchange for lower prices. (RX2834 at 20-21, Exhibit 2; RX2834 at 22-23, ¶ 30; RX2834 at 33, Exhibit 4 (Dr. Marshall's own data showed that Darby's share of sales to active Smile Source members was 24% in 2016); J. Johnson, Tr. 4808-4810). But Benco does not contest that the relevant markets are local or regional in scope.

1579. Independent dentists typically cannot store and manage large quantities of supplies in-house, and rely on frequent, small quantity orders. (CCFF ¶¶ 84, 86, 1475, 1484).

Schein's Response:

This asserted fact is overbroad, irrelevant, and essentially the same as CCFF 84 and Schein hereby incorporates its answer here. (*See* SRF 84).

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is misleading. Not all dentists need or desire next-day delivery, and many, if not most, dentists are willing to forego next-day delivery on at least some of the products they purchase in exchange for lower prices. (RX2834 at 20-21, Exhibit 2; RX2834 at 22-23, ¶ 30; RX2834 at 33, Exhibit 4 (Dr. Marshall's own data showed that Darby's share of sales to active Smile Source members was 24% in 2016); J. Johnson, Tr. 4808-4810). But Benco does not contest that the relevant markets are local or regional in scope.

1580. Independent dentists require prompt equipment servicing because delays in service affect dentists' ability to see patients. (CCFF ¶¶ 87-88, 1477-1481).

Schein's Response:

Complaint Counsel cites no record evidence to support this wholly irrelevant finding, and only cites their other proposed findings, which – as set forth in the specific replies – also fail to support Complaint Counsel's characterization of the evidence.

Substantively, this is an overbroad generalization. While there *may* be some service issues that may affect dentists' ability to see patients, Complaint Counsel introduced no evidence to show how frequently such issues arise or whether this has any bearing on dentist's decisions concerning which distributors to use to for their *purchases* of supplies and equipment. In that regard, Complaint Counsel has not attempted to define an equipment servicing market. Moreover, there is no support for the inference that prompt and reliable equipment maintenance is only available through full-service distributors because "[w]hile many dentists rely on full-service distributors for their repair and maintenance needs, dentists can also utilize independent service technicians." (See CX 7100-056).

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. This is not significant to geographic market definition because dentists can purchase dental equipment from direct-selling manufacturers or others outside the relevant market and obtain servicing from independent companies that provide such services. (J. Johnson, Tr. 4804-4805).

3. The Hypothetical Monopolist Test Further Confirms That The Relevant Geographic Markets Are Local In Nature.

1581. Pursuant to the Hypothetical Monopolist Test (“HMT”), the relevant geographic markets are local in nature and no larger than the United States. (Marshall, Tr. 2909-2912; [REDACTED]).

Schein’s Response:

Complaint Counsel has not introduced any evidence applying the HMT to a national market. As Complaint Counsel’s own expert testified, the relevant markets are local or regional in nature. (Marshall, Tr. 2902-03). He did not opine that the market is national.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response.

1582. Dr. Marshall performed the Hypothetical Monopolist Test and assessed the relevant geographic markets from the perspective and locations of an independent dentist’s purchasing decisions, as well as considering the locations of the sales offices of the full-service distributors. (Marshall, Tr. 2910-2912; CX7100 at 090-091 (¶¶228, 231) (Marshall Expert Report)).

Schein’s Response:

No response other than to incorporate SRF 1583 regarding Dr. Marshall’s HMT.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response.

1583. Dr. Marshall performed the Hypothetical Monopolist Test on the Atlanta, Georgia market as well as the Seattle, Washington markets, and he determined that the relevant geographic markets are local in nature. (Marshall, Tr. 2910-2913; CX7100 at 092, 108 (¶¶ 233-275) (Marshall Expert Report)).

Schein's Response:

Dr. Marshall purported to apply the Hypothetical Monopolist Test ("HMT") on the Georgia and Seattle markets, but he did not do so properly.

Dr. Marshall's HMT test is based on a logical fallacy. He first *assumed* small regional full-service distributors exert greater pricing constraints than either national (or regional) online distributors or direct-to-consumer manufacturers. (See CX 7100-072-73). Based on that *assumption*, he defined a candidate market around full-service distribution, and then analyzed whether adding Darby alone would be sufficient to negate a price increase among that group. (CX 7100-074-90; *see also* Marshall, Tr. 2904-08, 3338 ("I'm looking at the full-service distributors ... and comparing that to Darby")). In doing so, Dr. Marshall *assumed* – rather than proved – that Darby exerts less of a competitive constraint than other full-service distributors. Dr. Marshall's analytical flaw is particularly important, since Darby has repeatedly and successfully competed for buying groups, and has even won contracts in direct competition with Schein. (SF 581-632, 749-55, 1164-67, 1263-71).

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding mischaracterizes the evidence cited. Dr. Marchall did not opine that Atlanta, Georgia or Seattle, Washington are markets, but rather that, "[r]egardless of the exact parameters of the geographic market[s]," geographic markets might approximate the Atlanta MSA and perhaps some adjacent undefined rural

area to the south of it and the Seattle MSA and perhaps some adjacent undefined rural area to the north and west of it. (CX7100 at 102, ¶¶ 253-254; CX7100 at 107, 270-271). Benco does not contest that the relevant geographic markets are local or regional in nature.

1584. Dr. Marshall specifically chose to study the Atlanta and Seattle markets as a part of his geographic market HMT because Respondents faced competition from a large regional full-service distributor in each of these markets: Atlanta Dental and Burkhart. (CX7100 at 092 (¶233) (Marshall Expert Report)). Because of this competition from large regional full-service distributors, these two cities are likely areas in which Respondents' market power was less than the market power suggested by their average shares across the United States. (CX7100 at 092 (¶233) (Marshall Expert Report)).

Schein's Response:

While Schein does not dispute that the relevant market is local, the asserted fact is not supported by the evidence. The evidence shows that Respondents face regional competition in virtually *every* market, as Dr. Marshall's own market share statistics demonstrate. (CX 7101-142-43). In fact, [REDACTED] (CX 7101-142-43). As such, the evidence does not establish that Dr. Marshall's decision to cherry-pick Atlanta and Seattle for his geographic market analysis was due the absence of regional distributors in other markets.

Moreover, the asserted fact is based on a false premise, namely that Respondents possess market power in Atlanta, Seattle, or elsewhere. As Dr. Marshall's *own* analysis demonstrates, the existence of just *one* regional distributor – no matter how small – renders any attempt by Respondents to individually or collectively raise prices unprofitable. Specifically, in Dr. Marshall's profitability analyses, Dr. Marshall analyzed the profitability for each of the Respondents (collectively and individually) when they charged prices that were higher than a rival distributor (*e.g.*, Burkhart, or Atlanta Dental) to

particular subsets of buying group customers. (CX 7100-156, -165, -173, -184). That analysis purported to show that Respondents *lost* profits individually and collectively in those circumstances. (CX 7100-156, -165, -173, -184). This analysis – which was limited to the effects of just one competing distributor, rather than the full panoply of competitors that Respondents face – demonstrates that Respondents lack market power either individually or collectively.

Patterson's Response:

With regard to the statement that Respondents faced competition from a large, regional full-service distributor in the Atlanta and Seattle markets, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

It is unclear whether Complaint Counsel's proposed finding is supported by the evidence. Because Dr. Marshall did not examine competitive conditions in any other regions in the United States (J. Johnson, Tr. 4790-91; Marshall, Tr. 3370-3373), he cannot say what competitive constraints Respondents faced in other regions or how the Atlanta

and Seattle regions compared to other specific regions in the country. (RX2834 at 13, ¶ 17; J. Johnson, Tr. 4790-4792; *see also* RX1140 at 20, Exhibit 2).

1585. [REDACTED]

Schein's Response:

No response, other than to note that Dr. Marshall's market share calculations exclude competition from online/mail-order distributors, such as Darby, who successfully competed for many buying group contracts. (*See* SRF 1583).

Patterson's Response:

[REDACTED] this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading and is not supported by the evidence.

Dr. Marshall's market share calculations are meaningless because his product market definition is fundamentally flawed. (J. Johnson, Tr. 4790-91). Dr. Marshall erred by failing to include direct-selling manufacturers in the relevant product market. (CX0311 (Sullivan, Dep. 53 (" . . . some of our manufacturers we partner with, but they also have a direct selling component to their business . . . so those segments we view as competitors.")); CX0314 (Guggenheim, Dep. 48-49 ("There's hundreds of competitors, including manufacturers, who sell direct, compete with us.")); Kois, Sr. Tr. 174-77; RX2834 at 18-22 ¶¶ 26-28, Exhibit 2; J. Johnson, Tr. 4799-4805; RX2833 at 54, ¶ 135; RX2967 (Wu, Dep. 240-241)). Dr. Marshall erred in lumping together the distribution of dental equipment and the distribution of dental consumables. (J. Johnson, Tr. 4812-4815; RX2834 at 23-24, ¶¶ 30-34). Dr. Marshall erred in excluding non-full-service distributors from the relevant product market. (J. Johnson, Tr. 4805-4807; RX2834 at 20-22, Exhibit 2; CX1100 at 3; RX2833 at 46-49, ¶¶ 111-119). Calculating a share of something that is not a properly defined market is a meaningless exercise.

1586. [REDACTED]

Schein's Response:

No response, other than to note that Dr. Marshall's market share calculations exclude competition from online/mail-order distributors, such as Darby, who successfully competed for many buying group contracts. (See SRF 1583).

Patterson's Response:

[REDACTED] this Proposed Finding of Fact disregards this Court's

Order dated Feb. 21, 2019, which prohibits “cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents,” Order on Post-Trial Briefs, 3, as well as this Court’s admonition: “Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That’s what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I’m letting you know today so that you don’t think you’re going to question your experts about facts and rely on that,” (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is misleading and is not supported by the evidence.

Dr. Marshall’s market share calculations are meaningless because his product market definition is fundamentally flawed. (J. Johnson, Tr. 4790-91). Dr. Marshall erred by failing to include direct-selling manufacturers in the relevant product market. (CX0311 (Sullivan, Dep. 53 (“ . . . some of our manufacturers we partner with, but they also have a direct selling component to their business . . . so those segments we view as competitors.”))); CX0314 (Guggenheim, Dep. 48-49 (“There’s hundreds of competitors, including manufacturers, who sell direct, compete with us.”)); Kois, Sr. Tr. 174-77; RX2834 at 18-22 ¶¶ 26-28, Exhibit 2; J. Johnson, Tr. 4799-4805; RX2833 at 54, ¶ 135; RX2967 (Wu, Dep. 240-241)). Dr. Marshall erred in lumping together the distribution of dental equipment and the distribution of dental consumables. (J. Johnson, Tr. 4812-4815; RX2834 at 23-24, ¶¶ 30-34). Dr. Marshall erred in excluding non-full-service distributors from the relevant product market. (J. Johnson, Tr. 4805-4807; RX2834 at 20-22, Exhibit 2; CX1100

at 3; RX2833 at 46-49, ¶¶ 111-119). Calculating a share of something that is not a properly defined market is a meaningless exercise.

1587. Dr. Marshall analyzed these the local markets of Atlanta and Seattle as illustrations of areas where he expected Respondents to have the lowest collective market share. (CX7100 at 092 (¶234) (Marshall Expert Report)).

Schein's Response:

Schein does not dispute that Dr. Marshall *assumed* that the local Atlanta and Seattle markets could be illustrative of other local markets, but he did not actually study the question. (See SRF 1584).

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, misleading and not supported by the evidence.

Dr. Marshall's market share calculations are meaningless because his product market definition is fundamentally flawed. (J. Johnson, Tr. 4790-91). Dr. Marshall erred by failing to include direct-selling manufacturers in the relevant product market. (CX0311 (Sullivan, Dep. 53 (" . . . some of our manufacturers we partner with, but they also have a direct selling component to their business . . . so those segments we view as competitors."))); CX0314 (Guggenheim, Dep. 48-49 ("There's hundreds of competitors, including manufacturers, who sell direct, compete with us.")); Kois, Sr. Tr. 174-77; RX2834 at 18-22 ¶¶ 26-28, Exhibit 2; J. Johnson, Tr. 4799-4805; RX2833 at 54, ¶ 135; RX2967 (Wu, Dep. 240-241)). Dr. Marshall erred in lumping together the distribution of dental equipment and the distribution of dental consumables. (J. Johnson, Tr. 4812-4815; RX2834

at 23-24, ¶¶ 30-34). Dr. Marshall erred in excluding non-full-service distributors from the relevant product market. (J. Johnson, Tr. 4805-4807; RX2834 at 20-22, Exhibit 2; CX1100 at 3; RX2833 at 46-49, ¶¶ 111-119). Calculating a share of something that is not a properly defined market is a meaningless exercise.

Even if Dr. Marshall's share calculations had some meaning, there is no evidence to support comparison with other regions of the country. Because Dr. Marshall did not examine competitive conditions in any other regions in the United States (J. Johnson, Tr. 4790-91; Marshall, Tr. 3370-3373), he cannot say what competitive constraints Respondents faced in other regions or how the Atlanta and Seattle regions compared to other specific regions in the country. (RX2834 at 13, ¶ 17; J. Johnson, Tr. 4790-4792; *see also* RX1140 at 20, Exhibit 2).

1588. Respondents' collective market share in the Atlanta and Seattle markets, considered along with Respondents' collective national share, indicates Respondents possess market power throughout most, if not all, local markets across the country. (CX7100 at 092 (¶234) (Marshall Expert Report)).

Schein's Response:

False.

Schein does not possess market power. Even aside from Dr. Marshall's failure to include competition from online/mail order and direct-to-dentist distribution, Schein competes aggressively on price against other distributors and has no ability to raise price or exclude competition; the *sine qua non* of market power. Nor is there any basis for aggregating Schein's market share with other distributors, given the undisputed evidence that Schein competed against Respondents for the business of independent dentists.

Moreover, as Dr. Marshall's *own* analysis demonstrates, the existence of just *one* regional distributor renders any attempt to individually or collectively raise prices unprofitable. Specifically, in Dr. Marshall's profitability analyses, Dr. Marshall analyzed the profitability for each of the Respondents (collectively and individually) when they charged prices that were higher than a rival distributor (*e.g.*, Burkhart, or Atlanta Dental). (CX 7100-156, -165, -173, -184). That analysis purported to show that Respondents *lost* profits individually and collectively in those circumstances. (CX 7100-156, -165, -173, -184). This analysis – which was limited to the effects of just one competing distributor, rather than the full panoply of competitors that Respondents face – demonstrates that Respondents lack market power either individually or collectively.

Patterson's Response:

With regard to Respondents' collective market shares, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, misleading and not supported by the evidence.

Dr. Marshall's market share calculations are meaningless because his product market definition is fundamentally flawed. (J. Johnson, Tr. 4790-91). Dr. Marshall erred by failing to include direct-selling manufacturers in the relevant product market. (CX0311 (Sullivan, Dep. 53 (" . . . some of our manufacturers we partner with, but they also have a direct selling component to their business . . . so those segments we view as competitors.")); CX0314 (Guggenheim, Dep. 48-49 ("There's hundreds of competitors, including manufacturers, who sell direct, compete with us.")); Kois, Sr. Tr. 174-77; RX2834 at 18-22 ¶¶ 26-28, Exhibit 2; J. Johnson, Tr. 4799-4805; RX2833 at 54, ¶ 135; RX2967 (Wu, Dep. 240-241)). Dr. Marshall erred in lumping together the distribution of dental equipment and the distribution of dental consumables. (J. Johnson, Tr. 4812-4815; RX2834 at 23-24, ¶¶ 30-34). Dr. Marshall erred in excluding non-full-service distributors from the relevant product market. (J. Johnson, Tr. 4805-4807; RX2834 at 20-22, Exhibit 2; CX1100 at 3; RX2833 at 46-49, ¶¶ 111-119). Calculating a share of something that is not a properly defined market is a meaningless exercise.

Even if Dr. Marshall's share calculations had some meaning, there is no evidence to support comparison with other regions of the country. Because Dr. Marshall did not examine competitive conditions in any other regions in the United States (J. Johnson, Tr. 4790-91; Marshall, Tr. 3370-3373), he cannot say what competitive constraints Respondents faced in other regions or how the Atlanta and Seattle regions compared to other specific regions in the country. (RX2834 at 13, ¶ 17; J. Johnson, Tr. 4790-4792; *see also* RX1140 at 20, Exhibit 2).

1589. Local market shares will not necessarily mirror national shares, but they must average out to the national shares. (CX7100 at 056-057 (¶127) (Marshall Expert Report)).

Schein's Response:

Assuming the data is correct, then local market shares will average out to national shares on a *weighted* basis. This does not suggest that a distributor's high national share has any bearing on whether that distributor has a high share in any particular local market.

Patterson's Response:

Patterson joins Schein's and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, misleading and irrelevant. The operative question is whether Respondents' alleged conduct caused anticompetitive harm in any relevant antitrust market. Complaint Counsel cannot satisfy its burden or proof on this issue by skipping over definition of relevant geographic markets and any analysis of specific competitive conditions in properly defined antitrust markets, and instead invoking national averages.

In any event, Dr. Marshall's market share calculations are meaningless because his product market definition is fundamentally flawed. (J. Johnson, Tr. 4790-91). Dr. Marshall erred by failing to include direct-selling manufacturers in the relevant product market. (CX0311 (Sullivan, Dep. 53 (" . . . some of our manufacturers we partner with, but they also have a direct selling component to their business . . . so those segments we view as competitors.")); CX0314 (Guggenheim, Dep. 48-49 ("There's hundreds of competitors, including manufacturers, who sell direct, compete with us.")); Kojs, Sr. Tr. 174-77; RX2834 at 18-22 ¶¶ 26-28, Exhibit 2; J. Johnson, Tr. 4799-4805; RX2833 at 54, ¶ 135; RX2967 (Wu, Dep. 240-241)). Dr. Marshall erred in lumping together the distribution of dental equipment and the distribution of dental consumables. (J. Johnson, Tr. 4812-4815; RX2834 at 23-24, ¶¶ 30-34). Dr. Marshall erred in excluding non-full-service distributors

from the relevant product market. (J. Johnson, Tr. 4805-4807; RX2834 at 20-22, Exhibit 2; CX1100 at 3; RX2833 at 46-49, ¶¶ 111-119). Calculating a share of something that is not a properly defined market is a meaningless exercise.

Even if Dr. Marshall's share calculations had some meaning, there are no grounds to draw inferences regarding other regions of the country based on national averages. Because Dr. Marshall did not examine competitive conditions in any other regions in the United States (J. Johnson, Tr. 4790-91; Marshall, Tr. 3370-3373), he cannot say what competitive constraints Respondents faced in other regions of the country. (RX2834 at 13, ¶ 17; J. Johnson, Tr. 4790-4792; *see also* RX1140 at 20, Exhibit 2).

1590. Dr. Marshall selected Atlanta and Seattle to study for his geographic market analyses because they were likely areas in which Respondents' market power was less than the market power suggested by their average shares across the United States. (CX7100 at 115 (¶295) (Marshall Expert Report)). Dr. Marshall explained that because shares vary across geographic markets, for the Atlanta and Seattle shares to be lower than nationwide shares, other geographic markets must have shares higher than the national average. (CX7100 at 115 (¶295) (Marshall Expert Report)).

Schein's Response:

This asserted fact is essentially the same as CCFF 1584, and Schein incorporates its response to that finding here. In a nutshell, while Schein does not dispute that the relevant market is local, the asserted fact is not supported by the evidence. The evidence does not establish that Schein had market power in *any* relevant local market.

To the contrary, as Dr. Marshall's *own* analysis demonstrates, the existence of just *one* regional distributor renders any attempt to individually or collectively raise prices unprofitable. Specifically, in Dr. Marshall's profitability analyses, Dr. Marshall analyzed the profitability for each of the Respondents (collectively and individually) when they charged prices that were higher than a rival distributor (*e.g.*, Burkhardt, or Atlanta Dental).

(CX 7100-156, -165, -173, -184). That analysis purported to show that Respondents *lost* profits individually and collectively in those circumstances. (CX 7100-156, -165, -173, -184). This analysis – which was limited to the effects of just one competing distributor, rather than the full panoply of competitors that Respondents face – demonstrates that Respondents lack market power either individually or collectively.

Patterson’s Response:

With regard to the relative shares or market power in various markets, this Proposed Finding of Fact disregards this Court’s Order dated Feb. 21, 2019, which prohibits “cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents,” Order on Post-Trial Briefs, 3, as well as this Court’s admonition: “Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That’s what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I’m letting you know today so that you don’t think you’re going to question your experts about facts and rely on that,” (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is inaccurate, misleading and irrelevant. The operative question is whether Respondents’ alleged conduct caused anticompetitive harm in any relevant antitrust market. Complaint Counsel cannot satisfy its burden or proof on this issue by skipping over definition of relevant geographic markets and any analysis of specific competitive conditions in properly defined antitrust markets, and instead invoking national averages.

Dr. Marshall's market share calculations are meaningless because his product market definition is fundamentally flawed. (J. Johnson, Tr. 4790-91). Dr. Marshall erred by failing to include direct-selling manufacturers in the relevant product market. (CX0311 (Sullivan, Dep. 53 (" . . . some of our manufacturers we partner with, but they also have a direct selling component to their business . . . so those segments we view as competitors.")); CX0314 (Guggenheim, Dep. 48-49 ("There's hundreds of competitors, including manufacturers, who sell direct, compete with us.")); Kois, Sr. Tr. 174-77; RX2834 at 18-22 ¶¶ 26-28, Exhibit 2; J. Johnson, Tr. 4799-4805; RX2833 at 54, ¶ 135; RX2967 (Wu, Dep. 240-241)). Dr. Marshall erred in lumping together the distribution of dental equipment and the distribution of dental consumables. (J. Johnson, Tr. 4812-4815; RX2834 at 23-24, ¶¶ 30-34). Dr. Marshall erred in excluding non-full-service distributors from the relevant product market. (J. Johnson, Tr. 4805-4807; RX2834 at 20-22, Exhibit 2; CX1100 at 3; RX2833 at 46-49, ¶¶ 111-119). Calculating a share of something that is not a properly defined market is a meaningless exercise.

Even if Dr. Marshall's share calculations had some meaning, there is no evidence to support comparison with other regions of the country. Because Dr. Marshall did not examine competitive conditions in any other regions in the United States (J. Johnson, Tr. 4790-91; Marshall, Tr. 3370-3373), he cannot say what competitive constraints Respondents faced in other regions or how the Atlanta and Seattle regions compared to other specific regions in the country. (RX2834 at 13, ¶ 17; J. Johnson, Tr. 4790-4792; *see also* RX1140 at 20, Exhibit 2).

1591. Dr. Marshall's analyses of the Atlanta and Seattle geographic markets are representative of similar analyses that could be performed throughout the United States. (CX7100 at 109 (¶278)

(Marshall Expert Report)). Because Respondents' collective shares remains high even in the Atlanta and Seattle geographic markets, it is unnecessary to perform such analyses throughout the country to reach a general opinion about their market power in local markets throughout the country. (CX7100 at 109 (¶278) (Marshall Expert Report)).

Schein's Response:

While Schein does not contest that Dr. Marshall *assumed* the Atlanta and Seattle geographic markets are representative of other local markets, he did not actually study the question.

Patterson's Response:

With regard to the statement that Respondents' collective shares remain high even in the Atlanta and Seattle geographic markets, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, misleading and irrelevant.

Benco agrees that Dr. Marshall could have performed analyses of market definition, competitive conditions, and alleged harm to competition in regions throughout the United

States. Indeed, because shares and competitive conditions vary across geographic markets, (CX7100 at 115, ¶ 295), Dr. Marshall should have performed analyses of market definition, competitive conditions, and potential harm to competition in any regions in which he wished to test for alleged harm to competition. But he did not do so. (J. Johnson, Tr. 4790-91; Marshall, Tr. 3370-3373).

Dr. Marshall lacks any basis for opining that the shares he calculated for Atlanta and Seattle are representative of shares of any properly defined relevant market. Dr. Marshall's market share calculations are meaningless because his product market definition is fundamentally flawed. (J. Johnson, Tr. 4790-91). Dr. Marshall erred by failing to include direct-selling manufacturers in the relevant product market. (CX0311 (Sullivan, Dep. 53 (" . . . some of our manufacturers we partner with, but they also have a direct selling component to their business . . . so those segments we view as competitors.")); CX0314 (Guggenheim, Dep. 48-49 ("There's hundreds of competitors, including manufacturers, who sell direct, compete with us.")); Kois, Sr. Tr. 174-77; RX2834 at 18-22 ¶¶ 26-28, Exhibit 2; J. Johnson, Tr. 4799-4805; RX2833 at 54, ¶ 135; RX2967 (Wu, Dep. 240-241)). Dr. Marshall erred in lumping together the distribution of dental equipment and the distribution of dental consumables. (J. Johnson, Tr. 4812-4815; RX2834 at 23-24, ¶¶ 30-34). Dr. Marshall erred in excluding non-full-service distributors from the relevant product market. (J. Johnson, Tr. 4805-4807; RX2834 at 20-22, Exhibit 2; CX1100 at 3; RX2833 at 46-49, ¶¶ 111-119). Calculating a share of something that is not a properly defined market is a meaningless exercise.

Even if Dr. Marshall's share calculations had some meaning, there is no evidence to support comparison with other regions of the country. Because Dr. Marshall did not

examine competitive conditions in any other regions in the United States (J. Johnson, Tr. 4790-91; Marshall, Tr. 3370-3373), he cannot say what competitive constraints Respondents faced in other regions or how the Atlanta and Seattle regions compared to other specific regions in the country. (RX2834 at 13, ¶ 17; J. Johnson, Tr. 4790-4792; *see also* RX1140 at 20, Exhibit 2).

4. Price Comparisons Also Confirm That The Relevant Geographic Markets Are Local In Nature.

1592. To confirm that the relevant geographic markets are local in nature, Dr. Marshall also compared the prices dentists paid for similar products in different local geographic areas and found that there are meaningful price differences between neighboring local areas, bolstering Dr. Marshall's conclusion that the relevant geographic markets are local. [REDACTED] [REDACTED]).

Schein's Response:

No response.

Patterson's Response:

With regard to the statement that there are meaningful price differences between neighboring local areas, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about

facts and rely on that,” (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco’s Response:

Benco has no specific response.

XX. DR. MARSHALL DETERMINED THAT RESPONDENTS COLLECTIVELY HAVE MARKET POWER IN THE RELEVANT MARKETS.

1593. Based on his empirical analysis, Dr. Marshall determined that [REDACTED]

Schein’s Response:

Dr. Marshall’s estimates are not reliable because he compares apples to oranges. He obtains the denominator from various industry reports concerning overall market size, without determining how those figures were calculated or whether those sources of information are themselves accurate. (CX 7100-015). He then pairs that with certain distributors’ actual sales, but without ensuring that he is measuring exactly the same thing as the industry reports used for the denominator. (CX 7100-157). As such, the market share estimates are not reliable.

Patterson’s Response:

[REDACTED] this Proposed Finding of Fact disregards this Court’s Order dated Feb. 21, 2019, which prohibits “cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents,” Order on Post-Trial Briefs, 3, as well as this Court’s admonition: “Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions,

guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, misleading and not supported by the evidence.

Dr. Marshall's market share calculations are meaningless because his product market definition is fundamentally flawed. (J. Johnson, Tr. 4790-91). Dr. Marshall erred by failing to include direct-selling manufacturers in the relevant product market. (CX0311 (Sullivan, Dep. 53 (" . . . some of our manufacturers we partner with, but they also have a direct selling component to their business . . . so those segments we view as competitors.")); CX0314 (Guggenheim, Dep. 48-49 ("There's hundreds of competitors, including manufacturers, who sell direct, compete with us.")); Kois, Sr. Tr. 174-77; RX2834 at 18-22 ¶¶ 26-28, Exhibit 2; J. Johnson, Tr. 4799-4805; RX2833 at 54, ¶ 135; RX2967 (Wu, Dep. 240-241)). Dr. Marshall erred in lumping together the distribution of dental equipment and the distribution of dental consumables. (J. Johnson, Tr. 4812-4815; RX2834 at 23-24, ¶¶ 30-34). Dr. Marshall erred in excluding non-full-service distributors from the relevant product market. (J. Johnson, Tr. 4805-4807; RX2834 at 20-22, Exhibit 2; CX1100 at 3; RX2833 at 46-49, ¶¶ 111-119). Calculating a share of something that is not a properly defined market is a meaningless exercise.

1594. Based on his empirical analysis, Dr. Marshall determined that [REDACTED]

Schein's Response:

Dr. Marshall's estimates are not reliable because he compares apples to oranges. He obtains the denominator from various industry reports concerning overall market size, without determining how those figures were calculated or whether those sources of information are themselves accurate. (CX 7100-015). He then pairs that up with certain distributors' actual sales, but without ensuring that he is measuring exactly the same thing as the industry reports used for the denominator. (CX 7100-157). As such, the market share estimates are not reliable.

Patterson's Response:

[REDACTED], this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, misleading and not supported by the evidence.

Dr. Marshall's market share calculations are meaningless because his product market definition is fundamentally flawed. (J. Johnson, Tr. 4790-91). Dr. Marshall erred by failing to include direct-selling manufacturers in the relevant product market. (CX0311 (Sullivan, Dep. 53 (" . . . some of our manufacturers we partner with, but they also have a direct selling component to their business . . . so those segments we view as competitors.")); CX0314 (Guggenheim, Dep. 48-49 ("There's hundreds of competitors, including manufacturers, who sell direct, compete with us.")); Kois, Sr. Tr. 174-77; RX2834 at 18-22 ¶¶ 26-28, Exhibit 2; J. Johnson, Tr. 4799-4805; RX2833 at 54, ¶ 135; RX2967 (Wu, Dep. 240-241)). Dr. Marshall erred in lumping together the distribution of dental equipment and the distribution of dental consumables. (J. Johnson, Tr. 4812-4815; RX2834 at 23-24, ¶¶ 30-34). Dr. Marshall erred in excluding non-full-service distributors from the relevant product market. (J. Johnson, Tr. 4805-4807; RX2834 at 20-22, Exhibit 2; CX1100 at 3; RX2833 at 46-49, ¶¶ 111-119). Calculating a share of something that is not a properly defined market is a meaningless exercise.

1595. Based on his empirical analysis, Dr. Marshall determined that [REDACTED]

Schein's Response:

Dr. Marshall's estimates are not reliable because he compares apples to oranges. He obtains the denominator from various industry reports concerning overall market size, without determining how those figures were calculated or whether those sources of

information are themselves accurate. (CX 7100-015). He then pairs that up with certain distributors' actual sales, but without ensuring that he is measuring exactly the same thing as the industry reports used for the denominator. (CX 7100-157). As such, the market share estimates are not reliable.

Patterson's Response:

[REDACTED] this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, misleading and not supported by the evidence.

Dr. Marshall's market share calculations are meaningless because his product market definition is fundamentally flawed. (J. Johnson, Tr. 4790-91). Dr. Marshall erred by failing to include direct-selling manufacturers in the relevant product market. (CX0311 (Sullivan, Dep. 53 (" . . . some of our manufacturers we partner with, but they also have a direct selling component to their business . . . so those segments we view as competitors.")));

CX0314 (Guggenheim, Dep. 48-49 (“There’s hundreds of competitors, including manufacturers, who sell direct, compete with us.”)); Kois, Sr. Tr. 174-77; RX2834 at 18-22 ¶¶ 26-28, Exhibit 2; J. Johnson, Tr. 4799-4805; RX2833 at 54, ¶ 135; RX2967 (Wu, Dep. 240-241)). Dr. Marshall erred in lumping together the distribution of dental equipment and the distribution of dental consumables. (J. Johnson, Tr. 4812-4815; RX2834 at 23-24, ¶¶ 30-34). Dr. Marshall erred in excluding non-full-service distributors from the relevant product market. (J. Johnson, Tr. 4805-4807; RX2834 at 20-22, Exhibit 2; CX1100 at 3; RX2833 at 46-49, ¶¶ 111-119). Calculating a share of something that is not a properly defined market is a meaningless exercise.

1596. Based on his empirical analysis, Dr. Marshall determined that [REDACTED]

[REDACTED]

Schein’s Response:

Dr. Marshall’s estimates are not reliable because he compares apples to oranges. He obtains the denominator from various industry reports concerning overall market size, without determining how those figures were calculated or whether those sources of information are themselves accurate. (CX 7100-015). He then pairs that up with certain distributors’ actual sales, but without ensuring that he is measuring exactly the same thing as the industry reports used for the denominator. (CX 7100-157). As such, the market share estimates are not reliable.

Patterson’s Response:

[REDACTED]

[REDACTED] this

Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, misleading and not supported by the evidence.

Dr. Marshall's market share calculations are meaningless because his product market definition is fundamentally flawed. (J. Johnson, Tr. 4790-91). Dr. Marshall erred by failing to include direct-selling manufacturers in the relevant product market. (CX0311 (Sullivan, Dep. 53 (" . . . some of our manufacturers we partner with, but they also have a direct selling component to their business . . . so those segments we view as competitors.")); CX0314 (Guggenheim, Dep. 48-49 ("There's hundreds of competitors, including manufacturers, who sell direct, compete with us.")); Kois, Sr. Tr. 174-77; RX2834 at 18-22 ¶¶ 26-28, Exhibit 2; J. Johnson, Tr. 4799-4805; RX2833 at 54, ¶ 135; RX2967 (Wu, Dep. 240-241)). Dr. Marshall erred in lumping together the distribution of dental equipment and the distribution of dental consumables. (J. Johnson, Tr. 4812-4815; RX2834 at 23-24, ¶¶ 30-34). Dr. Marshall erred in excluding non-full-service distributors from the

relevant product market. (J. Johnson, Tr. 4805-4807; RX2834 at 20-22, Exhibit 2; CX1100 at 3; RX2833 at 46-49, ¶¶ 111-119). Calculating a share of something that is not a properly defined market is a meaningless exercise.

1597. In addition to national market power, Schein, Patterson, and Benco have market power in and around the two cities where they faced competition from a large, regional full-service distributor: Atlanta and Seattle. (Marshall, Tr. 2912: [REDACTED]).

Schein's Response:

False.

Schein does not possess market power. Dr. Marshall's market share statistics are not reliable because he has not shown that the SDM data on which he relies collects data from all distributors, including all online/internet distributors. Thus, his attempt to mix-and-match Respondents' transactional data with SDM data is not reliable.

Moreover, the evidence shows that Schein competes aggressively on price against other distributors and has no ability to raise price or exclude competition; the sine qua non of market power. Nor is there any basis for aggregating Schein's market share with other distributors, given the undisputed evidence that Schein competed against Respondents for the business of independent dentists.

As Dr. Marshall's *own* analysis demonstrates, the existence of just *one* regional distributor renders any attempt to individually or collectively raise prices unprofitable. (SF 1678; Marshall, Tr. 3131-33 (the alleged conspiracy is [REDACTED])
[REDACTED]) (emphasis added)). Specifically, in Dr. Marshall's profitability analyses, Dr. Marshall analyzed the profitability for each of the Respondents (collectively and individually) when

they charged prices that were higher than a rival distributor (*e.g.*, Burkhart, or Atlanta Dental). (CX 7100-156, -165, -173, -184). That analysis purported to show that Respondents *lost* profits individually and collectively in those circumstances. (CX 7100-156, -165, -173, -184). This analysis – which was limited to the effects of just one competing distributor, rather than the full panoply of competitors that Respondents face – demonstrates that Respondents lack market power either individually or collectively.

Patterson's Response:

This Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, misleading and not supported by the evidence.

Dr. Marshall's market share calculations are meaningless because his product market definition is fundamentally flawed. (J. Johnson, Tr. 4790-91). Dr. Marshall erred by failing to include direct-selling manufacturers in the relevant product market. (CX0311 (Sullivan, Dep. 53 (" . . . some of our manufacturers we partner with, but they also have a

direct selling component to their business . . . so those segments we view as competitors.”)); CX0314 (Guggenheim, Dep. 48-49 (“There’s hundreds of competitors, including manufacturers, who sell direct, compete with us.”)); Kois, Sr. Tr. 174-77; RX2834 at 18-22 ¶¶ 26-28, Exhibit 2; J. Johnson, Tr. 4799-4805; RX2833 at 54, ¶ 135; RX2967 (Wu, Dep. 240-241)). Dr. Marshall erred in lumping together the distribution of dental equipment and the distribution of dental consumables. (J. Johnson, Tr. 4812-4815; RX2834 at 23-24, ¶¶ 30-34). Dr. Marshall erred in excluding non-full-service distributors from the relevant product market. (J. Johnson, Tr. 4805-4807; RX2834 at 20-22, Exhibit 2; CX1100 at 3; RX2833 at 46-49, ¶¶ 111-119). Calculating a share of something that is not a properly defined market is a meaningless exercise.

1598. Based on his empirical analysis, Dr. Marshall determined that [REDACTED]

Schein’s Response:

False.

Schein does not possess market power. Dr. Marshall’s market share statistics are not reliable because he has not shown that the SDM data on which he relies collects data from all distributors, including all online/internet distributors. Thus, his attempt to mix-and-match Respondents’ transactional data with SDM data is not reliable.

Moreover, the evidence shows that Schein competes aggressively on price against other distributors and has no ability to raise price or exclude competition; the sine qua non of market power. Nor is there any basis for aggregating Schein’s market share with other

distributors, given the undisputed evidence that Schein competed against Respondents for the business of independent dentists.

As Dr. Marshall's *own* analysis demonstrates, the existence of just *one* regional distributor renders any attempt to individually or collectively raise prices unprofitable. Specifically, in Dr. Marshall's profitability analyses, Dr. Marshall analyzed the profitability for each of the Respondents (collectively and individually) when they charged prices that were higher than a rival distributor (*e.g.*, Burkhart, or Atlanta Dental). (CX 7100-156, -165, -173, -184). That analysis purported to show that Respondents *lost* profits individually and collectively in those circumstances. (CX 7100--156, -165, -173, -184). This analysis – which was limited to the effects of just one competing distributor, rather than the full panoply of competitors that Respondents face – demonstrates that Respondents lack market power either individually or collectively.

Patterson's Response:

[REDACTED]

[REDACTED]

this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on

that,” (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is inaccurate, misleading and not supported by the evidence.

Dr. Marshall’s market share calculations are meaningless because his product market definition is fundamentally flawed. (J. Johnson, Tr. 4790-91). Dr. Marshall erred by failing to include direct-selling manufacturers in the relevant product market. (CX0311 (Sullivan, Dep. 53 (“ . . . some of our manufacturers we partner with, but they also have a direct selling component to their business . . . so those segments we view as competitors.”)); CX0314 (Guggenheim, Dep. 48-49 (“There’s hundreds of competitors, including manufacturers, who sell direct, compete with us.”)); Kois, Sr. Tr. 174-77; RX2834 at 18-22 ¶¶ 26-28, Exhibit 2; J. Johnson, Tr. 4799-4805; RX2833 at 54, ¶ 135; RX2967 (Wu, Dep. 240-241)). Dr. Marshall erred in lumping together the distribution of dental equipment and the distribution of dental consumables. (J. Johnson, Tr. 4812-4815; RX2834 at 23-24, ¶¶ 30-34). Dr. Marshall erred in excluding non-full-service distributors from the relevant product market. (J. Johnson, Tr. 4805-4807; RX2834 at 20-22, Exhibit 2; CX1100 at 3; RX2833 at 46-49, ¶¶ 111-119). Calculating a share of something that is not a properly defined market is a meaningless exercise.

1599. Based on his empirical analysis, Dr. Marshall determined that

Schein's Response:

False.

Schein does not possess market power. Dr. Marshall's market share statistics are not reliable because he has not shown that the SDM data on which he relies collects data from all distributors, including all online/internet distributors. Thus, his attempt to mix-and-match Respondents' transactional data with SDM data is not reliable.

Moreover, the evidence shows that Schein competes aggressively on price against other distributors and has no ability to raise price or exclude competition; the sine qua non of market power. Nor is there any basis for aggregating Schein's market share with other distributors, given the undisputed evidence that Schein competed against Respondents for the business of independent dentists.

As Dr. Marshall's *own* analysis demonstrates, the existence of just *one* regional distributor renders any attempt to individually or collectively raise prices unprofitable. Specifically, in Dr. Marshall's profitability analyses, Dr. Marshall analyzed the profitability for each of the Respondents (collectively and individually) when they charged prices that were higher than a rival distributor (*e.g.*, Burkhart, or Atlanta Dental). (CX 7100-156, -165, -173, -184). That analysis purported to show that Respondents *lost* profits individually and collectively in those circumstances. (CX 7100-156, -165, -173, -184). This analysis – which was limited to the effects of just one competing distributor, rather than the full panoply of competitors that Respondents face – demonstrates that Respondents lack market power either individually or collectively.

Patterson's Response:

[REDACTED]

[REDACTED]

██████, this Proposed Finding of Fact disregards this Court’s Order dated Feb. 21, 2019, which prohibits “cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents,” Order on Post-Trial Briefs, 3, as well as this Court’s admonition: “Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That’s what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I’m letting you know today so that you don’t think you’re going to question your experts about facts and rely on that,” (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is inaccurate, misleading and not supported by the evidence.

Dr. Marshall’s market share calculations are meaningless because his product market definition is fundamentally flawed. (J. Johnson, Tr. 4790-91). Dr. Marshall erred by failing to include direct-selling manufacturers in the relevant product market. (CX0311 (Sullivan, Dep. 53 (“ . . . some of our manufacturers we partner with, but they also have a direct selling component to their business . . . so those segments we view as competitors.”))); CX0314 (Guggenheim, Dep. 48-49 (“There’s hundreds of competitors, including manufacturers, who sell direct, compete with us.”)); Kois, Sr. Tr. 174-77; RX2834 at 18-22 ¶¶ 26-28, Exhibit 2; J. Johnson, Tr. 4799-4805; RX2833 at 54, ¶ 135; RX2967 (Wu, Dep. 240-241)). Dr. Marshall erred in lumping together the distribution of dental equipment and the distribution of dental consumables. (J. Johnson, Tr. 4812-4815; RX2834 at 23-24, ¶¶ 30-34). Dr. Marshall erred in excluding non-full-service distributors from the

relevant product market. (J. Johnson, Tr. 4805-4807; RX2834 at 20-22, Exhibit 2; CX1100 at 3; RX2833 at 46-49, ¶¶ 111-119). Calculating a share of something that is not a properly defined market is a meaningless exercise.

1600. Schein, Patterson, and Benco's collective market share in Atlanta and Seattle, considered along with their collective national share, indicates that they possess market power throughout most, if not all, local markets across the country. [REDACTED]

Schein's Response:

False.

This asserted fact is essentially the same as CCFF 1588, and Schein incorporates its response to that finding here.

Schein does not possess market power. Dr. Marshall's market share statistics are not reliable because he has not shown that the SDM data on which he relies collects data from all distributors, including all online/internet distributors. Thus, his attempt to mix-and-match Respondents' transactional data with SDM data is not reliable.

Moreover, the evidence shows that Schein competes aggressively on price against other distributors and has no ability to raise price or exclude competition; the sine qua non of market power. Nor is there any basis for aggregating Schein's market share with other distributors, given the undisputed evidence that Schein competed against Respondents for the business of independent dentists.

As Dr. Marshall's *own* analysis demonstrates, the existence of just *one* regional distributor renders any attempt to individually or collectively raise prices unprofitable. Specifically, in Dr. Marshall's profitability analyses, Dr. Marshall analyzed the profitability for each of the Respondents (collectively and individually) when they charged

prices that were higher than a rival distributor (*e.g.*, Burkhart, or Atlanta Dental). (CX 7100-156, -165, -173, -184). That analysis purported to show that Respondents *lost* profits individually and collectively in those circumstances. (CX 7100-156, -165, -173, -184). This analysis – which was limited to the effects of just one competing distributor, rather than the full panoply of competitors that Respondents face – demonstrates that Respondents lack market power either individually or collectively.

Patterson's Response:

As explained above, the use of the market-share figures underlying this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, misleading and not supported by the evidence.

Dr. Marshall's market share calculations are meaningless because his product market definition is fundamentally flawed. (J. Johnson, Tr. 4790-91). Dr. Marshall erred by failing to include direct-selling manufacturers in the relevant product market. (CX0311

(Sullivan, Dep. 53 (“ . . . some of our manufacturers we partner with, but they also have a direct selling component to their business . . . so those segments we view as competitors.”)); CX0314 (Guggenheim, Dep. 48-49 (“There’s hundreds of competitors, including manufacturers, who sell direct, compete with us.”)); Kois, Sr. Tr. 174-77; RX2834 at 18-22 ¶¶ 26-28, Exhibit 2; J. Johnson, Tr. 4799-4805; RX2833 at 54, ¶ 135; RX2967 (Wu, Dep. 240-241)). Dr. Marshall erred in lumping together the distribution of dental equipment and the distribution of dental consumables. (J. Johnson, Tr. 4812-4815; RX2834 at 23-24, ¶¶ 30-34). Dr. Marshall erred in excluding non-full-service distributors from the relevant product market. (J. Johnson, Tr. 4805-4807; RX2834 at 20-22, Exhibit 2; CX1100 at 3; RX2833 at 46-49, ¶¶ 111-119). Calculating a share of something that is not a properly defined market is a meaningless exercise.

Even if Dr. Marshall’s share calculations had some meaning, there is no evidence to support comparison with other regions of the country. Because Dr. Marshall did not examine competitive conditions in any other regions in the United States (J. Johnson, Tr. 4790-91; Marshall, Tr. 3370-3373), he cannot say what competitive constraints Respondents faced in other regions or how the Atlanta and Seattle regions compared to other specific regions in the country. (RX2834 at 13, ¶ 17; J. Johnson, Tr. 4790-4792; *see also* RX1140 at 20, Exhibit 2).

XXI. DR. MARSHALL OBSERVED MARKET STRUCTURE CONDUCTIVE TO COLLUSION AGAINST BUYING GROUPS.

1601. The structure of the market for the full line of dental products and services sold through full-service distributors to independent dentists was conducive to effective collusion against dental buying groups. (Marshall, Tr. 2916; [REDACTED] CCFF ¶¶ 1602-1623)).

Schein's Response:

False.

First, it is important to note that there is no claim that the alleged market itself is “conducive to effective collusion.” Rather, the asserted fact is limited only to collusion “against ... buying groups.” Given that the *market* itself is competitive – because there is no allegation of collusion for the business of independent dentists – it makes no sense to assert that the market is conducive to collusion “against dental buying groups.”

Second, the market is not conducive to collusion against buying groups because, as Dr. Marshall established, any alleged conspiracy is unprofitable – and against the alleged co-conspirators’ *collective* and *individual* economic self-interest – so long as there is at least one other distributor that could supply the group. (SF 1678). Dr. Marshall, for example, found that an alleged boycott of Smile Source and/or Kois would be unprofitable for each and every Respondent, individually and collectively. (SF 1679-81). As such, the market is not conducive to a collusive group boycott.

Third, the market is not conducive to collusive group boycotts because there is no evidence that buying groups can deliver or divert substantial incremental volume from one distributor to another. Generally, for a conspiracy to make economic sense, it must be the case that the winning bidder earns substantially more profits than the losing bidder because the customer diverts business from the loser to the winner. Here, there is no evidence of substantial diversion of incremental business sufficient to offset any cannibalization. As Dr. Marshall concedes, he did not do a but-for analysis of any kind (SF 1717), and his own analysis shows that the 2011 and 2017 Smile Source contracts were unprofitable for Schein (SF 1722-35).

Fourth, the market is not conducive to collusion because it is subject to oligopolistic interdependence. That is, because buying groups were relatively small and easy to form, there was no downside for any Respondent to take a wait-and-see approach to buying groups. Dr. Marshall conceded that he could not distinguish between collusion and oligopolistic interdependence based on the economic data. (Marshall, Tr. 2883).

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, misleading, and not supported by the evidence. Dr. Marshall's conclusion is flawed for multiple reasons. (J. Johnson, Tr. 4817-4826; RX2834 at 24-28, ¶¶ 35-42; RX2832 at 67-68, ¶¶ 100-103). To the extent that Dr. Marshall suggests that a conspiracy can be inferred from industry characteristics, that is wrong; Dr. Marshall failed to distinguish between oligopolistic interdependence and conspiracy. (Carlton, Tr. 5382-5384; RX2832 at 65-66, ¶¶ 98-99).

1602. To determine whether a particular market is conducive to collusion, Dr. Marshall examines demand and costs conditions through the lens of Porter's Five Forces, as described by Michael Porter of the Harvard Business School in his book *Competitive Strategy*. (Marshall, Tr. 2913; *see also* CX7100 at 111 (¶281, n. 427) (Marshall Expert Report)).

Schein's Response:

Mr. Porter's Five Forces business-school jargon is not a valid basis for drawing conclusions about the susceptibility of a market to collusion. Regardless, Dr. Marshall failed to distinguish between oligopolistic interdependence and conspiracy. (SF 1670-75; Carlton, Tr. 5383-84; Marshall, Tr. 2878, 2883, 2952).

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and misleading. Michael Porter set forth his Five Forces to describe the factors that "impact the profits of an industry," not to determine whether a particular market is "conducive to collusion." (Marshall, Tr. 2913). Dr. Marshall's attempt to apply it was fundamentally flawed because he failed to distinguish between oligopolistic interdependence and conspiracy. (Carlton, Tr. 5382-5384; RX2832 at 65-66, ¶¶ 98-99).

1603. The Porters Five Forces framework is widely cited and applied to understand collusive behavior. (Marshall, Tr. 2914; [REDACTED]).

Schein's Response:

The cited evidence does not establish the asserted fact. Dr. Marshall says Porters Five Forces is "widely cited," but there is no evidence of it being cited anywhere other than by Dr. Marshall. Thus, the asserted fact is an improper attempt to admit expert opinion without proper foundation.

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, not supported by the evidence, and misleading. Michael Porter set forth his Five Forces to describe the factors that "impact the profits of an industry," not to determine whether a particular market is "conducive to collusion." (Marshall, Tr. 2913). Michael Porter's work is widely cited and applied in the

context for which he wrote it, but it was Dr. Marshall's decision that it was a "sensible framework to use" for his purposes. (Marshall, Tr. 2914). Dr. Marshall's analysis was fundamentally flawed because he failed to distinguish between oligopolistic interdependence and conspiracy. (Carlton, Tr. 5382-5384; RX2832 at 65-66, ¶¶ 98-99).

1604. In the Porters Five Forces analysis, the center force is the inter-firm rivalry. (Marshall, Tr. 2913; [REDACTED]).

Schein's Response:

Irrelevant.

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, not supported by the evidence, and misleading. Michael Porter set forth his Five Forces to describe the factors that "impact the profits of an industry," not to determine whether a particular market is "conducive to collusion." (Marshall, Tr. 2913). Michael Porter's work is widely cited and applied in the context for which he wrote it, but it was Dr. Marshall's decision that it was a "sensible framework to use" for his purposes. (Marshall, Tr. 2914). Dr. Marshall's analysis was fundamentally flawed because he failed to distinguish between oligopolistic interdependence and conspiracy. (Carlton, Tr. 5382-5384; RX2832 at 65-66, ¶¶ 98-99).

1605. The perimeter forces surrounding this center force in this Porters Five Forces model are threat of new entrants (barriers to entry), bargaining power of suppliers, threat of substitute products and services (availability of substitute goods), and bargaining power of buyers. (Marshall, Tr. 2913-2915; [REDACTED]).

Schein's Response:

Irrelevant.

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, not supported by the evidence, and misleading. Michael Porter set forth his Five Forces to describe the factors that "impact the profits of an industry," not to determine whether a particular market is "conducive to collusion." (Marshall, Tr. 2913). Michael Porter's work is widely cited and applied in the context for which he wrote it, but it was Dr. Marshall's decision that it was a "sensible framework to use" for his purposes. (Marshall, Tr. 2914). Dr. Marshall's analysis was fundamentally flawed because he failed to distinguish between oligopolistic interdependence and conspiracy. (Carlton, Tr. 5382-5384; RX2832 at 65-66, ¶¶ 98-99).

A. Bargaining Power of Buyers

1606. The bargaining power of buyers is one of the five forces that affect industry profitability in the Porter's Five Forces model. [REDACTED] CX7100 at 127-129 (¶329, n.496, ¶332) (Marshall Expert Report)).

Schein's Response:

Irrelevant.

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, not supported by the evidence, and misleading. Michael Porter set forth his Five Forces to describe the factors that "impact

the profits of an industry,” not to determine whether a particular market is “conducive to collusion.” (Marshall, Tr. 2913). Michael Porter’s work is widely cited and applied in the context for which he wrote it, but it was Dr. Marshall’s decision that it was a “sensible framework to use” for his purposes. (Marshall, Tr. 2914). Dr. Marshall’s analysis was fundamentally flawed because he failed to distinguish between oligopolistic interdependence and conspiracy. (Carlton, Tr. 5382-5384; RX2832 at 65-66, ¶¶ 98-99).

1607. When a set of independent dentists function together in a buying group, then they aggregate the potential foregone profits of the full-service distributors serving them. (CX7100 at 128 (¶330) (Marshall Expert Report)).

Schein’s Response:

False. The cited evidence offers only Dr. Marshall’s conjectures about buying groups generally, but Dr. Marshall is not an expert in the dental industry. In fact, very few, if any, buying groups actually aggregate the purchasing volume of their members (*i.e.* the “potential foregone profits”), since they lack any control over, or the ability to make any commitments concerning, their members’ purchasing volume. (Cavaretta, Tr. 5568-69; Baytosh, Tr. 1907; Mason, Tr. 2394; Goldsmith, Tr. 1970; Maurer, Tr. 4964; Puckett, Tr. 2240). Dr. Marshall’s own analysis shows that, even when buying group members purchase from the buying group’s designated distributor, dentists continue to purchase around 50% of their supplies from other full-service distributors, and untold amounts from online and regional distributors. (CX 7100-153, -163, -171; SRF 1441). There is nothing to prevent Schein, or any other distributor, from continuing to serve a buying group’s members, and therefore no aggregated potential foregone profits.

Patterson's Response:

Patterson joins Schein and Benco's responses. Also, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, misleading, and contrary to the evidence. Dentists do not "function together" in a buying group. Rather, individual dentists who are members of buying groups separately and independently decide what to purchase, place orders, take delivery and pay for the products ordered. (Cavaretta, Tr. 5568-69; Ryan, Tr. 1034-36; Kois Jr., Tr. 312-13). If dentists truly functioned together in a buying group, they would not aggregate "potential foregone profits," but rather potential cost savings, of the distributors serving them. But as structured, buying groups do nothing to permit distributors to reduce their costs to serve buying group members. (Ryan, Tr. 1082; J. Johnson, Tr. 4836-4837; RX2834 at 35, ¶ 55).

1608. Aggregating purchases for potential foregone profits for the full-service distributors serving the independent dentists increases the dentists' collective bargaining power and allows them to extract lower prices. (CX7100 at 128 (¶330) (Marshall Expert Report)).

Schein's Response:

False. The cited evidence offers only Dr. Marshall's conjectures about buying groups generally, but Dr. Marshall is not an expert in the dental industry. As stated in response to CCFF 1607, buying groups do not aggregate purchases. Very few, if any, buying groups actually aggregate the purchasing volume of their members, since they lack any control over, or the ability to make any commitments concerning, their members' purchasing volume. (Cavaretta, Tr. 5568-69; Baytosh, Tr. 1907; Mason, Tr. 2394; Goldsmith, Tr. 1970; Maurer, Tr. 4964; Puckett, Tr. 2240). Dr. Marshall's own analysis shows that, even when buying group members purchase from the buying group's designated distributor, dentists continue to purchase around 50% of their supplies from other full-service distributors and untold amounts from online and regional distributors. (CX 7100-153, -163, -171; SRF 1441). There is nothing to prevent Schein or any other distributor from continuing to serve a buying group's members, and therefore no aggregated potential foregone profits.

Patterson's Response:

Patterson joins Schein and Benco's responses. Also, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-

Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, misleading, and contrary to the evidence. Dentists do not "Aggregate[e] purchases" in a buying group. Buying groups don't decide what to order. (Cavaretta, Tr. 5568-69; Cohen, Tr. 861; Ryan, Tr. 1034-36; see also RX2928 (member "[p]urchases are made directly from the vendor"); Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65). Buying groups don't place orders. (Cavaretta, Tr. 5568-69; Cohen, Tr. 861; Ryan, Tr. 1034-36; see also RX2928 (member "[p]urchases are made directly from the vendor"); Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65). And buying groups don't take delivery of orders. (Cavaretta, Tr. 5568-69; Cohen, Tr. 861; Ryan, Tr. 1034-36; see also RX2928 (member "[p]urchases are made directly from the vendor"); Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65). Rather, individual dentists who are members of buying groups separately and independently decide what to purchase, place orders, take delivery and pay for the products ordered. (Cavaretta, Tr. 5568-69; Ryan, Tr. 1034-36; Kois Jr., Tr. 312-13). If dentists truly aggregated their purchases in a buying group, the potential cost savings of the distributors serving them would allow them to realize lower prices. But as structured, buying groups do nothing to permit distributors to reduce their costs to serve buying group members. (Ryan, Tr. 1082; J. Johnson, Tr. 4836-4837; RX2834 at 35, ¶ 55).

1609. Respondents focused their attention on controlling the rise of the bargaining power of buyers by keeping them as independent dentists and not allowing the rise of buying groups. (Marshall, Tr. 2915-2916; [REDACTED]).

Schein's Response:

False.

First, as stated in response to CCFF 1607, buying groups do not generate bargaining power because they do not aggregate the purchases of their members. Of course, many *claim* to aggregate the purchasing volume of their members in order to obtain lower prices. (Baytosh, Tr. 1883; Mason, Tr. 2326). But in fact, very few, if any, buying groups actually aggregate the purchasing volume of their members, since they lack any control over, or the ability to make any commitments concerning, their members' purchasing volume. (Cavaretta, Tr. 5568-69; Baytosh, Tr. 1907; Mason, Tr. 2394; Goldsmith, Tr. 1970; Maurer, Tr. 4964; Puckett, Tr. 2240). Thus, the evidence does not show that buying groups actually increased dentists' bargaining power.

Second, the evidence does not show that Schein focused its attention on "controlling the rise of the bargaining power of buyers" or focused on keeping customers "as independent dentists." Even Complaint Counsel acknowledges Schein worked with buying groups. (*See* CX 7101-140-41). Schein also worked with DSOs. DSOs assemble independent dentists into larger organizations that, in addition to serving other goals, negotiate discounts based on the buying power of their membership. (SRF 60-66). Complaint Counsel does not argue that Respondents boycotted DSOs, or that Schein tried to prevent dentists from joining these groups. (*See, e.g.*, CCFF 66, 102, 104). If Schein simply wanted to prevent dentists from joining groups to negotiate discounts, it would make little sense for Schein to work with DSOs, yet boycott one specific kind of group that does not actually leverage buying power (*i.e.* buying groups).

Third, the asserted fact is based solely on Dr. Marshall's interpretation of the factual record. (CX 7100-128-33). But Dr. Marshall is not a fact witness and is not competent to

testify as to what Respondents meant in their documents and emails. (Marshall, Tr. 2945-46, 3141 [REDACTED])

Fourth, there is no evidence that buying groups actually get better pricing for their members than individual dentists can negotiate for themselves.

Patterson's Response:

Buying groups were decidedly not Patterson's focus. It had no "number three" business segment (besides private practice and DSOs), Misiak testified. PF ¶ 80 (Misiak, Tr. 1468–69); PF ¶¶ 121, 20 (McFadden and Misiak had never seen Patterson pursuing buying groups in their two-decade careers). Also, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, misleading, and not supported by the evidence. Benco focused its attention on providing customers with the best possible customer experience, maintaining close, one-on-one relationships with its customers, and

not permitting any entity to come between it and its customers. (RX1113; Cohen, Tr. 445, 628-29, 675-677; J. Johnson, Tr. 4829-4831). Benco chose not to offer discounts to buying groups because buying groups interfered with Benco's relations with its individual dentist customers, they could not ensure compliance by their members, and they did nothing to permit Benco to reduce its costs to serve buying group members. (Ryan, Tr. 1166-67, 1179-80, 1082; Cohen, Tr. 444-45; J. Johnson, Tr. 4834-4837; RX2834 at 35, ¶ 55).

B. Low Price Elasticity Of Independent Dentists' Demand.

1610. Independent dentists (and dental buying groups composed of independent dentists) have a relatively low price elasticity of demand for the full line of dental products and services sold through full-service distributors. (CX7100 at 111-114 (¶¶282-290) (Marshall Expert Report)).

Schein's Response:

Dr. Marshall's conclusions about elasticity of demand rest on faulty assumptions about the relevant market. He says his conclusion is based on three "economic reasons" – products and services from full-service distributors are (1) essential to the practice of dentistry; (2) do not have close economic substitutes; and (3) were only a small portion of the overall cost of dental procedures. (CX 7100-111). The first two do not hold up under the weight of the evidence.

As to the first, neither Complaint Counsel nor Dr. Marshall has shown that there are any necessary products or services provided by full-service distributors that cannot be obtained from direct-selling manufacturers, online/mail-order distributors, or regional or local distributors. For instance, Dr. Kois testified that he believed it would be possible to obtain all necessary items from manufacturers, and Dr. Mason switched nearly all of his purchases to the online distributor Darby. (CX 8007 (Kois Sr., Dep. at 164); Mason, Tr. 2405-06).

As to the second, neither Complaint Counsel nor Dr. Marshall has shown that non-full-service distributors, regional distributors, or direct-selling manufacturers are not competitive with full-service distributors like Schein. Indeed, as Mr. Sullivan, testified, the competition varies customer by customer. It may be a regional distributor like Nashville, or it may be an online distributor like Darby. (CX 0311 (Sullivan, IHT at 54-55)). Demonstrating full substitutability, Dr. Mason switched nearly all his purchases from Patterson to Darby. (Mason, Tr. 2405-06).

Patterson's Response:

Patterson joins Schein and Benco's responses. Also, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25-26) (emphasis added). Thus, it is entitled to no weight.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. The price elasticities of independent dentists vary considerably. The overall volume of discounting in the industry, the sheer number of individual discounts offered by Benco, Patterson and Schein, and the growth and success of low-cost, low-price suppliers such as Darby and Safeco demonstrate that many dentists have a moderately high price elasticity of demand.

((CX1100 at 3 (“use selective price overrides to make Benco’s prices competitive with low-priced competitors like Darby and Safco.”); RX0380 at 31 (“I’m a good rep, but I’m not so good that I can compete with 20% off the Darby catalog.”); J. Johnson, Tr. 4805-4807; RX2834 at 22; RX2833 at 47, ¶ 112 (Patterson price change class forms list Darby and Safco as both offensive and defensive reasons to grant discounts); RX2834 at 33, Exhibit 4 (Dr. Marshall’s own data showed that Darby’s share of sales to active Smile Source members was 24% in 2016)).

1611. Specifically, there are three economic reasons the elasticity of demand for the products and services bought from full-service distributors was low: (1) these products and services were essential to the practice of dentistry; (2) these products and services did not have close economic substitutes; and (3) these products and services were only a small portion of the overall cost of dental procedures. (CX7100 at 111-112 (¶¶283-286) (Marshall Expert Report)).

Schein’s Response:

This finding essentially repeats CCFF 1610, and Schein incorporates its response to that finding here. (SRF 1610).

Patterson’s Response:

Patterson joins Schein and Benco’s responses. Also, this Proposed Finding of Fact disregards this Court’s Order dated Feb. 21, 2019, which prohibits “cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents,” Order on Post-Trial Briefs, 3, as well as this Court’s admonition: “Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That’s what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I’m letting you know today so that you don’t think you’re going to question your experts about facts and rely on that,” (JUDGE CHAPPELL, Pre-

Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. The price elasticities of independent dentists vary considerably. The overall volume of discounting in the industry, the sheer number of individual discounts offered by Benco, Patterson and Schein, and the growth and success of low-cost, low-price suppliers such as Darby and Safeco demonstrate that many dentists have a moderately high price elasticity of demand. ((CX1100 at 3 ("use selective price overrides to make Benco's prices competitive with low-priced competitors like Darby and Safco."); RX0380 at 31 ("I'm a good rep, but I'm not so good that I can compete with 20% off the Darby catalog."); J. Johnson, Tr. 4805-4807; RX2834 at 22; RX2833 at 47, ¶ 112 (Patterson price change class forms list Darby and Safco as both offensive and defensive reasons to grant discounts); RX2834 at 33, Exhibit 4 (Dr. Marshall's own data showed that Darby's share of sales to active Smile Source members was 24% in 2016)).

1612. Additionally, research indicates that the demand for dental services has been inelastic. (CX7100 at 113-114 (¶287) (Marshall Expert Report)).

Schein's Response:

The evidence does not support the conclusion.

Dr. Marshall asserts that the "demand for dental services has been inelastic," but he did not actually study the question. There is no regression or other quantitative analysis establishing that purchase volume is not responsive to price, or is only minimally

responsive to price. That failure precludes any finding that the demand for dental supplies is inelastic.

Dr. Marshall's contrary opinion is based on a fallacious argument. He states that "the demand for [dental] products and services is derived from the demand for dental care" so "[t]he only way for a price increase by distributors to be unprofitable in this case is if it causes dental patients to purchase far less dental care." (CX 7100-113-14). But as Dr. Marshall conceded (though buried in a footnote), this argument is based on the *assumption* that "inputs" (*i.e.*, dental products and services) are "used in fixed proportions." (CX 7100-113-14 & n.433). Because there are many different brands of dental products and services, including private label and varying options, dentists can save money by making different product choices, as well as being more economical in their use of supplies, etc.

Patterson's Response:

Patterson joins Schein and Benco's responses. Also, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. The price elasticities of independent dentists vary considerably. The overall volume of discounting in the industry, the sheer number of individual discounts offered by Benco, Patterson and Schein, and the growth and success of low-cost, low-price suppliers such as Darby and Safeco demonstrate that many dentists have a moderately high price elasticity of demand. ((CX1100 at 3 ("use selective price overrides to make Benco's prices competitive with low-priced competitors like Darby and Safco."); RX0380 at 31 ("I'm a good rep, but I'm not so good that I can compete with 20% off the Darby catalog."); J. Johnson, Tr. 4805-4807; RX2834 at 22; RX2833 at 47, ¶ 112 (Patterson price change class forms list Darby and Safco as both offensive and defensive reasons to grant discounts); RX2834 at 33, Exhibit 4 (Dr. Marshall's own data showed that Darby's share of sales to active Smile Source members was 24% in 2016)).

C. High Collective Share Of Schein, Patterson, and Benco.

1613. Concentration, or a small number of sellers, is a structural factor that is conducive to effective collusion. (CX7100 at 011, 114-115 (¶¶12, 290-295) (Marshall Expert Report)).

Schein's Response:

A small number of sellers also increases the likelihood of lawful oligopolistic interdependence, and thus, can make the likelihood of collusion *less* likely. (SF 1670-75; Carlton, Tr. 5383-84; Marshall, Tr. 2878, 2883, 2952).

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. Concentration is also a structural factor that is conducive to oligopolistic interdependence. Dr. Marshall's analysis was fundamentally flawed because he failed to distinguish between oligopolistic interdependence and conspiracy. (Carlton, Tr. 5382-5384; RX2832 at 65-66, ¶¶ 98-99).

1614. During the relevant period, Schein, Patterson, and Benco accounted for a combined 


Schein's Response:

Dr. Marshall's estimates are not reliable because he compares apples to oranges. He obtains the denominator from various industry reports concerning overall market size, without determining how those figures were calculated or whether those sources of information are themselves accurate. (CX 7100-015). He then pairs that up with certain distributors' actual sales, but without ensuring that he is measuring exactly the same thing as the industry report statistics he uses for the denominator. (CX 7100-157). As such, the cited market share estimates are not reliable. Nor does Dr. Marshall define a nationwide geographic market, but instead defines local or regional geographic markets. (Marshall, Tr. 3369 ("Q. Now, you concluded that the relevant geographic markets are local in nature; correct? A. That's fair. Local, regional in nature, yes.")).

Patterson's Response:

Patterson joins Schein and Benco's responses. Also, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert

testimony to support factual propositions that should be established by fact witnesses or documents,” Order on Post-Trial Briefs, 3, as well as this Court’s admonition: “Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That’s what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I’m letting you know today so that you don’t think you’re going to question your experts about facts and rely on that,” (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is misleading. Dr. Marshall’s market share calculations are meaningless because his product market definition is fundamentally flawed. (J. Johnson, Tr. 4790-91). Dr. Marshall erred by failing to include direct-selling manufacturers in the relevant product market. (CX0311 (Sullivan, Dep. 53 (“ . . . some of our manufacturers we partner with, but they also have a direct selling component to their business . . . so those segments we view as competitors.”)); CX0314 (Guggenheim, Dep. 48-49 (“There’s hundreds of competitors, including manufacturers, who sell direct, compete with us.”)); Kois, Sr. Tr. 174-77; RX2834 at 18-22 ¶¶ 26-28, Exhibit 2; J. Johnson, Tr. 4799-4805; RX2833 at 54, ¶ 135; RX2967 (Wu, Dep. 240-241)). Dr. Marshall erred in lumping together the distribution of dental equipment and the distribution of dental consumables. (J. Johnson, Tr. 4812-4815; RX2834 at 23-24, ¶¶ 30-34). Dr. Marshall erred in excluding non-full-service distributors from the relevant product market. (J. Johnson, Tr. 4805-4807; RX2834 at 20-22, Exhibit 2; CX1100 at 3; RX2833 at 46-49, ¶¶ 111-119).

Calculating a share of something that is not a properly defined market is a meaningless exercise.

D. Barriers To Entry In Full-Service Distribution.

1615. Barriers to entry are a structural factor that is conducive to effective collusion. [REDACTED]
[REDACTED] (CX7100 at 115-116 (¶296) (Marshall Expert Report)).

Schein's Response:

False. There are thousands of industries with barriers to entry that are not conducive to effective collusion. Moreover, barriers to entry also increase the likelihood of lawful oligopolistic interdependence, which can make the likelihood of collusion *less* likely. (SF 1670-75; Carlton, Tr. 5383-84; Marshall, Tr. 2878, 2883, 2952). In any event, there is insufficient evidence of any barriers to entry. There are many suppliers and sellers of dental products and services, and no evidence that entry into the market is especially costly or difficult.

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and not supported by the evidence. Benco's own experience demonstrates that any barriers to entry are small and can be overcome. Benco successfully entered both the Los Angeles region and the Seattle region during the time period in question. (Cohen, Tr. 632-33; J. Johnson, Tr. 4820-4821; J. Johnson, Tr. 4823-4824). Leading up to, and during, the time period in question, Benco was able to enter a series of regions and, within each region, increase its share from zero to a significant presence in just a short period of time. (Cohen, Tr. 628-34).

1616. Recruitment, training, and retention of sales representatives is a barrier to entry to full-service distribution of dental supplies. (CX2594 at 053, 055 (Henry Schein Global Dental Group 2015–2017 Strategic Plan Situation Analysis includes Schein emphases on investment in career development and training, “We need highly trained, specialized sales reps and service technicians” . . . “We need Business Solution Specialists that can speak to customers at a higher level and present full range of solutions”); RX2951 (Steck, Class 30b6 Dep. at 49-51) (rookie salesmen are rookies for 2-3 years and paid a base salary plus commission on what they sell, after which they can earn higher commissions); [REDACTED]).

Schein’s Response:

A desire for knowledgeable sales staff is not a barrier to entry, as sales staff can be hired. Indeed, there is substantial evidence of movement of sales people within the industry, which negates any finding of barriers to entry. Dr. Marshall has shown that regional full-service distributors have successfully entered every state in the country and gained significant share. (CX 7101-142-43).

Patterson’s Response:

The cited documents do not pertain to Patterson. Otherwise, Patterson joins Schein and Benco’s responses.

Benco’s Response:

Complaint Counsel’s proposed finding is inaccurate and not supported by the evidence. Benco’s own experience demonstrates that any barriers to entry are small and can be overcome. Benco successfully entered both the Los Angeles region and the Seattle region during the time period in question. (Cohen, Tr. 632-33; J. Johnson, Tr. 4820-4821; J. Johnson, Tr. 4823-4824). Leading up to, and during, the time period in question, Benco was able to enter a series of regions and, within each region, increase its share from zero to a significant presence in just a short period of time. (Cohen, Tr. 628-34).

1617. Sufficient service technicians to respond to issues competently and promptly is a barrier to entry to full-service distribution of dental supplies. (CX0301 (Cohen, IHT at 384) (“Dentists value the sales rep. They value the service tech, as evidenced by the fact that GPOs can work with Darby [mail-order distributor] all day long, and they choose not to because dentists want the service that a Benco or full-service dealer would provide.”); CX0311 (Sullivan, IHT at 45-46) (full-service distributors can answer any and all needs of a dental office, including equipment installation, repair, and service); CX5005 at 008 (Form 10-K for Patterson Companies, 2017) (Patterson differentiated itself based in part on its highly-trained and experienced service technicians);

[REDACTED] RX2951 (Steck, 30b6 Dep. at 28-29) (Schein competes using high-quality trained technicians who respond quickly to service calls); [REDACTED]

Schein’s Response:

A desire for knowledgeable service technicians is not a barrier to entry, as service technicians can be hired. Indeed, there is substantial evidence of movement of sales people within the industry, which negates any finding of barriers to entry. Dr. Marshall has shown that regional full-service distributors have successfully entered every state in the country and gained significant share. (CX 7101-142-43). Moreover, there is no evidence that service technicians are required to sell supplies, or that the lack of service technicians has a meaningful impact on the ability to sell supplies.

Patterson’s Response:

Patterson joins Schein and Benco’s responses.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete and misleading. Benco’s own experience demonstrates that any barriers to entry are small and can be overcome. Benco successfully entered both the Los Angeles region and the Seattle region during the time period in question. (Cohen, Tr. 632-33; J. Johnson, Tr. 4820-4821; J. Johnson, Tr. 4823-4824). Leading up to, and during, the time period in question, Benco was able to enter a

series of regions and, within each region, increase its share from zero to a significant presence in just a short period of time. (Cohen, Tr. 628-34).

1618. Pricing from manufactures as well as other favorable terms from manufacturers that lower costs for large full-service distributors is a barrier to entry to full-service distribution of dental supplies. (CX0302 (Jackson, IHT at 040) (identifying that a challenge of starting up a dental distributor startup is obtaining product lines from manufacturers); CX7100 at 116 (¶297) (Marshall Expert Report)).

Schein's Response:

The cost of inputs is not a barrier to entry. Distributors buy and sell products. There is no evidence that the fact that they must do so inhibits entry.

Additionally, the cited testimony does not support the asserted fact. Mr. Jackson did not testify about whether receiving pricing or favorable terms from manufacturers was a barrier to entry. Mr. Jackson actually testified that setting up a new distributor is “like any business,” and a potential difficulty could be “[g]etting product lines.” (CX 0302 (Jackson, IHT at 40)). Mr. Jackson noted that, because “manufacturers make decisions on how many distributors they need,” a given manufacturer will only authorize between 30 and 70 distributors for its products. (CX 0302 (Jackson, IHT at 40)). Nowhere in the cited testimony does Mr. Jackson say special pricing and terms are a barrier for new entrants.

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. Benco's own experience demonstrates that any barriers to entry are small and can be overcome. Benco successfully entered both the Los Angeles region and the Seattle region during the time period in question. (Cohen, Tr. 632-33; J. Johnson, Tr. 4820-4821; J. Johnson, Tr. 4823-

4824). Leading up to, and during, the time period in question, Benco was able to enter a series of regions and, within each region, increase its share from zero to a significant presence in just a short period of time. (Cohen, Tr. 628-34).

1619. Obtaining the requisite infrastructure, specifically: warehouse or distribution centers to store a comprehensive selection of products, local showrooms, and service vans for “one stop shopping” is a barrier to entry to full-service distribution of dental supplies. [REDACTED] CX8017 (Rogan, Dep. at 69) (Patterson has seven distribution centers and can deliver product to 95 percent of the country in one day); CX8015 (Cohen, Dep. at 47-48) (discussing infrastructure needed for Benco to better supply west coast); CX8031 (Steck, Dep. at 143) (independent dentists need quick and frequent deliveries because they have limited storage space and “run out of stuff”); CX7100 at 116 (¶297) (Marshall Expert Report)).

Schein’s Response:

There is no evidence concerning the costs of warehousing or other infrastructure necessary to compete in the relevant market. A new entrant does not need to enter at the scale of Patterson to be competitive. Rather, there are many competitive regional distributors. Nor is there any evidence that the cost of warehousing or infrastructure has prevented or impeded entry. Indeed, the mere necessity of an initial capital investment to enter a business is not a cognizable barrier to entry. *E.g.*, Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶421b. (3rd and 4th Editions, 2018 Cum. Supp.) (“The effect [of a high initial capital investment] should not be substantial when capital markets are efficient. If capital markets are working well, new investment will be made in any market earning anything above competitive returns—which is defined to include sufficient profit to attract new capital—regardless of the absolute cost of entry.”).

In any event, Dr. Marshall has shown that regional full-service distributors have successfully entered every state in the country and gained significant share. (CX 7101-142-143).

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. Benco's own experience demonstrates that any barriers to entry are small and can be overcome. Benco successfully entered both the Los Angeles region and the Seattle region during the time period in question. (Cohen, Tr. 632-33; J. Johnson, Tr. 4820-4821; J. Johnson, Tr. 4823-4824). Leading up to, and during, the time period in question, Benco was able to enter a series of regions and, within each region, increase its share from zero to a significant presence in just a short period of time. (Cohen, Tr. 628-34).

1620. [REDACTED]

Schein's Response:

The cited document does not support the proposed finding. The cited Burkhart email, *from 2017*, describes [REDACTED] not the issues facing all participants in the market. (CX 4124-002). This 2017 document actually lists [REDACTED] [REDACTED] (CX 4124-

002). This does not establish that [REDACTED] in the dental supplies distribution industry.

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. Benco's own experience demonstrates that any barriers to entry are small and can be overcome. Benco successfully entered both the Los Angeles region and the Seattle region during the time period in question. (Cohen, Tr. 632-33; J. Johnson, Tr. 4820-4821; J. Johnson, Tr. 4823-4824). Leading up to, and during, the time period in question, Benco was able to enter a series of regions and, within each region, increase its share from zero to a significant presence in just a short period of time. (Cohen, Tr. 628-34).

1621. A February 2012 Patterson market analysis stated that "The risk associated with . . . new entrants is minimal. . . . Due to the duopoly nature of the North American distribution landscape a high barrier to entry limits the threat of new entrants in the space." (CX0082 at 009 (attachment to February 28, 2012 email from Guggenheim to Love)).

Schein's Response:

The cited document is not reliable evidence of the existence of barriers to entry.

Indeed, the cited statement – a single sentence in an 18-page email – is a non-sequitur. A duopoly does not create "a high a barrier to entry." Nor does the document establish that the market is a duopoly. The email itself notes that, in addition to Patterson, there is also Schein, Benco, "[r]oughly a dozen large independent regional distributors," an "[u]nknown number of small local players," and a "[h]andful of significant direct-to-dentist companies." (CX 0082-008).

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

Benco joins in the response of Schein.

1622. Benco Senior Team Retreat Notes from June 2013 asked, "How attractive is our industry on the 'five forces' framework? Best: High barriers to entry, low power of customers." (CX1246 at 002).

Schein's Response:

The cited "Senior Team Retreat Notes" lack foundation. Complaint Counsel never asked about CX 1246 either at trial or in deposition, and never confirmed that these notes accurately reflect the conclusions of Benco's leadership. In fact, the notion of high barriers to entry is contrary to Benco's own expansion experience. (Cohen, Tr. 628-34). Complaint Counsel laid no foundation that these apparently one-off notes were based on accurate or reliable information. Finally, the document does not specify what "high barriers to entry" means or to what it refers.

Patterson's Response:

Patterson joins Benco's response.

Benco's Response:

Complaint Counsel's proposed finding is misleading and contrary to the weight of evidence. Complaint Counsel cites two lines in a 10-page set of notes from a broad, wide-ranging discussion of multiple topics. This one-off comment is unpersuasive when compared with Benco's own experience, which demonstrates that any barriers to entry are small and can be overcome. Benco successfully entered both the Los Angeles region and the Seattle region during the time period in question. (Cohen, Tr. 632-33; J. Johnson, Tr.

4820-4821; J. Johnson, Tr. 4823-4824). Leading up to, and during, the time period in question, Benco was able to enter a series of regions and, within each region, increase its share from zero to a significant presence in just a short period of time. (Cohen, Tr. 628-34).

E. Manufacturers Have Little To No Bargaining Power Against Distributors.

1623. Manufacturers have little or no bargaining power against distributors. (CX0082 at 009 (“Patterson Dental enjoys significant influence and channel power with our vendor partners.”); CX8017 (Rogan, Dep. at 83-84) (when a manufacturer started selling direct to Patterson customers, Patterson reps moved customers to different manufacturers); CX0317 (Rogan, IHT at 277-278) (Patterson reps steering customers away from Dentsply products after Dentsply started selling direct); CX1254 at 011; CX2633 at 021 (May 2016 Boston Consulting Group presentation to Schein notes fragmented customer and supplier base); CX3299 at 006 (July 2014 Patterson presentation notes industry has “classic hour glass shape...many manufacturers, many customers”); CX7100 at 118-120 (¶303) (Marshall Expert Report)).

Schein’s Response:

The asserted fact ignores evidence to the contrary. The record demonstrates that manufacturers can and do exert significant pressure on distributors. For example, the proposed finding cites a Patterson document that says, “Sirona [a manufacturer] has significant bargaining power.” (CX 0082-009). In 2013, A-dec (a dental chair manufacturer) cut Benco off after Benco refused to sell a higher percentage of A-dec chairs. (RX 2756-001; *see also* Sullivan, Tr. 4081). The move was “a big deal.” (Sullivan, Tr. 4081; *see also* RX 2756). And when Mr. Sullivan’s company, Sullivan Dental, merged with Schein, A-dec “cut [them] off.” (Sullivan, Tr. 4081).

Manufacturers can also partner with buying groups directly, cutting out distributors entirely. In 2014, P&G partnered directly with the Dental Co-Op of Utah, putting the group in direct conflict with Schein’s exclusive Colgate relationship. (Titus, Tr. 5237-39; Sullivan, Tr. 4233-34; Cavaretta, Tr. 5602; CX 0305 (Cavaretta, IHT at 158-59); CX 8010

(Titus, Dep. at 126)). According to Colgate, the Dental Co-Op's P&G partnership led to a significant drop in sales of Colgate to Dental Co-Op members. (CX 2239-002-04 (noting that the Dental Co-Op was "eating up base business" as Colgate/Schein had recently lost two accounts to its competitor Proctor & Gamble, maker of Crest/Oral-B)). Similarly, partially because of the conflicts the relationship caused with manufacturers, Schein was forced to renegotiate its partnership with Dental Gator in 2014. (SF 655).

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, misleading, and not supported by the evidence. Manufacturers of key brands or unique products have significant bargaining power. (J. Johnson, Tr. 4824-4826). The record indicates that Dentsply, a leading manufacturer of false teeth, has significant bargaining power. (J. Johnson, Tr. 4824-4826). There is ample economic evidence of manufacturers pushing back on distributors. Manufacturers frequently play off one distributor against another. Some manufacturers have entered into exclusive agreements with either Schein or Patterson. (J. Johnson, Tr. 2824-2826; RX2834 at 24, ¶ 40). Other manufacturers do not have exclusive agreements in place but have nevertheless played off one distributor against another, and in doing so, have chosen not to sell to Benco. (RX2834 at 24, ¶ 40). For example, A-dec, a manufacturer of dental chairs, pushed very hard on Benco, and ultimately took away its business. (Cohen, Tr. 662-63; J. Johnson, Tr. 4824-4826).

XXII. DR. MARSHALL OBSERVED CHANGES IN THE BIG THREE'S CONDUCT INDICATIVE OF COLLUSIVE BEHAVIOR.

1624. Although in an oligopoly one may observe interdependence and parallel conduct among firms, changes in conduct are a known indicator of collusive behavior. (CX7100 at 190 (¶427) (Marshall Expert Report)).

Schein's Response:

False. Companies change conduct all the time. For example, within weeks of Amazon announcing next-day shipping, Walmart did the same. This was obviously not collusive. See Lauren Thomas, *Walmart Announces Next-Day Delivery, Firing Back at Amazon*, CNBC, May 14, 2019, <https://www.cnbc.com/2019/05/13/walmart-announces-next-day-delivery-firing-back-at-amazon.html>. For changes in conduct to be evidence of “collusive behavior,” they must be so unusual that no firm would have engaged in such a change without an advance understanding.

The asserted fact is also unsupported by record evidence. In his expert report, Dr. Marshall cites his own article as support for the assertion. But the article did not purport to conclude or support the conclusion that “changes in conduct are a known indicator of collusive behavior.” Rather, the article compared price announcements in the vitamins industry during a period of known collusion to price announcements in a non-collusion period, and noted that “price announcements ... are an important aspect of cartel behavior” Robert C. Marshall, Leslie M. Marx & Matthew E. Raiff, *Cartel Price Announcements: The Vitamins Industry*, 26 Int'l J. of Indus. Org. 762, 763 (2008). The study found “several empirical implications concerning the distinction between non-collusive and collusive price announcement behavior.” *Cartel Price Announcements* at 786.

Thus, the assertion is nothing but expert *ipse dixit* and should be disregarded. To the extent Complaint Counsel seeks to make a legal assertion regarding what constitutes plus factors as a matter of law, Dr. Marshall is not an attorney and is not competent to so testify.

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

Benco has no specific response.

1625. Structural breaks are a part of the economic analysis of collusive conduct. (Marshall, Tr. 2889; CX7100 at 190 (¶427) (Marshall Expert Report)).

Schein's Response:

CCFF 1625 is a repeat of CCFF 1624 and cites the same paragraph from Dr. Marshall's report. Schein incorporates its response to CCFF 1624 here. In the cited portion of Dr. Marshall's report, he merely presents his own definition of structural break. More expert *ipse dixit*. As Dr. Johnson explained, the concept of "structural break comes from ... the field of econometrics. It's a statistical concept." (J. Johnson, Tr. 4858; RX 2834-050). Dr. Marshall did not do any statistical testing. (J. Johnson, Tr. 4858).

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and not supported by the evidence. "Structural break" has nothing to do with the analysis of collusive conduct. Rather, it is a statistical concept from the field of econometrics that represents a method of

empirical testing to determine if the fundamentals in the data have changed. (J. Johnson, Tr. 4858-4859). Structural break uses statistical testing on a model to show whether the various factors in the model have changed. (J. Johnson, Tr. 4859) The point of the economic definition is to have an objective standard by which to judge whether there has been a structural break. (J. Johnson, Tr. 4859). Dr. Marshall did not use the term “structural break” in accordance with its econometric meaning, as he did not perform any statistical analysis with respect to his asserted “structural breaks,” and in fact did not perform any kind of objective, measurable test. (J. Johnson, Tr. 4858-4859). Rather, Dr. Marshall simply gave a subjective assessment of certain characteristics of behavior, which he dressed up in faux economic language. (J. Johnson, Tr. 4858-4860).

In fact, Dr. Marshall did not apply any recognized methodology to his “structural break analysis,” and his “analysis” can’t be replicated because it is just his subjective assessment. (J. Johnson, Tr. 4858-4860). Indeed, Dr. Marshall’s “method of analysis,” if applied consistently, would establish a “structural break” by Benco to start dealing with buying groups in 2013, contrary to the terms of the alleged conspiracy, in the middle of the alleged conspiracy period. (*See* BFF 1253-1257).

1626. There are structural changes that support Complaint Counsel’s conspiracy start date of 2011, including Schein ending its relationship with Unified Smiles and Smile Source. (Marshall, Tr. 2948; [REDACTED])

Schein’s Response:

False. Complaint Counsel improperly cites to expert opinion in support of an assertion of fact. As Dr. Marshall testified, he is not a fact witness. (Marshall, Tr. 2945, 3141 [REDACTED]). Though he is not offering an economic opinion to pin a precise date as to the start of the alleged

conspiracy, Dr. Marshall finds his “first structural break” on December 21, 2011, citing a single email where Schein turned down Unified Smiles. (CX 7100-190; Marshall, Tr. 2947). But Dr. Marshall is not a competent witness to interpret what was meant by any email or phone call. (Marshall, Tr. 2946 (“[W]hat they meant is up to them.”)). Even if he was, Dr. Marshall did not review the entire record to see if this instance was the first time Schein had turned down a buying group, and as a result, he does not know one way or the other whether Schein said no to buying groups prior to December 21, 2011. (Marshall, Tr. 2948-49). Nor does Dr. Marshall know if Schein articulated its reasons for turning down Unified Smiles differently than for other buying groups. (Marshall, Tr. 2950-51). That is no basis for a structural break opinion. Without having considered all of Schein’s interactions with buying groups, it is impossible for Dr. Marshall to render any reliable conclusion as to a structural break. (SF 1645-48). In fact, the evidence shows no structural break in Schein’s behavior towards buying groups in 2011. (SF 1338-55).

In addition, as to Smile Source, Complaint Counsel appears to have abandoned their unsupported contention that Schein terminated Smile Source or that Schein surreptitiously induced Smile Source to terminate Schein in 2012. As such, there is no basis for Dr. Marshall’s claim that Smile Source constitutes a structural break. Moreover, because the evidence shows that Schein was willing to continue working with Smile Source throughout the alleged conspiracy, it constitutes conduct inconsistent with the alleged conspiracy.

Patterson’s Response:

This Proposed Finding of Fact disregards this Court’s Order dated Feb. 21, 2019, which prohibits “cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents,” Order on Post-Trial Briefs, 3, as well as this Court’s admonition: “Do not use experts to elicit facts that should be elicited through a fact

witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, misleading, and unsupported by the evidence. Before 2011, Schein evaluated the opportunity to bid for buying group business on a case by case basis; sometimes Schein bid for buying group business, and sometimes Schein decided not to bid for buying group business. (Titas, Tr. 5192-94; RX2957 at 12-13). But Dr. Marshall didn't know whether Schein said no to buying groups before 2011 because he didn't review the record before 2011. (Marshall, Tr. 2949-51). After 2011, Schein continued to evaluate the opportunity to bid for buying group business on a case by case basis; sometimes Schein bid for buying group business, and sometimes Schein decided not to bid for buying group business. (Titas, Tr. 5192-94; RX2957 at 12-13). Dr. Marshall ignored the instances between 2011 and 2015 when Schein bid for the business of buying groups. (Carlton, Tr. 5366-67). Indeed, [REDACTED]

[REDACTED] Schein's sales data indicate that there was no break. (Carlton, Tr. 5373-5374; *see also* RX2832 at 22). Schein's sales data indicate that Schein's business with buying groups remained high, and in fact was even higher during the alleged conspiracy period than it was in the non-conspiratorial period. (Carlton, Tr. 5373-5374; *see also* RX2832 at

22). Dr. Marshall's assertion that Schein's behavior at the beginning of the alleged conspiracy period constituted a structural break was "just wrong." (Carlton, Tr. 5372-5373).

1627. Prior to 2011, Schein had done business with a few buying groups (*See* Section VIII.A (CCFF ¶¶ 432-453); CCFF ¶¶ 687; *see also* CX7100 at 191 (¶429) (Marshall Expert Report)).

Schein's Response:

Schein did do business with buying groups. However, the year 2011 has no relevance. Schein did business with buying groups before 2011, in 2011, and after 2011. (SF 377-1355, 1609-29, 1637-48).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and misleading. Before 2011, Schein evaluated the opportunity to bid for buying group business on a case by case basis; sometimes Schein bid for buying group business, and sometimes Schein decided not to bid for buying group business. (Titas, Tr. 5192-94; RX2957 at 12-13). After 2011, Schein continued to evaluate the opportunity to bid for buying group business on a case by case basis; sometimes Schein bid for buying group business, and sometimes Schein decided not to bid for buying group business. (Titas, Tr. 5192-94; RX2957 at 12-13).

1628. The first structural break was in December 21, 2011, when Schein rejected the buying group Unified Smiles because Schein "no longer participate[s] in buying groups." (Marshall, Tr. 2890-2891; CX7100 at 190 (¶428) (Marshall Expert Report) (citing CX2062 at 001) (Dec. 21, 2011 email from Foley to Durante forwarding email sent to Unified Smiles informing them that Schein no longer participates in Buying Groups)).

Schein's Response:

False. CCFF 1628 merely quotes from the solitary email that Dr. Marshall cites to conclude there was a structural break on December 21, 2011, as described in more detail in SRFs 719-720 and 743. As such, it is a repeat of CCFFs 719 and 1626, and Schein incorporates its responses to those proposed findings here. (SRF 719, 1626). Not only is Dr. Marshall's conclusion based on an unreliable interpretation of a cherry-picked document from the factual record, the evidence shows that Schein consistently approached buying groups with careful skepticism, but evaluated each one on a case-by-case basis before and after December 21, 2011. (SF 1338-55; *see also* SF 377-1355).

Moreover, it is notable that Complaint Counsel has again changed their story, and in their brief now asserts that the first structural break occurred in July 2011. (CC Br. 26-27 (asserting that "[b]y July 2011, Sullivan's position had changed.")).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, misleading, and unsupported by the evidence. Before 2011, Schein evaluated the opportunity to bid for buying group business on a case by case basis; sometimes Schein bid for buying group business, and sometimes Schein decided not to bid for buying group business. (Titas, Tr. 5192-94; RX2957 at 12-13). But Dr. Marshall didn't know whether Schein said no to buying groups before 2011 because he didn't review the record before 2011. (Marshall, Tr. 2949-51). After 2011, Schein continued to evaluate the opportunity to bid for buying group business on a case by case basis; sometimes Schein bid for buying group business, and sometimes Schein decided not to bid for buying group business. (Titas, Tr. 5192-94; RX2957 at 12-

13). Dr. Marshall ignored the instances between 2011 and 2015 when Schein bid for the business of buying groups. (Carlton, Tr. 5366-67). Indeed, [REDACTED]

[REDACTED] Schein's sales data indicate that there was no break. (Carlton, Tr. 5373-5374; *see also* RX2832 at 22). Schein's sales data indicate that Schein's business with buying groups remained high, and in fact was even higher during the alleged conspiracy period than it was in the non-conspiratorial period. (Carlton, Tr. 5373-5374; *see also* RX2832 at 22). Dr. Marshall's assertion that Schein's behavior at the beginning of the alleged conspiracy period constituted a structural break was "just wrong." (Carlton, Tr. 5372-5373).

1629. The rejection of Unified Smiles is a structural break because Schein stated that Schein does not do business with buying groups with regards to Unified Smiles – "[t]hat's different from just turning down Unified Smiles." (Marshall, Tr. 2949-2950).

Schein's Response:

CCFF 1629 merely quotes from Dr. Marshall's testimony regarding his December 21, 2011 structural break opinion. As such, it is a repeat of CCFF 1626 and Schein incorporates its response to that proposed finding here. (SRF 1626). Specifically, Dr. Marshall is not a competent witness to testify as to the characterizations of emails, first because he is not a fact witness, and second, because he did not review the entire record of Schein's characterizations of decisions not to do business with particular buying groups. (Marshall, Tr. 2946, 2948-51).

Moreover, Mr. Foley's statement in CX 2062, relied upon by Dr. Marshall, is no different in kind to similar sentiments expressed towards buying groups well before 2011,

all while Schein was doing business with buying groups. In 2002, for instance, Mr. Muller wrote regarding buying groups, “We have held a pretty firm line on saying NO to virtually all of them.” (RX 2405-001). And in 2010, before the alleged conspiracy, Mr. Sullivan wrote of turning down the buying group Synergy Dental, “You know the drill ... not interested in GPOs.” (CX 2451-001). The evidence shows that at the time these emails were written, Schein was working with buying groups.

To put the nail in the coffin of Complaint Counsel’s (and Dr. Marshall’s) structural break theory, the *day after* Mr. Foley’s December 21, 2011 email, Mr. Cavaretta outlined a proposal to do business with the buying group MeritDent, which was formalized two months later in a purchasing agreement. (SF 1346-47). There simply is no basis to treat Mr. Foley’s email to Unified Smiles as anything other than a continuation of Schein’s practice towards buying groups – evaluating them with a skeptical eye and doing business with some but not others.

Patterson’s Response:

This Proposed Finding of Fact disregards this Court’s Order dated Feb. 21, 2019, which prohibits “cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents,” Order on Post-Trial Briefs, 3, as well as this Court’s admonition: “Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That’s what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I’m letting you know today so that you don’t think you’re going to question your experts about facts and rely on that,” (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, misleading, and not supported by the evidence. Dr. Marshall didn't know whether Schein articulated its reasons for turning down Unified Smiles differently than it articulated its reasons for turning down other buying groups before that, and therefore had no basis for saying that this was any sort of change. (Marshall, Tr. 2950). Furthermore, it's clear that Schein's statement was turning down Unified Smiles only – Dr. Marshall ignored the fact that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1630. INTENTIONALLY LEFT BLANK.

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

No response.

1631. INTENTIONALLY LEFT BLANK.

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

No response.

1632. A structural break in Patterson's conduct is when it entered discussions with buying group New Mexico Dental Cooperative in 2013, then rejected the buying group after receiving an email from Cohen (Benco) about it. (CCFF ¶¶ 454, 1743, 643, 414; CX0090 at 001 (February 8, 2013 email from Guggenheim to Cohen regarding the New Mexico Dental Cooperative); CX7100 at 193-194 (¶¶440-445) (Marshall Expert Report)).

Schein's Response:

No response.

Patterson's Response:

The proposed finding grossly misstates the record. There was never any break in Patterson's conduct. In practice, Patterson salespeople repeatedly met with and evaluated buying groups for years before, during, and after the alleged conspiracy. *See, e.g.*, FOF ¶¶ 119, 130-134, 167-173; Guggenheim, Tr. 1529, 1569-1570 (when Guggenheim was southwest regional manager from 2000 to 2010, Patterson would "often evaluate" buying groups); McFadden, Tr. 2704 ("we were open-minded to take a look at some GPOs to see if it made business sense"); CX8017 (Rogan, Dep. at 60) ("[W]e take a look at [buying groups] and see if it makes sense for us to do business"); CX8023 (Guggenheim, Dep. at 185) (Guggenheim testified that Patterson has a "nuanced position on buying groups to evaluate them individually in each market based on whether or not they made sense").

Prior to Guggenheim's receipt of Cohen's February 8, 2013 email, the founder of the New Mexico Dental Cooperative sent out a blast email that confused dental manufacturers. CX4090 at 2. As a result, Patterson's local office began "walking back" its relationship with the New Mexico Dental Cooperative prior to February 8, 2013.

(Mason, Tr. 2381; CX0090 at 1). *See also* Patterson's responses to CCFF ¶¶ 454, 1743, 643, 414.

Benco's Response:

Benco joins the response of Patterson.

1633. Another observation of a structural break with regards to Patterson is in 2016-2017 when Patterson pursues the business of buying group Smile Source and attempts to win Smile Souce's business. (CCFF ¶¶ 1347-1357; Marshall, Tr. 2893; CX7100 at 198 (¶459) (Marshall Expert Report)).

Schein's Response:

No response.

Patterson's Response:

There was never any break in Patterson's conduct, as the record demonstrates. Patterson declined to explore working with Smile Source initially because "there was no upside from a business perspective" for Patterson. (McFadden, Tr. 2720). Moreover, Smile Source's representative at the time, Dr. Goldsmith, made a poor first impression on Patterson executives. (McFadden, Tr. 2719). By 2017, manufacturers had indicated their interest in working with Smile Source to Patterson, and Patterson felt Smile Source may be able to deliver the volume commitments from dentist that Patterson would need to partner with Smile Source. (Rogan, Tr. 3548-49) (Q. So part of the reason that Patterson bid on Smile Source was that manufacturers were working with Smile Source? A. Well, the way I remember it -- and I still know it today -- is that some of the manufacturers were saying, "Hey, this is more than just a bunch of dentists getting together for a better deal. They have actually got some meat to this, and they can maybe bring the spend. They were providing a lot of value to the dentists. You should take a look at this." And we did, we

took a deep look, and they were right. This was more than just a group of people trying to get a better deal.). *See also* Patterson’s responses to CCFF ¶¶ 1347-1357.

Furthermore, while Complaint Counsel labels Smile Source a buying group (Compl. ¶ 35), Smile Source views itself as a “franchise DSO” and not a buying group. (Maurer, Tr. 2046); *see also* (Goldsmith, Tr. 1949 (“Judge Chappell: Did you consider Smile Source or do you consider Smile Source to be a buying group or a -- what is it, GPO? . . . A: I do not consider it to be that. Judge Chappell: Either of those. A: Correct.”); Maurer, Tr. 4969 (“Mr. Maurer, if I heard your testimony right, Smile Source is not a buying group. Is that right? A. Correct.”); Goldsmith, Tr. 2040–41 (“Q. And you consider Smile Source to be a franchisor; is that right? A. That is correct.”)).

Finally, Complaint Counsel’s alleged “structural break” occurred over a year and half after Complaint Counsel claims the alleged conspiracy ended. (Kahn, Tr. 19).

Benco’s Response:

Benco joins the response of Patterson.

1634. Benco instituted a no buying group policy in 1996. (CX1112 at 003 (Answer of Benco, Preliminary Statement); CX8015 (Cohen, Dep. at 278)).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete. Benco was willing to deal with dental service organizations (“DSOs”) because DSOs act as centralized decision makers and centralized purchasing agents that can agree to volume commitments and drive

compliance, and they reduce distributors costs by agreeing to purchase certain volumes of specific products, placing orders electronically, taking central delivery, and eliminating the need for a large sales force. (See, e.g., Ryan, Tr. 1166-67; Puckett, Tr. 2205-06; Meadows, Tr. 2523-24; CX8016 (Meadows, Dep. at 271-72); CX8033 (Cavaretta, Dep. at 42-45); CX8010 (Titus, Dep. at 26, 255-56); CX8005 (Muller, Dep. at 94-95); CX0309 (Muller, IHT at 59-60, 63); J. Johnson, Tr. 4832-33; RX2834 at 34-35, ¶ 54; RX2833 at 19-20, ¶ 33; RX2832 at 41, ¶ 58). And because a DSO is the customer, Benco maintains direct contact and communication with the customer. (Ryan, Tr. 1165-66).

Benco chose not to offer discounts to buying groups because buying groups interfered with Benco's relations with its individual dentist customers, they could not ensure compliance by their members, and they did nothing to permit Benco to reduce its costs to serve buying group members. (Ryan, Tr. 1166-67, 1179-80, 1082; Cohen, Tr. 444-45; J. Johnson, Tr. 4834-4837; RX2834 at 35, ¶ 55).

1635. There is a structural break in Benco's conduct in late 2015 and early 2016 when it began working with a buying group called Elite Dental Alliance ("EDA"). (Section XVII.B.2.c (CCFF ¶¶ 1366-1387); Marshall, Tr. 2891; [REDACTED]).

Schein's Response:

EDA is not a structural break. As Mr. Cohen testified, Benco has "veto power over vendors," has "control over the rules for admitting members," and receives 50% of the group's profits. (Cohen, Tr. 816-17, 820-21; CX 1282). EDA is a one-of-a-kind program, not a typical buying group. (SRF 1381, 1385-87).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, incomplete, misleading, and not supported by the evidence.

Dr. Marshall did not apply any recognized methodology to his "structural break" analysis. (J. Johnson, Tr. 4858-4860). Dr. Marshall's opinion is not supported by any evidence. Dr. Marshall did not undertake any investigation to determine if Elite Dental Alliance was representative of buying groups in general. (Marshall, Tr. 3399). Dr. Marshall was unaware of, forgot, or chose to ignore critical attributes that set Elite Dental Alliance apart from other buying groups. (Marshall, Tr. 3399-3406). Dr. Marshall has no basis to opine that Benco's dealings with respect to Elite Dental Alliance represented a "structural break" because he didn't know the salient features that mattered for purposes of doing the assessment. (J. Johnson, Tr. 4863).

The Elite Dental Alliance arrangement had critical attributes that, from Benco's perspective, set it apart from other buying groups and resolved many of Benco's concerns about doing business with buying groups. (Cohen, Tr. 818-23). The partnership with Cain Watters, which could encourage customers to purchase from Benco during their annual financial counseling, provided Benco with additional assurance that EDA could actually drive compliance. (Cohen, Tr. 814-16; J. Johnson, Tr. 4860-62). 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. (Cohen, Tr. 468, 817; J. Johnson, Tr. 4860-4862). Benco believed that the specific attributes of the Elite Dental Alliance arrangement made it more likely that members of Elite Dental Alliance would comply with the program and Benco would actually realize incremental revenue from the arrangement. (Cohen, Tr. 463; 818-23).

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. (J. Johnson, Tr. 4860-62). 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. (Cohen, Tr. 817; J. Johnson, Tr. 4860-62). Benco actually had some control over the selection of direct manufacturers and the development of the program, which helped set it apart from other buying groups. (Cohen, Tr. 817, 820-21; J. Johnson, Tr. 4860-4862). Benco was also entitled to 50 percent of any profits earned by Elite Dental Alliance. (Cohen, Tr. 816).

From an economic perspective, all of these specific features of the Elite Dental Alliance arrangement made it fundamentally more attractive than most buying groups and a unique opportunity. (J. Johnson, Tr. 4860-62). 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). 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).

1636. In 2017, Schein resumed its relationship with Smile Source, indicating another break where Schein changed its behavior to resuming the pursuit of buying group business. CCFF ¶¶ 1316, 1319; (Marshall, Tr. 2891; [REDACTED]).

Schein's Response:

False. After years of off-and-on negotiations, Schein and Smile Source were finally able to come to an agreement on a partnership in 2017. This was not, however, a “structural break.” It was nothing new. After Smile Source fired Schein in 2012, Schein tried to win Smile Source’s business in 2014, and tried again in 2015. (RX 2213; Steck, Tr. 3789). Smile Source’s President Trevor Maurer noted that by 2017, [REDACTED] [REDACTED] RX 2091-001). Dr. Marshall’s interpretation of the evidence that Schein was “resuming the pursuit of buying group business” is wrong. (Marshall, Tr. 2890-91). Indeed, Schein was consistently willing to do business with Smile Source throughout the relevant period. (SF 1156-70, 1181-86).

The 2017 Smile Source agreement was not indicative of a change in behavior. Complaint Counsel does not cite any record evidence for this assertion, but rather relies entirely on Dr. Marshall’s interpretation of the evidence. As noted, not only is Dr. Marshall wrong, he is neither a fact witness nor a fact finder. (Marshall, Tr. 2945, 3141 [REDACTED] [REDACTED]). Nor is he competent to interpret what was meant by any email or phone call. (Marshall, Tr. 2946 (“[W]hat they meant is up to them.”)).

Patterson's Response:

No specific response.

Benco's Response:

Benco joins the response of Schein.

XXIII. DR. MARSHALL OBSERVED CONDUCT INCONSISTENT WITH THE BIG THREE'S UNILATERAL INTERESTS AND CONSISTENT WITH COORDINATED ACTION.

1637. Schein, Patterson, and Benco's conduct of not bidding for buying group business was inconsistent with acting in their own unilateral economic self-interest. (CCFF ¶¶ 1647-1684; *see also* Section XVII.B.1 (CCFF ¶¶ 1254-1315)).

Schein's Response:

False. Complaint Counsel does not cite any record evidence to support this finding, but instead cites only other proposed findings. As set forth in Schein's specific replies, those findings also fail to support the claim that Schein acted against its unilateral economic self-interest.

Substantively, the evidence shows that Schein at all times acted deliberately, rationally, and unilaterally with respect to buying groups. (*E.g.*, SF 159-341). Complaint Counsel cites two types of evidence in support of its proposed finding: 1) Dr. Marshall's opinions (CCFF 1647-84); and 2) internal Schein commentary that certain types of buying groups could pose business opportunities if they could exhibit compliance, stickiness, or otherwise complement Schein's value proposition (SRF 1254-315; *see also* SF 159-82). The latter simply demonstrates Schein's rational approach of working with buying groups when it make good business sense.

As to Dr. Marshall's opinions, they cannot support a finding of acts contrary to self-interest primarily because Dr. Marshall did not actually study the question. He did not even attempt to analyze the but-for world, and thus failed to fully analyze what Schein's experience with buying groups would be, including cannibalization, impact on FSCs, and internal conflicts between Special Markets and HSD. (SF 1661, 1713-21). Moreover, Dr. Marshall's analysis is fundamentally unreliable as evidenced by (i) the false positives it generates (it incorrectly finds acts against self-interest outside of the alleged conspiracy

period) (SF 1661, 1662-69); (ii) its attempt to render generalized conclusions as to all buying groups based on analysis of just two non-representative groups (SF 1661, 1689-95); and (iii) its failure to distinguish between oligopolistic interdependence and conspiracy (SF 1661, 1670-75). Dr. Marshall's analysis shows that the alleged conspiracy itself was irrational as it was always unprofitable so long as *any* distributor could supply a given buying group. (SF 1661, 1676-88).

Dr. Marshall's analysis ignores the actual evidence in the case showing that Schein was always open to doing business with Smile Source and repeatedly tried to win it back. It also ignores the evidence showing that Schein worked to negotiate in good faith with Qadeer Ahmed and the Kois Buyers Group, but Dr. Kois decided to go with Burkhart before answering Schein's requests for more information. (*E.g.*, SF 1661, 1696-712).

Patterson's Response:

Dr. Marshall's opinion is based on study of two entities, neither of which were the subject of any communications between Patterson and Schein or Benco. PF ¶¶ 713, 741. And Dr. Marshall conceded it would have been rational for a distributor to turn down an "incoherent," "irrational," or "irresponsible business proposal, yet he did not know anything about Kois's approach to Patterson, including that it blatantly lied and exaggerated and Patterson caught it doing so. PF ¶¶ 709, 722-27. Similarly, though Dr. Marshall conceded some buying group opportunities are not profitable due to cannibalization, and even though he reviewed a document showing Patterson's analysis that every Smile Source member reviewed was already a Patterson customer, he concluded that Patterson acted against its self-interest by declining Smile Source. PF ¶¶ 696-97, 99. Dr. Marshall also offered no explanation for how Kois and Smile Source were

representative of other buying groups. PF ¶¶ 716–17. Dr. Marshall also had no idea whether other buying groups made coherent proposals to Patterson. PF ¶ 716.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and incomplete. Benco acted consistently with its unilateral economic self-interest when it declined to offer discounts to buying groups. (*See* BFF 879-1242; *see also* RRFF 1647-1684, 1254-1315).

1638. A firm acts against its own unilateral economic self-interest when there is some action that could be profitable for it, but it declines to take the action. (Marshall, Tr. 2859-2860; CX7100 at 127-128 (¶¶328-330) (Marshall Expert Report)).

Schein's Response:

The asserted fact is overbroad. Firms decline to take actions that *could* be profitable all the time for legitimate reasons. No firm has unlimited capacity to take on every potentially profitable opportunity, but instead must pick and choose. Just because a firm chooses some actions but not others does not make passed opportunities “acts against its own unilateral economic self-interest.”

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and inaccurate. Every firm has limited resources, and therefore must decide how to allocate its resources. (RX2834 at 40, ¶ 63; J. Johnson, Tr. 4840-4842; Marshall, Tr. 3375-76). To determine whether a firm has acted contrary to its own self-interest, it is inappropriate to consider one action in isolation, because that does not consider the opportunity cost, such as alternative potential uses for the resources in question. (J. Johnson, Tr. 4840-4842; RX2834 at 40, ¶ 63).

Rather, to determine whether an action is contrary to a firm's self-interest, it is necessary to conduct a counter-factual analysis, in which the profitability of a hypothetical action in question is weighed against the profitability of the action that was taken instead of the hypothetical action. (J. Johnson, 4842-4844; RX2834 at 40, ¶ 63). Dr. Marshall's analysis was flawed from the outset because he did not conduct a counterfactual analysis. (Marshall, Tr. 3375-77; J. Johnson, Tr. 4843-44).

1639. To determine whether Respondents acted against their own unilateral self-interests, Dr. Marshall conducted five data experiments that examined whether or not it was profitable for dental supply distributors, including Respondents, to bid for and obtain the business of buying groups. (Marshall, Tr. 2859-2861; CX7100 at 150-187 (¶¶347-415) (Marshall Expert Report)).

Schein's Response:

Dr. Marshall conducted five analyses of sales data, but those analyses did not determine or identify acts against self-interest. This is true for many reasons. (*E.g.*, SF 1661 *et seq.*). For one, Dr. Marshall's analyses cannot distinguish between oligopolistic interdependence and conspiracy, making them incapable of identifying acts against self-interest. (SF 1670-75; Carlton, Tr. 5383-84; Marshall, Tr. 2878, 2883, 2952). For another, Dr. Marshall and Complaint Counsel improperly seek to extrapolate Dr. Marshall's conclusions to the "business of buying groups" generally, despite the fact that Dr. Marshall's five analyses were conducted on two atypical buying groups. (SF 1689-95; Carlton, Tr. 5387-90). Indeed, for that reason, Dr. Marshall conceded that he is [REDACTED] [REDACTED] and that each buying group [REDACTED] (Marshall, Tr. 3002-03). Nor do Dr. Marshall's analyses fully study the question of self-interest. They do not account for salient factors like the risk of cannibalization, impact on FSCs, and internal conflicts, all

of which must be taken into account (and Schein did take into account) when evaluating buying groups. (SF 112, 159-83; 1713-14).

As Dr. Marshall conceded, he did not even study the but-for world – he did not compare profits actually earned with profits that would have been earned if Schein had won the Smile Source or Kois contracts during the alleged conspiracy period. (SF 1715-21; Carlton, Tr. 5390-91; Marshall, Tr. 3026, 3056). Without doing so, Dr. Marshall is incapable of answering the question of unilateral self-interest. In fact, Dr. Marshall's analyses of Smile Source show on their face that the business was *unprofitable* for Schein in 2012 and 2017. (SF 1722-35; RX 3058; Marshall, Tr. 3073, 3121-22). As to the Kois Buyers Group, Dr. Marshall did not even analyze the proposal it presented to Schein, but rather analyzed the effect (on Burkhart) after Kois fired Mr. Ahmed and changed the program. (CX 8040 (Marshall, Dep. at 209-10, 222-23)).

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. Dr. Marshall's theoretical basis for his analysis is inaccurate because his analysis conflates conspiratorial behavior with non-conspiratorial oligopolistic behavior. (Carlton, Tr. 5384, 5386-87; RX2832 at 45, RX2832 at 48-49, ¶¶ 70-71). Dr. Marshall's studies did not follow any accepted method of economic analysis. (J. Johnson, Tr. 4837-38; Marshall, Tr. 3241). Although there are multiple reasons why a distributor might choose not to deal with a buying group, (*see* Cavaretta, Tr. 5568-69; Cohen, Tr. 444-45, 780, 861; Ryan, Tr. 1034-36, 1082, 1166-67, 1179-80; RX2928; Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65; Carlton, Tr. 5387), Dr. Marshall ignored them all except for

cannibalization. (Marshall, Tr. 3380; Carlton, Tr. 5387-90). Dr. Marshall's implementation of his five studies involved multiple flaws, including use of data sets that included only a tiny fraction of dentists in the United States, focus on only two buying groups that are not representative of buying groups in general, 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. (J. Johnson, Tr. 4838-40, 4845-46, 4855-56; RX2834 at 37, ¶ 58; *id.* at 38, Exhibit 6; Wu, Tr. 5037, 5039-41, 5044-46, 5055-58; RX2833 at 10, ¶ 13; RX2832 at 54, ¶ 81; Marshall, Tr. 3112-13, 3115-18, 3121-22, 3219-20, 3373). But the biggest flaw in Dr. Marshall's five studies was his failure to conduct a counter-factual analysis. (J. Johnson, Tr. 4840-44; [REDACTED] [REDACTED] Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380; [REDACTED] [REDACTED]; [REDACTED] [REDACTED]. These multiple flaws render Dr. Marshall's five studies inherently unreliable.

1640. As a part of these data analyses, Dr. Marshall also examined whether it was costly for Respondents not to bid for and obtain the business of buying groups. (Marshall, Tr. 2860-2861; CX7100 at 150 (¶351) (Marshall Expert Report)).

Schein's Response:

The asserted fact is vague as to "costly," and otherwise is a repeat of CCFF 1639. Schein incorporates its response to that proposed finding here. (SRF 1639). In a nutshell, Dr. Marshall failed to present any reliable opinion as to whether it was "costly" not to bid for a buying group because (i) he failed to distinguish between oligopolistic interdependence and conspiracy; (ii) he improperly sought to extrapolate a conclusion

about bidding on buying groups generally from analyses of only two atypical buying groups; (iii) he failed to account for the risks and costs of doing business with buying groups, including cannibalization, impacts on FSCs, and internal conflicts; (iv) he did not study the but-for world; (v) his analysis shows that it was costly for Schein to do business with Smile Source in 2012 and 2017; and (vi) he did not evaluate the actual proposal the Kois Buyers Group presented to Schein.

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. Dr. Marshall's theoretical basis for his analysis is inaccurate because his analysis conflates conspiratorial behavior with non-conspiratorial oligopolistic behavior. (Carlton, Tr. 5384, 5386-87; RX2832 at 45, RX2832 at 48-49, ¶¶ 70-71). Dr. Marshall's studies did not follow any accepted method of economic analysis. (J. Johnson, Tr. 4837-38; Marshall, Tr. 3241). Although there are multiple reasons why a distributor might choose not to deal with a buying group, (*see* Cavaretta, Tr. 5568-69; Cohen, Tr. 444-45, 780, 861; Ryan, Tr. 1034-36, 1082, 1166-67, 1179-80; RX2928; Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65; Carlton, Tr. 5387), Dr. Marshall ignored them all except for cannibalization. (Marshall, Tr. 3380; Carlton, Tr. 5387-90). Dr. Marshall's implementation of his five studies involved multiple flaws, including use of data sets that included only a tiny fraction of dentists in the United States, focus on only two buying groups that are not representative of buying groups in general, 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. (J. Johnson, Tr. 4838-40, 4845-46, 4855-56; RX2834 at 37, ¶ 58; *id.* at 38, Exhibit 6; Wu, Tr. 5037, 5039-41, 5044-46, 5055-58; RX2833 at 10, ¶ 13; RX2832 at 54, ¶ 81; Marshall, Tr. 3112-13, 3115-18, 3121-22, 3219-20, 3373). But the biggest flaw in Dr. Marshall's five studies was his failure to conduct a counter-factual analysis. (J. Johnson, Tr. 4840-44; [REDACTED] [REDACTED] Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380; [REDACTED] [REDACTED] [REDACTED]). These multiple flaws render Dr. Marshall's five studies inherently unreliable.

1641. Dr. Marshall's data analyses were based on data from dental supply distributors and examined specific episodes of a distributor doing business or not doing business with a buying group. (Marshall, Tr. 2860; [REDACTED] [REDACTED]).

Schein's Response:

The asserted fact is imprecise. Dr. Marshall studied data surrounding five specific episodes regarding just two atypical buying groups: Smile Source and Kois Buyers Group. By focusing exclusively on customers of the winning distributor, Dr. Marshall studied only episodes of a particular distributor – Burkhart, Atlanta Dental, or Schein – doing business with Smile Source or Kois. (CX 7100-151 (¶ 354), -162 (¶ 375), -170 (¶ 386), -175 (¶ 398), -182 (¶ 408)). Dr. Marshall did not analyze data regarding the full customer base of any distributor not doing business with Smile Source or Kois. Specifically, Dr. Marshall failed to analyze the cannibalization rates, incremental volume rates, or but-for margins that a Respondent would have realized had it won the buying group contract. (SF 1714-21). As such, Dr. Marshall only analyzed half of the relevant equation.

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. Dr. Marshall's theoretical basis for his analysis is inaccurate because his analysis conflates conspiratorial behavior with non-conspiratorial oligopolistic behavior. (Carlton, Tr. 5384, 5386-87; RX2832 at 45, RX2832 at 48-49, ¶¶ 70-71). Dr. Marshall's studies did not follow any accepted method of economic analysis. (J. Johnson, Tr. 4837-38; Marshall, Tr. 3241). Although there are multiple reasons why a distributor might choose not to deal with a buying group, (*see* Cavaretta, Tr. 5568-69; Cohen, Tr. 444-45, 780, 861; Ryan, Tr. 1034-36, 1082, 1166-67, 1179-80; RX2928; Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65; Carlton, Tr. 5387), Dr. Marshall ignored them all except for cannibalization. (Marshall, Tr. 3380; Carlton, Tr. 5387-90). Dr. Marshall's implementation of his five studies involved multiple flaws, including use of data sets that included only a tiny fraction of dentists in the United States, focus on only two buying groups that are not representative of buying groups in general, 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. (J. Johnson, Tr. 4838-40, 4845-46, 4855-56; RX2834 at 37, ¶ 58; *id.* at 38, Exhibit 6; Wu, Tr. 5037, 5039-41, 5044-46, 5055-58; RX2833 at 10, ¶ 13; RX2832 at 54, ¶ 81; Marshall, Tr. 3112-13, 3115-18, 3121-22, 3219-20, 3373). But the biggest flaw in Dr. Marshall's five studies was his failure to conduct a counter-factual analysis. (J. Johnson, Tr. 4840-44; [REDACTED])

[REDACTED] Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380; [REDACTED]

1. *Journal of Management Studies*, 1996, 33, 1, 1-14.

Schein's Response:

114

Dr. Marshall did not study any other buying group, and as a result, could not identify which if any of the buying groups listed in paragraph 491 of his report were similar to Kois or Smile Source. (*See* Marshall, Tr. 3246-47, 3256).

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed findings is incomplete and misleading. 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. (Wu, Tr. 5039; Wu, Tr. 5040-5041; Wu, Tr. 5044). 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. (Wu, Tr. 5040-5041; Wu, Tr. 5045-5046; RX2833 at 10, ¶ 13). 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. (CX4060; Rogan, Tr. 3754-55; Cohen, Tr. 792; RX1039; Reese, Tr. 4493-95; Kois, Sr., Tr. 273; RX1042; Wu, Tr. 5044-45, 5057-58; Marshall, Tr. 3260 ("I understand that if the conclusion is incoherent management, I can understand someone walking away from that.")). Smile Source was not representative of other buying groups because [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]; Marshall, Tr. 3256; Wu, Tr. 5044-45).

1643. In addition, for his profitability analyses, Dr. Marshall studied several different sizes of buying groups (small, medium, and large buying groups). (Marshall, Tr. 2863; *see generally* [REDACTED])

Schein's Response:

Complaint Counsel's use of the phrase "in addition" is misleading. Dr. Marshall studied only two buying groups. Period. There is no "in addition." Dr. Marshall did not testify that he studied other small, medium, or large buying groups, but that he studied the Kois Buyers Group and Smile Source at various periods in time. (Marshall, Tr. 2863). He looked at the Kois Buyers Group at only one point in time: its inception; and he looked at Smile Source in 2012, 2014, and 2017. (CX 7100-150-68). For the reasons explained in SRF 1637-1642, Dr. Marshall and Complaint Counsel failed to establish that the Kois Buyers Group or Smile Source was representative of any other buying group at any point in time. (SRF 1637-42).

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed findings is inaccurate, incomplete and misleading. Complaint Counsel's proposed finding is misleading in that it implies that Dr. Marshall studied multiple buying groups; in fact, he studied only two buying groups, but he counts the Smile Source buying group multiple times. [REDACTED]
[REDACTED]).

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. (Wu, Tr. 5039; Wu, Tr. 5040-5041; Wu, Tr. 5044). 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. (Wu, Tr. 5040-5041; Wu, Tr. 5045-5046; RX2833 at 10, ¶ 13). 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. (CX4060; Rogan, Tr. 3754-55; Cohen, Tr. 792; RX1039; Reese, Tr. 4493-95; Kois, Sr., Tr. 273; RX1042; Wu, Tr. 5044-45, 5057-58; Marshall, Tr. 3260 (“I understand that if the conclusion is incoherent management, I can understand someone walking away from that.”)). Smile Source was not representative of other buying groups because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; Marshall, Tr. 3256; Wu, Tr. 5044-45).

1644. [REDACTED]

Schein’s Response:

Dr. Marshall never once used the word “substitution” or any variant of it in the profitability sections of his expert reports. (CX 7100-143-78; CX 7101-043-60).

Moreover, Dr. Marshall did not fully study the substitution question, rendering his analysis unreliable on that score. In fact, any such opinion is infected by self-selection bias. To illustrate, in his Kois Buyers Group analysis, Dr. Marshall exclusively studied Kois members that purchased from Burkhart. In other words, he studied only those dentists that already had a preference for Burkhart or who did in fact switch to Burkhart (though his analysis does not, and is incapable of, identifying any such dentist that switched as opposed to dentists that merely increased purchases from Burkhart).²³ Dr. Marshall leaves out of his analysis any Kois members that purchased from Schein or another distributor and continued purchasing from Schein (or another distributor). (See CX 8008 (Kois Jr., Dep. at 128 (“We have members that don’t spend with Burkhart and are still members....”)); Marshall, Tr. 3021-22).

Patterson’s Response:

Patterson joins Schein and Benco’s responses.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete and misleading. It obscures the fact that Dr. Marshall studied only two non-representative buying groups, and that the specific groups of dentists studied at those buying groups accounted for only a tiny, non-representative portion of dentists in the United States.

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

²³ This is an important point, because increasing purchases from Burkhart is not necessarily the same as substituting purchases from another distributor. Dr. Marshall did not study the latter question.

groups in general. (Wu, Tr. 5039; Wu, Tr. 5040-5041; Wu, Tr. 5044). 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. (Wu, Tr. 5040-5041; Wu, Tr. 5045-5046; RX2833 at 10, ¶ 13). 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. (CX4060; Rogan, Tr. 3754-55; Cohen, Tr. 792; RX1039; Reese, Tr. 4493-95; Kois, Sr., Tr. 273; RX1042; Wu, Tr. 5044-45, 5057-58; Marshall, Tr. 3260 (“I understand that if the conclusion is incoherent management, I can understand someone walking away from that.”)). Smile Source was not representative of other buying groups because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Marshall, Tr. 3256; Wu, Tr. 5044-45).

Dr. Marshall’s analysis of respondent’s business opportunities with the Kois and Smile Source buying groups studied a total of only [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1645.

[REDACTED]

Schein's Response:

False. In order to study the question of whether it would have been profitable for Schein or any of the Respondents to discount to the Kois Buyers Group or Smile Source, Dr. Marshall had to study Respondents' entire customer base because that is what would have been impacted in the but-for world. (See Carlton, Tr. 5390-91). Dr. Marshall, however, did not analyze the but-for world. (Marshall, Tr. 3026, 3056). By failing to do so, Dr. Marshall excludes from his analysis the risk of cannibalization, a cost that Dr.

Marshall recognizes is [REDACTED] (Marshall, Tr. 3002-03; *see also* Marshall, Tr. 2926-27, 2986-87, 3034, 3136-37).

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. (*See* RRF 1644).

1646. Based on all of his different profitability studies, Dr. Marshall concluded that Respondents all had a unilateral economic self-interest to bid for the business of buying groups. (Marshall, Tr. 2876; [REDACTED] CCFF ¶¶ 1647-1684).

Schein's Response:

The asserted fact states Dr. Marshall's conclusion, but it is not a reliable one for the reasons previously explained. (SRF 1637-45; *see also* SF 1660-752). In a nutshell, Dr. Marshall's profitability studies cannot support his conclusion because (i) they are contrary to the evidence of Schein's actual behavior towards buying groups; (ii) they find false positives outside of the alleged conspiracy period; (iii) they fail to analyze the but-for world; (iv) they are limited to two atypical buying groups; (v) they fail to distinguish between oligopolistic interdependence and conspiracy; (vi) they show the alleged conspiracy was irrational; and (vii) they show that Schein's business with Smile Source in 2012 and 2017 was unprofitable.

Patterson's Response:

Patterson joins Schein and Benco's responses. With regard to the statement that Respondents all had a unilateral economic self-interest to bid for the business of buying

groups, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. Dr. Marshall's theoretical basis for his analysis is inaccurate because his analysis conflates conspiratorial behavior with non-conspiratorial oligopolistic behavior. (Carlton, Tr. 5384, 5386-87; RX2832 at 45, RX2832 at 48-49, ¶¶ 70-71). Dr. Marshall's studies did not follow any accepted method of economic analysis. (J. Johnson, Tr. 4837-38; Marshall, Tr. 3241). Although there are multiple reasons why a distributor might choose not to deal with a buying group, (*see* Cavaretta, Tr. 5568-69; Cohen, Tr. 444-45, 780, 861; Ryan, Tr. 1034-36, 1082, 1166-67, 1179-80; RX2928; Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65; Carlton, Tr. 5387), Dr. Marshall ignored them all except for cannibalization. (Marshall, Tr. 3380; Carlton, Tr. 5387-90). Dr. Marshall's implementation of his five studies involved multiple flaws, including use of data sets that included only a tiny fraction of dentists in the United States, focus on only two buying groups that are not representative of buying groups in general, 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. (J. Johnson, Tr. 4838-40, 4845-46, 4855-56; RX2834 at 37, ¶ 58; *id.* at 38, Exhibit 6; Wu, Tr. 5037, 5039-41, 5044-46, 5055-58; RX2833 at 10, ¶ 13; RX2832 at 54, ¶ 81; Marshall, Tr. 3112-13, 3115-18, 3121-22, 3219-20, 3373). But the biggest flaw in Dr. Marshall's five studies was his failure to conduct a counter-factual analysis. (J. Johnson, Tr. 4840-44; [REDACTED] [REDACTED] Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380; [REDACTED] [REDACTED] [REDACTED]). These multiple flaws render Dr. Marshall's five studies inherently unreliable.

A. Dr. Marshall's Kois-Burkhart 2014 Profitability Study.

1647. Dr. Marshall studied the Kois Buyers Group at its inception when Burkhart started supplying it in November 2014. (Marshall, Tr. 2864; [REDACTED] [REDACTED])

Schein's Response:

Dr. Marshall did not study the entire Kois Buyers Group at its inception or otherwise. He only studied [REDACTED] [REDACTED] (CX 7100-151). He did not include in his study Kois members who did not purchase from Burkhart; nor did he study Kois Buyers Group membership in the but-for world. (*See* CX 8008 (Kois Jr., Dep. at 128 ("We have members that don't spend with Burkhart and are still members...."))); Marshall, Tr. 3026, 3056 [REDACTED] 3021-22).

Nor did Dr. Marshall's study focus on the Kois Buyers Group at its inception. Instead, he compared two measures of profits: one aggregated data from 2015 and 2016, and the other aggregated data from 2013. (CX 7100-155-56).

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

Benco has no specific response.

1648. Dr. Marshall did this profitability analysis of Kois Buyers Group members' purchases to determine whether Patterson, Benco, and Schein were forgoing profits by not pursuing the Kois Buyers Group member business as their dentist customers substituted away from them and towards Burkhart, the lower-priced supplier of the Kois Buyers Group. (Marshall, Tr. 2867).

Schein's Response:

This was the ostensible purpose of Dr. Marshall's analysis, but the analysis fails to further that purpose for the reasons previously explained. (SRF 1637-45; *see also* SF 1660-1752). In a nutshell, Dr. Marshall's profitability studies cannot support Dr. Marshall's conclusion because (i) they are contrary to the evidence of Schein's actual behavior towards buying groups; (ii) they find false positives outside of the alleged conspiracy period; (iii) they fail to analyze the but-for world; (iv) they are limited to two atypical buying groups; (v) they fail to distinguish between oligopolistic interdependence and conspiracy; (vi) they show the alleged conspiracy was irrational; and (vii) they show that Schein's business with Smile Source in 2012 and 2017 was unprofitable.

Indeed, Dr. Marshall wholly ignores Schein's interest in negotiating with Mr. Ahmed and the Kois Buyers Group, and its repeated attempts to get more information on what a partnership might look like. (SF 893-936). During the negotiations, Mr. Sullivan

repeatedly noted that Schein was “very interested” and “interest continues to remain high” but that Schein needed “a little bit of time to do some homework” because Schein had “many more questions than we do answers at this time.” (RX 2602-006, -004). Rather than answer those questions, however, Mr. Ahmed said he would do so only “after you give us the supply deal....” (RX 2602-003). While negotiations with Schein were still open, Kois reached an agreement and decided to move forward with Burkhart. (CX 4251-001; Kois Sr., Tr. 265-66; CX 8007 (Kois Sr., Dep. at 167-68)).

Patterson’s Response:

Patterson joins the responses of Schein and Benco.

Benco’s Response:

Complaint Counsel’s proposed finding is inaccurate, incomplete and misleading.

It is incomplete and misleading because Burkhart is not representative of Benco (or Schein or Patterson). (Carlton, Tr. 5396; Wu, Tr. 5046-55; RX2834 at 39, ¶ 61). The only proper way to determine whether Benco (and Schein and Patterson) were foregoing profits by not seeking to deal with the Kois Buyers Group is to conduct a counter-factual analysis.

(J. Johnson, Tr. 4840-44; [REDACTED]

[REDACTED] Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380; [REDACTED]

[REDACTED]
[REDACTED]. Dr. Marshall failed to perform such an analysis. *Id.*

Complaint Counsel’s proposed finding is inaccurate because it falsely states that Patterson, Benco and Schein were “not pursuing the Kois Buyers Group member business.” In fact, Benco, Schein and Patterson competed fiercely for the business of individual dentists at all times, including the business of dentists who were members of the Kois Buyers Group or other buying groups. Indeed, Dr. Marshall conceded that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

1649. As a part of his Kois-Burkhart 2014 profitability study, Dr. Marshall examined the dental supply purchases of the Kois Buyers Group member dentists who bought something from Burkhart in 2015-2016. (Marshall, Tr. 2864; *see also* [REDACTED] [REDACTED]).

Schein's Response:

Dr. Marshall did not examine all dental supply purchases of Kois member dentists who purchased from Burkhart. He excluded all purchases from non-full-service distributors like Darby and direct-selling manufacturers. (CX 7100-152 [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]). Dr. Marshall did not demonstrate any valid reason for excluding those purchases, or indicate non-full-service distributors or direct-selling manufacturers were not competitive with full-service distributors.

It is also important to note that, in 2015, the Kois Buyers Group changed its program. It was no longer the one that Mr. Ahmed had presented when seeking distribution partners in 2014. In particular, Kois fired Mr. Ahmed and reduced members' fees from up to \$6,000 per year down to \$299. (SF 924, 929). This change substantially grew Kois Buyers Group's membership and sales, but it renders Dr. Marshall's study a *post-hoc* analysis that would be improper to consider in determining whether the Kois Buyers Group – as initially presented – would be profitable.

It is also important to note that Dr. Marshall's profitability analysis suffers from self-selection bias. By only looking at members that purchased from Burkhart – and not the entire membership of the Kois Tribe (*i.e.*, those eligible to participate in the group) – the analysis fails to account for the cannibalization that would have occurred had Schein won the business.

Patterson's Response:

Patterson joins the responses of Schein and Benco.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. Burkhart is not representative of Benco (or Schein or Patterson). (Carlton, Tr. 5396; Wu, Tr. 5046-55; RX2834 at 39, ¶ 61). The only proper way to determine whether Benco (and Schein and Patterson) were foregoing profits by not seeking to deal with the Kois Buyers Group is to conduct a counter-factual analysis. (J. Johnson, Tr. 4840-44; [REDACTED] [REDACTED] Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380; [REDACTED] Dr. Marshall failed to perform such an analysis. *Id.*

1650. For this same set of dentists who bought something from Burkhart in his Kois-Burkhart 2014 profitability study, Dr. Marshall also studied whether the Kois Buyers Group members purchased something from Benco, Patterson, and Schein during this same time period (before and after Burkhart started supplying the Kois Buyers Group). (Marshall, Tr. 2865; *see also* [REDACTED] [REDACTED])

Schein's Response:

See SRF 1649. Again, this sample suffers from self-selection bias.

Patterson's Response:

Patterson joins the responses of Schein and Benco.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. Burkhart is not representative of Benco (or Schein or Patterson). (Carlton, Tr. 5396; Wu, Tr. 5046-55; RX2834 at 39, ¶ 61). The only proper way to determine whether Benco (and Schein and Patterson) were foregoing profits by not seeking to deal with the Kois Buyers Group is to conduct a counter-factual analysis. (J. Johnson, Tr. 4840-44; [REDACTED]; [REDACTED]; Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380; [REDACTED]; [REDACTED] Dr. Marshall failed to perform such an analysis. *Id.*

1651. Burkhart's market share increased as a result of Burkhart supplying the Kois Buyers Group. (Marshall, Tr. 2865; *see also* Marshall, Tr. 2919; [REDACTED]; [REDACTED])

Schein's Response:

Irrelevant and unreliable. By studying only Kois members who chose to purchase from Burkhart, Dr. Marshall biased his results and excluded members who did not purchase from Burkhart at all. (CX 8007 (Kois Sr., Dep. at 167-68)).

A simple example makes the point. Suppose dentists purchase 100% of supplies from their primary distributor. Now, suppose there are 100 customers, none of whom purchased from Burkhart before it contracted with the buying group, but that Burkhart picked up one such customer after the contract. Dr. Marshall's methodology would have Burkhart's share going from 0% to 100% while in fact it went from 0% to 1%.

Moreover, neither Complaint Counsel nor Dr. Marshall has presented evidence that Burkhart's experience discounting to the Kois Buyers Group is at all indicative of what

Schein's or any Respondent's experience would be. (Cavaretta, Tr. 5563-65 (confirming that just because a buying group is a good deal for Burkhart, does not mean that it is a good deal for Schein)). Dr. Marshall recognized as much. While he believed "[i]t makes economic sense that a distributor with a small customer base and small sales would find it profitable to supply such buying groups, ... a distributor with a large customer base and large sales might find it less profitable to supply such buying groups." (CX 7100-175-76). In fact, Schein's experience was quite different. It lost money discounting to Smile Source in 2012 and 2017, as well as to Steadfast. (SF 1722-35; RX 3058; Marshall, Tr. 3073-75, 3121-22; SF 1218-19; CX 0255; Titus, Tr. 5250-51).

Patterson's Response:

Patterson joins the responses of Schein and Benco. This Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25-26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. Burkhart is not representative of Benco (or Schein or Patterson). (Carlton, Tr. 5396; Wu, Tr. 5046-55;

RX2834 at 39, ¶ 61). The only proper way to determine whether Benco (and Schein and Patterson) were foregoing profits by not seeking to deal with the Kois Buyers Group is to conduct a counter-factual analysis. (J. Johnson, Tr. 4840-44; [REDACTED] [REDACTED] Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380; [REDACTED] Dr. Marshall failed to perform such an analysis. *Id.*

1652. Marshall Report Figure 57 depicts [REDACTED]
[REDACTED]

Schein's Response:

As an initial matter, Figure 57 does not show the *buying group's* ability to do anything. Burkhart lowered its prices to a select universe of customers and gained volume as a result. As such, it shows some degree of price sensitivity. But this has nothing to do with a buying group's ability to drive purchasing volume, because Burkhart is fully capable of lowering its prices to other customers if it so chooses without the assistance of a buying group. There is no evidence that a buying group is capable of delivering incremental volume that a distributor cannot achieve on its own simply by offering the same price to a similarly-situated, non-member dentist.

Second, Figure 57 suffers from self-selection bias because it only focuses on the limited number of customers that switched to Burkhart. As such, it does not properly analyze *net* increases in sales. To analyze net increases in sales, the analysis would have to properly analyze cannibalization rates. While Dr. Marshall purports to do so for

Burkhart, he does not attempt to do so for Schein or the other Respondents, because he does not analyze what would have happened had those other distributors won the contract.

Third, Dr. Marshall's Figure 57 does not demonstrate compliance – it shows the opposite. Even for members that chose to purchase from Burkhart, the Kois Buyers Group was not even able to drive [REDACTED] of those members' volume towards Burkhart. (CX 7100-152-53). Dr. Marshall only studied the 323 dentists that chose to purchase from Burkhart. The Kois Buyers Group had no compliance mechanism – its members were free to purchase from whomever they wished, and some did not purchase from Burkhart at all. (RX 2928; Kois Sr., Tr. 246-49; Kois Jr., Tr. 319 (“There's no purchasing requirements, and there's no requirement to purchase from anybody in quantity or vendor.”); CX 8008 (Kois Jr., Dep. at 128); Marshall, Tr. 3021-22). As such, as Dr. Kois conceded, the Kois Buyers Group does not actually have any buying power. (Kois Sr., Tr. 249-50; Kois Jr., Tr. 337, 366-67).

This is in stark contrast to DSOs, which, as Dr. Marshall admitted, do in fact drive compliance:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(Marshall, Tr. 3017-18 (emphasis added)).

The asserted fact is also irrelevant, as Complaint Counsel has produced no evidence that Burkhart's experience with buying groups is indicative of what another distributor's experience would be. (Cavaretta, Tr. 5563-65 (confirming that just because a buying group is a good deal for Burkhart, does not mean that it is a good deal for Schein)). Dr. Marshall made this point as well. While he believed "[i]t makes economic sense that a distributor with a small customer base and small sales would find it profitable to supply such buying groups, ... a distributor with a large customer base and large sales might find it less profitable to supply such buying groups." (CX 7100-175-76). In fact, Schein's experience was quite different. It lost money discounting to Smile Source in 2012 and 2017, as well

as to Steadfast. (SF 1722-35; RX 3058; Marshall, Tr. 3073-75, 3121-22; SF 1218-19; CX 0255; Titus, Tr. 5250-51).

Patterson's Response:

Patterson joins the responses of Schein and Benco. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, not supported by the evidence, and misleading. Marshall Report Figure 57 says nothing about the general ability of a buying group to drive purchasing volume to any distributor, because the Kojs Buyers Group is not representative of buying groups in general and Burkhart is not representative of Benco (or Schein or Patterson).

The Kojs 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. (CX4060; Rogan, Tr. 3754-55; Cohen, Tr. 792; RX1039; Reese, Tr. 4493-95; Kois, Sr., Tr. 273; RX1042; Wu, Tr. 5044-45, 5057-58; Marshall, Tr. 3260 (“I understand that if the conclusion is incoherent management, I can understand someone walking away from that.”)).

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). (Carlton, Tr. 5396; Wu, Tr. 5046-55; RX2834 at 39, ¶ 61; *see also* BFF 1063-1079). For example, Burkhart had a substantial presence and extensive name recognition in the Seattle region (Reese, Tr. 4357) and therefore was well positioned to increase its business with Kois Buyers Group members by entering into an agreement with the Kois Buyers Group. (RX2834 at 39, ¶ 61 and Exhibit 7). 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. (Cohen, Tr. 632-633; RX2834 at 39, ¶ 61 and Exhibit 7). There is no reason to think, simply because Burkhart increased its business with Kois Buyers Group members, that Benco would have profited by working with the Kois Buyers Group. (RX2834 at 39, ¶ 61). Conversely, Benco had opportunities elsewhere that Burkhart did not have, and therefore Benco’s decisions not to seek to enter into agreements with the Kois and Smile Source buying groups was profitable for Benco even if it might not have been for Burkhart. [REDACTED]

[REDACTED]

The only proper way to determine whether Benco (and Schein and Patterson) were 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. (J. Johnson, Tr. 4840-44; [REDACTED] Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380; [REDACTED] Dr. Marshall failed to perform such an analysis. *Id.*

1653. [REDACTED]

Schein's Response:

The asserted fact merely describes the same chart cited in CCFF 1652 and Schein incorporates its response to that proposed finding here. (SRF 1652).

In addition, while the chart is not entirely clear, it appears that the [REDACTED] figure is understated and the [REDACTED] figure is overstated.

Moreover, while Dr. Marshall's Figure 57 shows an increase in revenue and sales, it does not account for any effects of cannibalization of Burkhart's existing customer base. Indeed, Burkhart lost money on sales to Dr. Kois because of the Kois Buyers Group. (Kois Sr., Tr. 289).

The asserted fact is also irrelevant, as Complaint Counsel has produced no evidence that Burkhart's experience with buying groups is indicative of what another distributor's experience would be. (Cavaretta, Tr. 5563-65 (confirming that just because a buying group is a good deal for Burkhart, does not mean that it is a good deal for Schein)). Dr. Marshall made this point as well. While he believed "[i]t makes economic sense that a distributor

with a small customer base and small sales would find it profitable to supply such buying groups, ... a distributor with a large customer base and large sales might find it less profitable to supply such buying groups.” (CX 7100-175-76). In fact, Schein’s experience was quite different. It lost money discounting to Smile Source in 2012 and 2017, as well as to Steadfast. (SF 1722-35; RX 3058; Marshall, Tr. 3073-75, 3121-22; SF 1218-19; CX 0255; Titus, Tr. 5250-51).

Patterson’s Response:

Patterson joins the responses of Schein and Benco. [REDACTED]

[REDACTED]

[REDACTED] this Proposed Finding of Fact disregards this Court’s Order dated Feb. 21, 2019, which prohibits “cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents,” Order on Post-Trial Briefs, 3, as well as this Court’s admonition: “Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That’s what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I’m letting you know today so that you don’t think you’re going to question your experts about facts and rely on that,” (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco’s Response:

To the extent that Complaint Counsel implies that Benco, or any other distributor, would have realized similar gains in revenue and sales, Complaint Counsel’s proposed finding is unsupported by the evidence, incomplete and misleading. Burkhart is not

representative of Benco (or Schein or Patterson). (Carlton, Tr. 5396; Wu, Tr. 5046-55; RX2834 at 39, ¶ 61). The only proper way to determine whether Benco (and Schein and Patterson) were foregoing profits by not seeking to deal with the Kois Buyers Group is to conduct a counter-factual analysis. (J. Johnson, Tr. 4840-44; [REDACTED] [REDACTED] Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380; [REDACTED] Dr. Marshall failed to perform such an analysis. *Id.*

1654. [REDACTED]

Schein's Response:

False.

First, a large portion of the gain is coming from new sales, not switched purchases. Between 2014 and 2015, total sales appeared to grow by about [REDACTED] while Burkhart's sales increased by around [REDACTED] (CX 7100-153 (Fig. 57); *see also* SRF 1653).

Second, the blue portions of the chart from 2010 to 2014 represent the baseline business that Burkhart had among customers that became Kois members, and thus, represents the cannibalized sales. (CX 7100-153 (Fig. 57)).

Third, Dr. Marshall's Figure 57 is not reliable support for the asserted fact. Neither Dr. Marshall nor Complaint Counsel has presented evidence of how, or from where, any particular dentist shifted his or her purchases. Dr. Marshall's Figure 57 excludes all purchases from non-full-service distributors like Darby and direct-selling manufacturers. There is thus no basis to conclude that Burkhart's increases came from other full-service

distributors and not from Darby, other non-full-service distributors, or direct-selling manufacturers; or that the decreases in the gray bar indicate shifts towards non-full-service distributors or direct-selling manufacturers rather than Darby. Indeed, Dr. Mason did just that as soon as he joined the New Mexico chapter of the Dental Co-Op of Utah – shifted virtually all of his purchases from Patterson to Darby. (CX 8035 (Mason, Dep. at 68)).

Patterson's Response:

Patterson joins the responses of Schein and Benco. [REDACTED]

[REDACTED] this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

To the extent that Complaint Counsel implies that Benco, or any other distributor, would have realized similar gains in revenue and sales, Complaint Counsel's proposed finding is unsupported by the evidence, incomplete and misleading. Burkhart is not representative of Benco (or Schein or Patterson). (Carlton, Tr. 5396; Wu, Tr. 5046-55; RX2834 at 39, ¶ 61). The only proper way to determine whether Benco (and Schein and

Patterson) were foregoing profits by not seeking to deal with the Kois Buyers Group is to conduct a counter-factual analysis. (J. Johnson, Tr. 4840-44; [REDACTED]
[REDACTED] Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380; [REDACTED] Dr. Marshall failed to perform such an analysis. *Id.*

1655. Schein, Patterson, and Benco each lost sales from Kois Buyers Group member dentists as well as share during the time period that Burkhart was supplying Kois Buyers Group. [REDACTED]
[REDACTED]

Schein's Response:

Misleading, as Dr. Marshall's analysis suffers from self-selection bias.

Since Dr. Marshall is only looking at customers that switched to Burkhart, he is not analyzing any relevant "share" figure. Again, under Dr. Marshall's methodology, if Burkhart picks up one customer, then looking at that one customer, Burkhart would have 100% share, even though that customer may be a *de minimis* portion of the relevant customers. Put simply, Dr. Marshall relied on statistical hocus pocus.

Moreover, Dr. Marshall's opinions do not support the asserted fact because he did not study all Kois Buyers Group member dentists. He studied only those who purchased from Burkhart, thus biasing his results by including only those dentists that chose to purchase something from Burkhart. Some did not. (CX 8008 (Kois Jr., Dep. at 128); Marshall, Tr. 3021-22).

The asserted fact is also irrelevant because neither Complaint Counsel nor Dr. Marshall compared Burkhart's experience with buying groups to the alleged but-for world in which one of the Respondents discounted to the Kois Buyers Group. (SF 1715-21; Carlton, Tr. 5390-91; Marshall, Tr. 3026, 3056). In fact, as the cross examination of Dr.

Marshall demonstrated, Schein could very well have lost even more if it had supplied the Kois Buyers Group. (SF 1719-20; Marshall, Tr. 2926-27, 2986-87, 3002-03, 3031-68; RXD 0014).

Patterson's Response:

Patterson joins the responses of Schein and Benco. Additionally, at worst, Dr. Marshall's case studies show Patterson losing a tiny fraction of sales relative to its overall revenue and profits. PF ¶¶ 748-50.

Benco's Response:

Complaint Counsel's proposed finding is irrelevant and misleading. During the time period that Burkhart was supplying Kois Buyers Group, Benco used its resources to pursue its own business strategy, including pursuit of opportunities with other, more profitable customers. (See Cohen, Tr. 401, 637-39, 823-34). During the time period that Burkhart was Kois Buyers Group's preferred distributor, Benco successfully completed its expansion into Southern California and the Pacific Northwest. (Cohen, Tr. 632-33).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1656. By studying the trade-off between increased share and reduced margin, Dr. Marshall determined that it was profitable for Burkhart to supply the Kois Buyers Group. (Marshall, Tr. 2866, [REDACTED])

Schein's Response:

The asserted fact is irrelevant, as Complaint Counsel has produced no evidence that Burkhart's experience with buying groups is indicative of what another distributor's experience would be. (Cavaretta, Tr. 5563-65 (confirming that just because a buying group is a good deal for Burkhart, does not mean that it is a good deal for Schein)). Dr. Marshall made this point as well. While he believed "[i]t makes economic sense that a distributor with a small customer base and small sales would find it profitable to supply such buying groups, ... a distributor with a large customer base and large sales might find it less profitable to supply such buying groups." (CX 7100-175-76). In fact, Schein's experience was quite different. It lost money discounting to Smile Source in 2012 and 2017, as well as to Steadfast. (SF 1722-35; RX 3058; Marshall, Tr. 3073-75, 3121-22; SF 1218-19; CX 0255; Titus, Tr. 5250-51).

Dr. Marshall also failed to account for other factors that a rational distributor would consider, such as (i) the decrease in margins a Respondent would have to offer to win the contract, (ii) the degree of cannibalization it would experience among its own customer base, (iii) the likelihood that it would have to offer similar discounts to similarly-situated non-member dentists, and (iv) the impact on FSCs' compensation.

Patterson's Response:

Patterson joins the responses of Schein and Benco. With regard to the statement that it was profitable for Burkhart to supply the Kois Buyers Group, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts

are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

To the extent that Complaint Counsel implies that Benco, or any other distributor, would have realized similar gains in revenue and sales, Complaint Counsel's proposed finding is unsupported by the evidence, incomplete and misleading. Burkhart is not representative of Benco (or Schein or Patterson). (Carlton, Tr. 5396; Wu, Tr. 5046-55; RX2834 at 39, ¶ 61). The only proper way to determine whether Benco (and Schein and Patterson) were foregoing profits by not seeking to deal with the Kois Buyers Group is to conduct a counter-factual analysis. (J. Johnson, Tr. 4840-44; [REDACTED] [REDACTED] Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380; [REDACTED] Dr. Marshall failed to perform such an analysis. *Id.*

1657. Dr. Marshall also evaluated the same trade-off (market share and margin) for Benco, Patterson, and Schein in not bidding on Kois Buyers Group. (Marshall, Tr. 2867, [REDACTED] [REDACTED] .

Schein's Response:

False. Dr. Marshall does not say in his testimony or his expert report that he studied the trade-off between increased share and reduced margin of any of the Respondents. As

he conceded, he did not study what any Respondent's market share or margin would have been if it had discounted to the Kois Buyers Group, or any buying group, calling it a "counterfactual." (See, e.g., Marshall, Tr. 3026, 3056 [REDACTED] see also RX 2832-051; Carlton, Tr. 5390-94).

Patterson's Response:

Patterson joins the responses of Schein and Benco.

Benco's Response:

Complaint Counsel's proposed finding is unsupported by the evidence, incomplete and misleading.

Dr. Marshall did not evaluate the same trade-off for Benco, Patterson, and Schein. Dr. Marshall did not analyze any trade-off based on the amount of discounts that Benco, Patterson or Schein would have had to offer, the degree of cannibalization that Benco, Patterson or Schein would have experienced, or the amount of new business (if any) that Benco, Patterson and Schein would have gained. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Marshall,

Tr. 3375 (“Q. Now, with respect to Benco, you also did not perform a counterfactual analysis of Benco winning the Kois buying group contract, did you? A. No, I did not perform a counterfactual exercise. It informs me by analogy.”)).

Furthermore, Dr. Marshall’s studies were flawed because he failed to consider the alternative uses to which Benco, Patterson and Schein put their resources. Every firm has limited resources, and therefore must decide how to allocate its resources. (RX2834 at 40, ¶ 63; J. Johnson, Tr. 4840-4842; Marshall, Tr. 3375-76). To determine whether a firm has acted contrary to its own self-interest, it is inappropriate to consider one action in isolation, because that does not consider the opportunity cost, such as alternative potential uses for the resources in question. (J. Johnson, Tr. 4840-4842; RX2834 at 40, ¶ 63). Rather, to determine whether an action is net profitable, it is necessary to conduct a counter-factual analysis, in which the profitability of a hypothetical action in question is weighed against the profitability of the action that was taken instead of the hypothetical action. (J. Johnson, 4842-4844; RX2834 at 40, ¶ 63). The only proper way to determine whether Benco (and Schein and Patterson) would have gained or lost market share and profits by seeking to deal with the Kois Buyers Group is to conduct a counter-factual analysis. (J. Johnson, Tr. 4840-44; [REDACTED] Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380; [REDACTED] [REDACTED] [REDACTED]. Dr. Marshall’s analysis was flawed from the outset because he did not conduct a counterfactual analysis. (Marshall, Tr. 3375-77; J. Johnson, Tr. 4843-44).

1658. Based on the trade-off evaluation in his Kois-Burkhart 2014 profitability study, Dr. Marshall found that Patterson, Benco, and Schein’s sales shares fell and that not supplying Kois

Buyers Club was unprofitable for Patterson, Benco, and Schein. (Marshall, Tr. 2867; *see also* [REDACTED])

Schein's Response:

Dr. Marshall's opinions do not support the asserted fact. Dr. Marshall does not say in his testimony or his expert report that he studied the trade-off between increased share and reduced margin of any of the Respondents. As he conceded, he did not study what any Respondent's market share or margin would have been if it had discounted to the Kois Buyers Group, or any buying group, calling it a "counterfactual." (*See, e.g.*, Marshall, Tr. 3026, 3056 [REDACTED] *see also* RX 2832-051; Carlton, Tr. 5390-94). In fact, as the cross examination of Dr. Marshall demonstrated, Schein could very well have lost even more if it had supplied the Kois Buyers Group. (SF 1719-20; Marshall, Tr. 2926-27, 2986-87, 3002-03, 3031-68; RXD 0014).

Patterson's Response:

Patterson joins the responses of Schein and Benco. With regard to statements that Patterson, Benco, and Schein's sales shares fell, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr.

25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is unsupported by the evidence, incomplete and misleading.

Dr. Marshall did not analyze any trade-off based on the amount of discounts that Benco, Patterson or Schein would have had to offer, the degree of cannibalization that Benco, Patterson or Schein would have experienced, or the amount of new business (if any) that Benco, Patterson and Schein would have gained. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Marshall, Tr. 3375 (“Q. Now, with respect to Benco, you also did not perform a counterfactual analysis of Benco winning the Kois buying group contract, did you? A. No, I did not perform a counterfactual exercise. It informs me by analogy.”)).

Furthermore, Dr. Marshall's studies were flawed because he failed to consider the alternative uses to which Benco, Patterson and Schein put their resources. Every firm has

limited resources, and therefore must decide how to allocate its resources. (RX2834 at 40, ¶ 63; J. Johnson, Tr. 4840-4842; Marshall, Tr. 3375-76). To determine whether a firm has acted contrary to its own self-interest, it is inappropriate to consider one action in isolation, because that does not consider the opportunity cost, such as alternative potential uses for the resources in question. (J. Johnson, Tr. 4840-4842; RX2834 at 40, ¶ 63). Rather, to determine whether an action is net profitable, it is necessary to conduct a counter-factual analysis, in which the profitability of a hypothetical action in question is weighed against the profitability of the action that was taken instead of the hypothetical action. (J. Johnson, 4842-4844; RX2834 at 40, ¶ 63). The only proper way to determine whether Benco (and Schein and Patterson) would have gained or lost market share and profits by seeking to deal with the Kois Buyers Group is to conduct a counter-factual analysis. (J. Johnson, Tr. 4840-44; [REDACTED] Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380; [REDACTED] [REDACTED]). Dr. Marshall's analysis was flawed from the outset because he did not conduct a counterfactual analysis. (Marshall, Tr. 3375-77; J. Johnson, Tr. 4843-44).

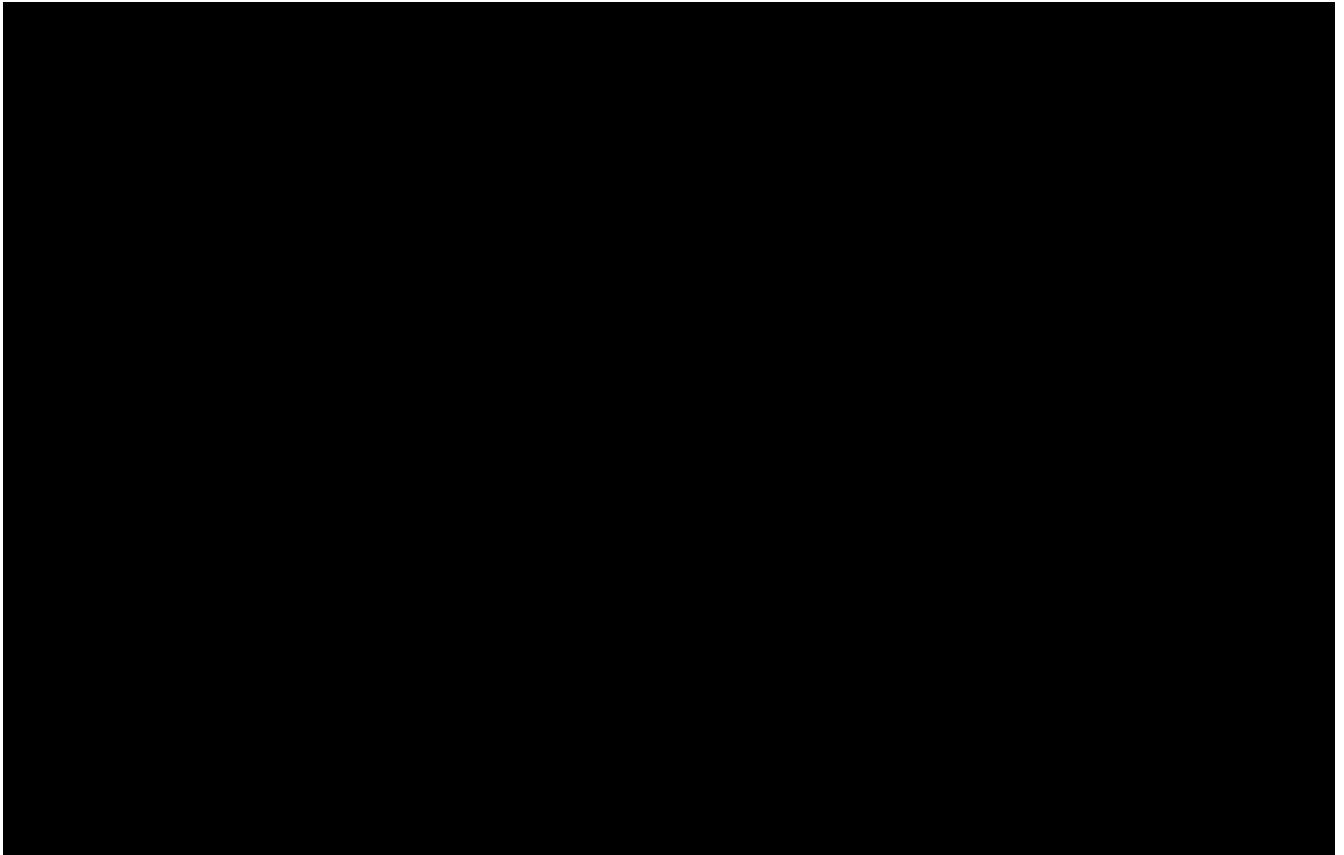
1659. Dr. Marshall's Kois-Burkhart 2014 profitability study shows that Patterson lost \$855,000 of profits from its decision not to supply Kois Buyers Group. [REDACTED]

Schein's Response:

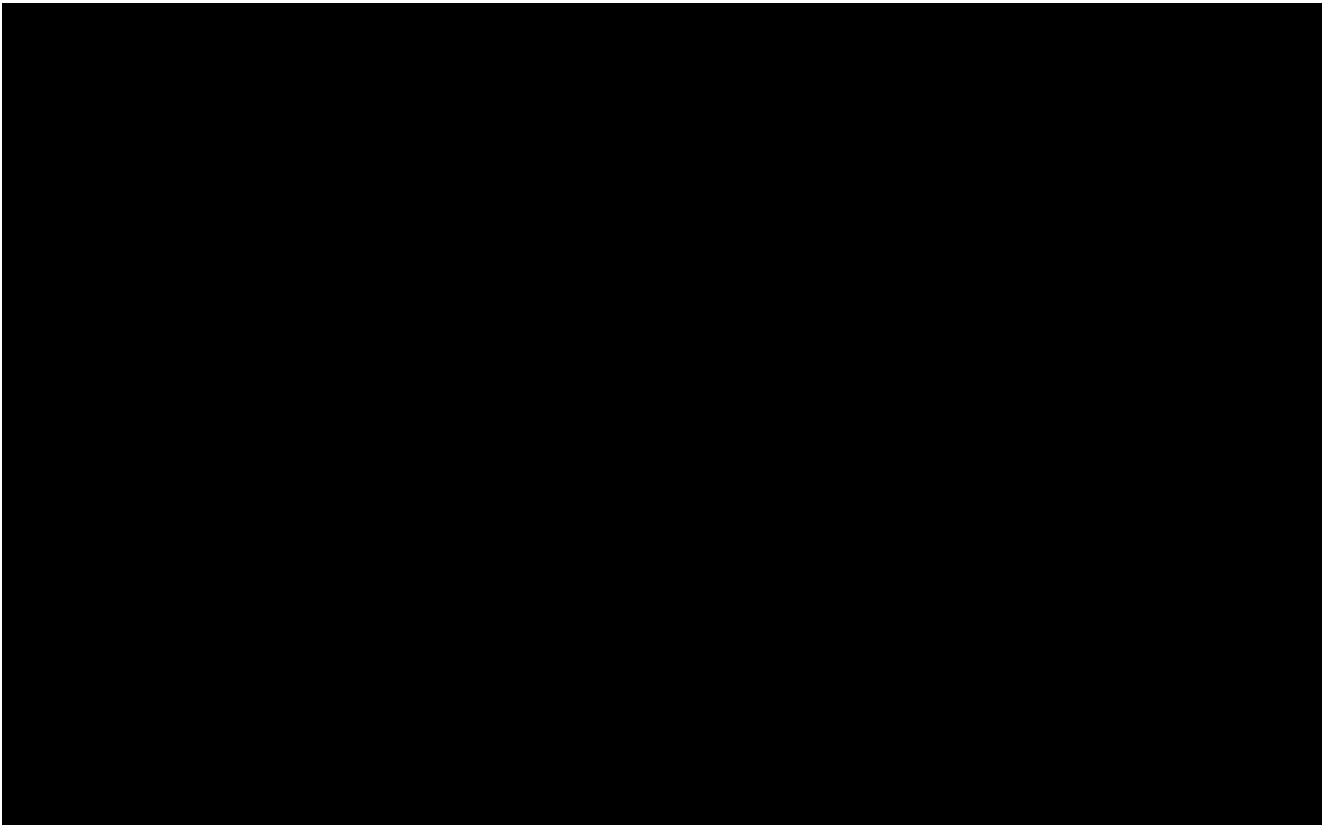
False.

Dr. Marshall only analyzed half of the equation. He analyzed the lost profits that Patterson experienced among customers that purchased from Burkhart compared to the world in which *no buying group existed*. To determine what the but-for loss would be, Dr.

Marshall would have to also analyze what Patterson's (gains or losses) would be if it reduced its margins and won the contract. Dr. Marshall did not do this. (SF 1715-19; Marshall, Tr. 3055-56). This is was also reflected in the following demonstrative:



As cross examination of Dr. Marshall showed, doing the full analysis shows the opposite: that buying groups are generally unprofitable. (Marshall, Tr. 3096-98). This was reflected in the following demonstrative:



Indeed, Dr. Marshall's own analysis shows that the Smile Source contracts – comparing the periods when Schein had the contract to when it did not have the contracts – were not profitable. (SF 1722-41).

As noted, Dr. Marshall's profitability study is not reliable support for the asserted fact. (See SRF 1637-58; *see also* SF 377-1355).

Patterson's Response:

Patterson joins the responses of Schein and Benco. Additionally, at worst, Dr. Marshall's case studies show Patterson losing a tiny fraction of sales relative to its overall revenue and profits. PF ¶¶ 748–50.

Benco's Response:

Complaint Counsel's proposed finding is unsupported by the evidence, incomplete and misleading.

Dr. Marshall did not analyze any trade-off based on the amount of discounts that Patterson would have had to offer, the degree of cannibalization that Patterson would have experienced, or the amount of new business (if any) that Patterson would have gained.

Furthermore, Dr. Marshall's studies were flawed because he failed to consider the alternative uses to which Patterson put its resources. Every firm has limited resources, and therefore must decide how to allocate its resources. (RX2834 at 40, ¶ 63; J. Johnson, Tr. 4840-4842; Marshall, Tr. 3375-76). To determine whether a firm's course of conduct was net profitable, it is inappropriate to consider one action in isolation, because that does not consider the opportunity cost, such as alternative potential uses for the resources in question. (J. Johnson, Tr. 4840-4842; RX2834 at 40, ¶ 63). Rather, to determine whether an action is net profitable, it is necessary to conduct a counter-factual analysis, in which the profitability of a hypothetical action in question is weighed against the profitability of the action that was taken instead of the hypothetical action. (J. Johnson, 4842-4844; RX2834 at 40, ¶ 63). The only proper way to determine whether Patterson would have gained or lost market share and profits by seeking to deal with the Kois Buyers Group is to conduct a counter-factual analysis. (J. Johnson, Tr. 4840-44; [REDACTED]; [REDACTED]; Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380). Dr. Marshall's analysis was flawed from the outset because he did not conduct a counterfactual analysis. [REDACTED] Carlton, 5393-5395; Marshall, Tr. 3375-77; J. Johnson, Tr. 4843-44).

Schein's Response:

False. As noted, Dr. Marshall's profitability study is not reliable support for the asserted fact. (*See* SRF 1637-58; *see also* SF 377-1355). At most, Dr. Marshall's study shows what Schein lost among the 323 Kois members that chose to purchase from Burkhart by reason of Burkhart supplying the Kois Buyers Group. Dr. Marshall did *not* study how much Schein would lose across its entire customer base if it had won the Kois contract, calling it a [REDACTED] (Marshall, Tr. 3026, 3056 [REDACTED])

[REDACTED] In fact, as the cross examination of Dr. Marshall demonstrated, Schein could very well have lost even more if it had supplied the Kois Buyers Group, just as it did discounting to Smile Source. (SF 1719-35; Marshall, Tr. 2926-27, 2986-87, 3031-68, 3073, 3121-22; RXD 0014; RX 3058).

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is unsupported by the evidence, incomplete and misleading.

Dr. Marshall did not analyze any trade-off based on the amount of discounts that Schein would have had to offer, the degree of cannibalization that Schein would have experienced, or the amount of new business (if any) that Schein would have gained.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Furthermore, Dr. Marshall's studies were flawed because he failed to consider the alternative uses to which Schein put its resources. Every firm has limited resources, and therefore must decide how to allocate its resources. (RX2834 at 40, ¶ 63; J. Johnson, Tr. 4840-4842; Marshall, Tr. 3375-76). To determine whether a firm has acted contrary to its own self-interest, it is inappropriate to consider one action in isolation, because that does not consider the opportunity cost, such as alternative potential uses for the resources in question. (J. Johnson, Tr. 4840-4842; RX2834 at 40, ¶ 63). Rather, to determine whether an action is net profitable, it is necessary to conduct a counter-factual analysis, in which the profitability of a hypothetical action in question is weighed against the profitability of the action that was taken instead of the hypothetical action. (J. Johnson, 4842-4844; RX2834 at 40, ¶ 63). The only proper way to determine whether Schein would have gained or lost profits by seeking to deal with the Kois Buyers Group is to conduct a counter-factual analysis. (J. Johnson, Tr. 4840-44; [REDACTED] [REDACTED] Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380). Dr. Marshall's analysis was flawed from the outset because he did not conduct a counterfactual analysis. [REDACTED] Carlton, 5393-5395).

1661. [REDACTED]

Schein's Response:

As noted, Dr. Marshall's profitability study is not reliable support for the asserted fact. (See SRF 1637-60; *see also* SF 377-1355).

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is unsupported by the evidence, incomplete and misleading.

Dr. Marshall did not analyze any trade-off based on the amount of discounts that Benco would have had to offer, the degree of cannibalization that Benco would have experienced, or the amount of new business (if any) that Benco would have gained. (Marshall, Tr. 3375 ("Q. Now, with respect to Benco, you also did not perform a counterfactual analysis of Benco winning the Kois buying group contract, did you? A. No, I did not perform a counterfactual exercise. It informs me by analogy."); *see also* Marshall, Tr. 3373).

Furthermore, Dr. Marshall's studies were flawed because he failed to consider the alternative uses to which Benco put its resources. Every firm has limited resources, and therefore must decide how to allocate its resources. (RX2834 at 40, ¶ 63; J. Johnson, Tr. 4840-4842; Marshall, Tr. 3375-76). To determine whether a firm has acted contrary to its own self-interest, it is inappropriate to consider one action in isolation, because that does not consider the opportunity cost, such as alternative potential uses for the resources in question. (J. Johnson, Tr. 4840-4842; RX2834 at 40, ¶ 63). Rather, to determine whether

an action is net profitable, it is necessary to conduct a counter-factual analysis, in which the profitability of a hypothetical action in question is weighed against the profitability of the action that was taken instead of the hypothetical action. (J. Johnson, 4842-4844; RX2834 at 40, ¶ 63). The only proper way to determine whether Benco would have gained or lost profits by seeking to deal with the Kois Buyers Group is to conduct a counter-factual analysis. (J. Johnson, Tr. 4840-44; [REDACTED])

[REDACTED] Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380; [REDACTED]
[REDACTED]; [REDACTED]

[REDACTED] Dr. Marshall's analysis was flawed from the outset because he did not conduct a counterfactual analysis. (Marshall, Tr. 3375-77; J. Johnson, Tr. 4843-44). Instead of supplying the Kois Buyers Group, Benco used its resources to pursue its own business strategy, including pursuit of opportunities with other, more profitable customers, and to successfully complete its expansion into Southern California and the Pacific Northwest. (See Cohen, Tr. 401, 632-33, 637-39, 823-34); [REDACTED]

[REDACTED]
[REDACTED]

B. Dr. Marshall's Burkhart-Smile Source 2012 Profitability Study.

1662. As a part of his profitability studies, Dr. Marshall also analyzed Burkhart's partnership with the buying group Smile Source that started in 2012 – at this time, Smile Source was quite small. (Marshall, Tr. 2867-2868; *see also* [REDACTED]).

Schein's Response:

No response.

Patterson's Response:

Smile Source was not a buying group, according to both of the Smile Source executives who testified at trial. PF ¶ 465. Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response.

1663. In this Burkhart-Smile Source 2012 profitability study, Dr. Marshall examined dentists who purchased products from Burkhart between 2012 and 2016 when Burkhart was partnered with Smile Source. (Marshall, Tr. 2868; *see also* [REDACTED]).

Schein's Response:

Vague as to "examined." Dr. Marshall's 2012 Burkhart-Smile Source profitability study was limited to those dentists who were Smile Source members and purchased from Burkhart between 2012 and 2016. (CX 7100-162 (¶374)). That is, Dr. Marshall's analysis only included customers who switched to Burkhart, resulting in self-selection bias.

Patterson's Response:

2012 is a year before Patterson allegedly joined a conspiracy. (Compl. ¶ 36). Otherwise, Patterson joins Schein and Benco's responses.

Benco's Response:

[REDACTED]

[REDACTED]

[REDACTED] This amounts to barely one-tenth of one percent of dentists in the United States. (See Marshall, Tr. 3219-3220). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1664. When Burkhart partnered with Smile Source in 2012, Burkhart gained sales from the Smile Source dentists. (Marshall, Tr. 2870; *see also* [REDACTED])

Schein's Response:

False.

The cited charts do ***not*** show the share of existing Smile Source member purchases that Burkhart gained when it contracted with Smile Source. That analysis is reflected only in Dr. Marshall's back-up materials (RX 3058), which show only a small increase in Burkhart's profits. That analysis also shows that the Smile Source contract was not profitable for Schein in 2012.

The cited charts do show that, as Smile Source grew in members, Burkhart also gained customers. (CX 7100-164 (Figs. 66-67)). But, again, there is no attempt to disaggregate the effects of Burkhart's lower prices (for which Burkhart did not need Smile Source's help to offer) from ability of Smile Source, if any, to drive incremental volume.

Moreover, the analysis is irrelevant because Complaint Counsel has produced no evidence that Burkhart's experience with buying groups is indicative of what another distributor's experience would be. (Cavaretta, Tr. 5563-65 (confirming that just because a buying group is a good deal for Burkhart, does not mean that it is a good deal for Schein)). Dr. Marshall made this point as well. While he believed "[i]t makes economic sense that a distributor with a small customer base and small sales would find it profitable to supply such buying groups, ... a distributor with a large customer base and large sales might find it less profitable to supply such buying groups." (CX 7100-175-76). In fact, Schein's

experience was quite different. It lost money discounting to Smile Source in 2012 and 2017, as well as to Steadfast. (SF 1722-35; RX 3058; Marshall, Tr. 3073-75, 3121-22; SF 1218-19; CX 0255; Titus, Tr. 5250-51).

Patterson's Response:

2012 is a year before Patterson allegedly joined a conspiracy. (Compl. ¶ 36). Also, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson joins Schein and Benco's responses.

Benco's Response:

To the extent that Complaint Counsel seek to draw more general conclusions from this proposed finding, it is incomplete and misleading. Burkhart is not representative of Benco (or Schein or Patterson), and simply because Burkhart gained sales is no indication that any other distributor would have gained sales. (Carlton, Tr. 5396; Wu, Tr. 5046-55; RX2834 at 39, ¶ 61). The only proper way to determine whether Benco (and Schein and Patterson) were foregoing profits by not seeking to deal with Smile Source is to conduct a counter-factual analysis. (J. Johnson, Tr. 4840-44; Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380; [REDACTED])

[REDACTED] Dr. Marshall

failed to perform such an analysis. *Id.*

1665. When Burkhart partnered with Smile Source in 2012, Schein, Patterson, and Benco's shares generally declined for the Smile Source dentist members that Burkhart was supplying.
[REDACTED]

Schein's Response:

Irrelevant and imprecise. Benco's shares actually increased among the Smile Source members included in Dr. Marshall's study. (CX 7100-165 (Fig. 69)). Moreover, as Dr. Marshall's 2012 Schein-Smile Source analysis shows, Schein made more money among its Smile Source member customers after Smile Source fired Schein in favor of Burkhart. (SF 1722-35; RX 3058; Marshall, Tr. 3073, 3121-22).

Moreover, the asserted fact is irrelevant because neither Complaint Counsel nor Dr. Marshall compared Burkhart's experience with buying groups to the alleged but-for world in which one of the Respondents discounted to Smile Source in 2012. (SF 1715-21; Carlton, Tr. 5390-91; Marshall, Tr. 3026, 3056). In fact, as the cross examination of Dr. Marshall demonstrated, Schein could very well have lost even more if it had continued discounting to Smile Source after 2012. (SF 1719-20; Marshall, Tr. 2926-27, 2986-87, 3002-03, 3031-68; RXD 0014).

Patterson's Response:

Patterson joins Schein and Benco's responses. Dr. Marshall inferred that Patterson acted contrary to its economic self-interest in Case Study 2 because Patterson lost a tiny fraction, i.e., 0.0003 or three one hundredths of one percent, of the company's gross profits over five years. (Marshall, Tr. 3231 ("Q. So your basis in section V.D.2 for your opinion that my client acted contrary to its self-interest is based on .0001 of the dentists, and for

those dentists you say my client lost roughly half of the \$2.5 million-plus you billed to the government for your opinion so far; right? A. Yeah. Your -- Patterson lost about half of \$2.5 million by not securing the business of Smile Source when Burkhart did. Q. And that's over a five-year period; right? . . . A. Yes."); Marshall, Tr. 3232-33 ("Q. So I took your half of what you billed down here in the blacked-out part, and I divided it by the 4.4 billion, so your V.D.2 study of the .0001 of the dentists, you're concluding my client acted contrary to its self-interest because it lost .0003 of its gross profit those years. A. Yes. It was contrary to Patterson's unilateral self-interest to forgo half of \$2.5 million in profits."); see also RXD0208 at 1 ("Burkhart and Smile Source Profitability").

Also, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25-26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is irrelevant and misleading. During the time period that Burkhart was supplying Smile Source, Benco used its resources to pursue its own business strategy, including pursuit of opportunities with other, more profitable customers. (*See* Cohen, Tr. 401, 637-39, 823-34). During the time period that Burkhart

was Smile Source's preferred distributor, Benco successfully completed its expansion into Southern California and the Pacific Northwest. (Cohen, Tr. 632-33). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1666. When Burkhart partnered with Smile Source in 2012, Burkhart made incremental profits from its partnership with Smile Source. (Marshall, Tr. 2870; [REDACTED])

[REDACTED]

Schein's Response:

This is essentially the same as CCFF 1656 proposed regarding Dr. Marshall's Burkhart-Kois analysis. CCFF 1666 is irrelevant for the same reasons. (*See* SRF 1656). In short, there is no evidence that Burkhart's experience with Smile Source is indicative of what Schein's or any other Respondent's experience would be. (Cavaretta, Tr. 5563-65 (confirming that just because a buying group is a good deal for Burkhart, does not mean that it is a good deal for Schein)). In fact, Schein's experience was quite different – it lost money discounting to Smile Source in both 2012 and 2017. (SF 1722-35; RX 3058; Marshall, Tr. 3073, 3121-22; *see also* CX 7100-176).

Patterson's Response:

Patterson joins Schein and Benco's responses. This Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use

experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is irrelevant and misleading. Burkhart is not representative of Benco (or Schein or Patterson), and simply because Burkhart made incremental profits is no indication that any other distributor would have gained sales. (Carlton, Tr. 5396; Wu, Tr. 5046-55; RX2834 at 39, ¶ 61). The only proper way to determine whether Benco (and Schein and Patterson) were foregoing profits by not seeking to deal with Smile Source is to conduct a counter-factual analysis. (J. Johnson, Tr. 4840-44; Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380; [REDACTED]
[REDACTED]
[REDACTED]. Dr. Marshall failed to perform such an analysis. *Id.*

1667. Losing business from dentists as a result of Burkhart's partnership with Smile Source was costly for Schein and Patterson. [REDACTED]
[REDACTED].

Schein's Response:

False. Schein profited from the loss of the Smile Source business in 2012. Dr. Marshall's own analysis shows that, among Smile Source's existing customers, Schein earned [REDACTED] *more* following the termination by Smile Source. (RX 3058). If Smile

Source had continued to grow, as it did, and Schein's share and margins remained the same as they had been prior to termination, Schein would have lost over [REDACTED] by continuing to serve Smile Source. (See RXD 0014-040-41). As Dr. Marshall conceded, [REDACTED]
[REDACTED]
(Marshall, Tr. 3097).

Dr. Marshall's analysis of Schein's contract with Smile Source in 2017 also shows that, once rebates and administrative fees are accounted for (as they were in all of Dr. Marshall's other analyses, but omitted from the 2017 analysis), Schein lost [REDACTED] by supplying Smile Source. (Marshall, Tr. 3122 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]).

Moreover, as Dr. Marshall employed the same unreliable methodologies in his Burkhardt-Kois analysis (CCFF 1658), Schein incorporates its response to CCFF 1658 here. (SRF 1658). *First*, Dr. Marshall did not study how costly it would have been for Schein to continue discounting to Smile Source in 2012 if Smile Source had not fired Schein. (*E.g.*, Marshall, Tr. 3026, 3056 [REDACTED] Carlton, Tr. 5390-94; *see also* SF 1719-20). *Second*, Dr. Marshall's own analysis showed that Schein made more money from Smile Source member purchases after Smile Source terminated Schein in 2012. (SF 1722-35; RX 3058; Marshall, Tr. 3073, 3121-22; *see also* CX 7100-176).

Patterson's Response:

Patterson joins Schein and Benco's responses. Dr. Marshall inferred that Patterson acted contrary to its economic self-interest in Case Study 2 because Patterson lost a tiny

fraction, i.e., 0.0003 or three one hundredths of one percent, of the company's gross profits over five years. (Marshall, Tr. 3231 ("Q. So your basis in section V.D.2 for your opinion that my client acted contrary to its self-interest is based on .0001 of the dentists, and for those dentists you say my client lost roughly half of the \$2.5 million-plus you billed to the government for your opinion so far; right? A. Yeah. Your -- Patterson lost about half of \$2.5 million by not securing the business of Smile Source when Burkhart did. Q. And that's over a five-year period; right? . . . A. Yes."); Marshall, Tr. 3232-33 ("Q. So I took your half of what you billed down here in the blacked-out part, and I divided it by the 4.4 billion, so your V.D.2 study of the .0001 of the dentists, you're concluding my client acted contrary to its self-interest because it lost .0003 of its gross profit those years. A. Yes. It was contrary to Patterson's unilateral self-interest to forgo half of \$2.5 million in profits."); see also RXD0208 at 1 ("Burkhart and Smile Source Profitability").

Also, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25-26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Benco joins in the responses of Schein and Patterson.

1668. [REDACTED]

Schein's Response:

The asserted fact is pure speculation and expert *ipse dixit*. Dr. Marshall did not study the question of why Benco's profitability increased after 2012 among Smile Source members who purchased from Burkhart. He merely guessed based on interpretations of the factual record, which, as an expert witness and not the fact finder, he is incompetent to do.

Patterson's Response:

Patterson joins Schein and Benco's responses. [REDACTED]

[REDACTED]

[REDACTED], at the same time Burkhart is supplying Smile Source, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is sheer speculation, as is the testimony of Dr. Marshall that it cites. The increase in Benco's sales and profits to Smile Source members demonstrate that Benco competed aggressively to sell to individual dentists who were members of Smile Source, that its margins (and by extension, its prices) to Smile Source members were as low or lower than those of Burkhart, even though Burkhart had entered into an agreement with Smile Source, and that Smile Source members could obtain equally favorable pricing outside the arrangements of the Smile Source buying group. [REDACTED]

[REDACTED]). Indeed, Dr. Marshall conceded that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] And Dr. Johnson found that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Critically, Dr. Johnson did not just speculate, as did Dr. Marshall and Complaint Counsel, as to the locations [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

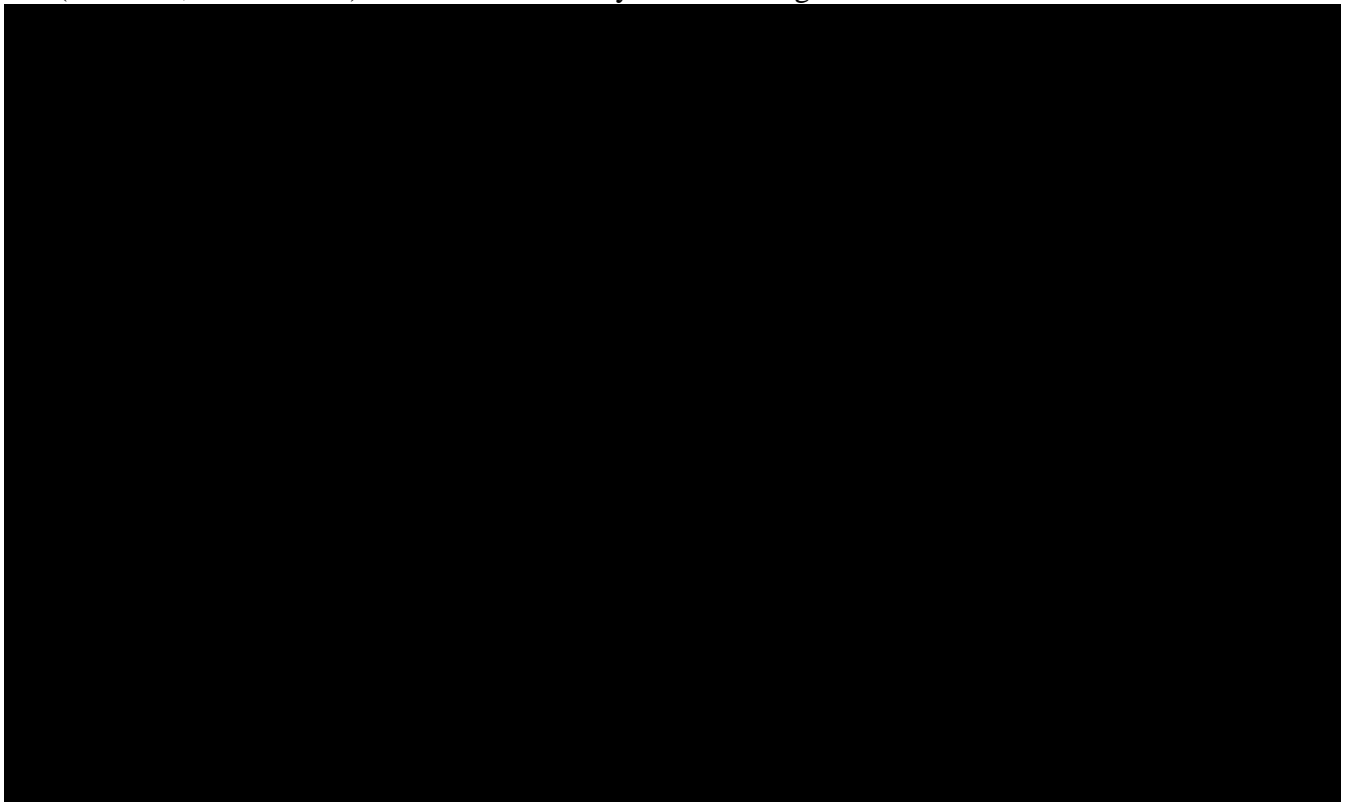
[REDACTED].

C. Dr. Marshall's Atlanta Dental-Smile Source 2013 Profitability Study.

1669. Dr. Marshall also conducted an analyses of Atlanta Dental's partnership with Smile Source as a part of his profitability studies. (Marshall, Tr. 2871; *see also* [REDACTED]).

Schein's Response:

No response, other than to note that Dr. Marshall used false data. In particular, he intentionally used Schein's margins from 2011 (and sales from 2012) to calculate profits for 2012. Had he used 2012 margins (and sales), his analysis would show that Schein gained, not lost, profit as a result of Atlanta Dental's partnership with Smile Source. (Marshall, Tr. 3112-14). This was shown by the following demonstrative:



Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1670. Atlanta Dental is a regional full-service distributor with a significant presence in Georgia. (Goldsmith, Tr. 1946; Cohen, Tr. 644-645).

Schein's Response:

See also CX 7101-142.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1671. Similar to what Burkhart did in its partnerships with the Kois Buyers Group and Smile Source, Atlanta Dental decreased its margins and offered lower prices to the Smile Source customers. (Marshall, Tr. 2872; [REDACTED]).

Schein's Response:

Misleading. The Atlanta Dental analysis is infected by a very small sample size, as Dr. Marshall noted in his report and testimony. (CX 7100-165 (¶390 n.662); Marshall, Tr. 3112-14). In fact, Dr. Marshall showed that Atlanta Dental's sales in 2010 were greater than in 2013 and similar to its sales in 2014. (CX 7100-172 (Fig. 75)). Thus, it is not clear that the decrease in margins – or the Smile Source contract – is responsible for Atlanta Dental's increase in sales.

Patterson's Response:

Patterson joins Benco and Schein's responses. This Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use

experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and not supported by the evidence. In particular, the evidence does not establish that Burkhart reduced its margins and offered lower prices in its partnership with Smile Source. Rather, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1672. Dr. Marshall found that when Atlanta Dental signed up to supply Smile Source, Atlanta Dental gained incremental volume of transactions and market share. (Marshall, Tr. 2872; [REDACTED]).

Schein's Response:

Schein incorporates its response to CCFF 1671 here. (SRF 1671). As noted, Atlanta Dental's sales in 2010 appear similar to its sales in 2014. Dr. Marshall has not shown that the changes in sales or profits were a result of the Smile Source contract, as opposed to a small sample size problem.

Moreover, Dr. Marshall's opinion is irrelevant for the same reasons as Dr. Marshall's Burkhart-Kois and Burkhart-Smile Source analyses. (See SRF 1651-53, 1664). Schein incorporates its responses to CCFF 1651-53 and 1664 here. In short, the asserted

fact is irrelevant because a gain in sales or share does not without more indicate whether it was a profitable gain, and neither Complaint Counsel nor Dr. Marshall has presented evidence or analysis that Atlanta Dental's experience with one buying group at a particular point in time is at all indicative of what Schein's or any Respondent's would have been. (See CX 7100-175-76; Cavaretta, Tr. 5565 (confirming that just because a buying group is a good deal for Atlanta Dental, does not mean that it is a good deal for Schein)). In fact, Schein's experience was quite different, losing money discounting to Smile Source in 2012 and 2017 as well as to Steadfast. (SF 1722-35; RX 3058; Marshall, Tr. 3073-75, 3121-22; SF 1218-19; CX 0255; Titus, Tr. 5250-51).

Patterson's Response:

Patterson joins Schein and Benco's responses. Also, with regard to the statement that, when Atlanta Dental signed up to supply Smile Source, Atlanta Dental gained incremental volume of transactions and market share, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25-26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is irrelevant and misleading. Atlanta Dental is 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). The only proper way to determine whether Benco (and Schein and Patterson) were foregoing profits by not seeking to deal with Smile Source is to conduct a counter-factual analysis. (J. Johnson, Tr. 4840-44; Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380; [REDACTED])

[REDACTED] Dr. Marshall failed to perform such an analysis. *Id.*

1673. Dr. Marshall found that supplying Smile Source was profitable for Atlanta Dental. (Marshall, Tr. 2872; [REDACTED]).

Schein's Response:

Schein incorporates its response to CCFF 1671 here. (SRF 1671). This is the same assertion that Complaint Counsel made regarding Dr. Marshall's Burkhardt-Kois and Burkhardt-Smile Source analyses. (CCFF 1656, 1666). Because Dr. Marshall's methodology in those analyses was the same as for his Atlanta Dental-Smile Source analysis, Schein incorporates its responses to CCFF 1656 and 1666 here. (SRF 1656, 1666). In short, the asserted fact is irrelevant as there is no evidence that Atlanta Dental's experience with Smile Source is indicative of what Schein's or any other Respondent's experience would be. (Cavaretta, Tr. 5565 (confirming that just because a buying group is a good deal for Atlanta Dental, does not mean that it is a good deal for Schein)). The Atlanta Dental-Smile Source study is based on just [REDACTED] customers and is thus plagued by

a small sample size, rendering any extrapolation from it pure speculation. (*See* CX 7100-170). In fact, Schein's experience was quite different – it lost money discounting to Smile Source in both 2012 and 2017. (SF 1722-35; RX 3058; Marshall, Tr. 3073, 3121-22; *see also* CX 7100-176).

Patterson's Response:

Patterson joins Schein and Benco's responses. Also, Dr. Marshall concluded that Patterson acted contrary to its economic self-interest in Case Study 3 based on his assumption that Patterson lost an even smaller fraction, i.e., 0.00008, of the company's gross profits over four years by not selling to Smile Source. (Marshall, Tr. 3236-38 ("Q. All right. Now, you see, Dr. Marshall, I divided the few hundred thousand dollars in profit you say my client missed out on by not selling to Smile Source when Atlanta Dental sold them and then I divided by the company's gross profit over those years, and it's .00008. Do you see that? . . . A. Well, I see all that, yeah. . . . Q. That's the basis for your section V.D.3 opinion that my client acted contrary to its economic self-interest; right? A. That Patterson incurred a loss when Atlanta Dental won the business of Smile Source, that was the loss that Patterson incurred on the dentists who bought from Atlanta Dental, the 39 dentists, as a consequence of Atlanta Dental winning the contract, yes."); *see also* RXD209 at 1 ("Atlanta Dental & Smile Source Profitability").

With regard to the statement that supplying Smile Source was profitable for Atlanta Dental, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation.

That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is irrelevant and misleading. Atlanta Dental is not representative of Benco (or Schein or Patterson), and simply because it was profitable for Atlanta Dental to enter into an agreement with Smile Source is no indication that it would have been profitable for any other distributor to do so. (Wu, Tr. 5046-55). The only proper way to determine whether Benco (and Schein and Patterson) were foregoing profits by not seeking to deal with Smile Source is to conduct a counter-factual analysis. (J. Johnson, Tr. 4840-44; Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380; [REDACTED]

[REDACTED]

[REDACTED] Dr. Marshall failed to perform such an analysis. *Id.*

1674. In Dr. Marshall's Atlanta Dental-Smile Source 2013 profitability study, Schein, Patterson, and Benco incurred losses by not signing up to supply Smile Source. (Marshall, Tr. 2872; [REDACTED].

Schein's Response:

False. The asserted fact is flawed because Dr. Marshall's analysis relied on false data. (SF 1739). Though the analysis purports to compare 2012 margins and shares to margins and shares between 2013 and 2016, Dr. Marshall used Schein's 2011 margins but 2012 margins for all other distributors. (CX 7100-172). Using Schein's 2012 margins, Dr. Marshall's results flip. (SF 1740; Marshall, Tr. 3114-15).

In addition, the asserted fact suffers the same flaws as explained in SRF 1658 and 1667 regarding Dr. Marshall's Burkhardt-Kois and Burkhardt-Smile Source analyses, which Schein incorporates herein. *First*, Dr. Marshall did not study how costly it would have been for Schein to continue discounting to Smile Source in 2013 if Smile Source had not fired it in 2012. (*E.g.*, Marshall, Tr. 3026, 3056 [REDACTED] Carlton, Tr. 5390-94; *see also* SF 1719-20). *Second*, Dr. Marshall's own analysis showed that Schein made more money from Smile Source member purchases after Smile Source fired Schein in 2012. (SF 1722-35; RX 3058; Marshall, Tr. 3073, 3121-22; *see also* CX 7100-176).

Additionally, Smile Source did not issue an RFP or otherwise ask Schein to supply its members in the Atlanta, Georgia region in 2013. As such, Dr. Marshall's analysis of Smile Source members in that region is irrelevant.

Patterson's Response:

Patterson joins Schein and Benco's responses. Also, Dr. Marshall concluded that Patterson acted contrary to its economic self-interest in Case Study 3 based on his assumption that Patterson lost an even smaller fraction, i.e., 0.00008, of the company's gross profits over four years by not selling to Smile Source. (Marshall, Tr. 3236-38 ("Q. All right. Now, you see, Dr. Marshall, I divided the few hundred thousand dollars in profit you say my client missed out on by not selling to Smile Source when Atlanta Dental sold them and then I divided by the company's gross profit over those years, and it's .00008. Do you see that? . . . A. Well, I see all that, yeah. . . . Q. That's the basis for your section V.D.3 opinion that my client acted contrary to its economic self-interest; right? A. That Patterson incurred a loss when Atlanta Dental won the business of Smile Source, that was the loss that Patterson incurred on the dentists who bought from Atlanta Dental, the 39

dentists, as a consequence of Atlanta Dental winning the contract, yes.”); *see also* RXD209 at 1 (“Atlanta Dental & Smile Source Profitability”).

With regard to the statement that supplying Smile Source was profitable for Atlanta Dental, this Proposed Finding of Fact disregards this Court’s Order dated Feb. 21, 2019, which prohibits “cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents,” Order on Post-Trial Briefs, 3, as well as this Court’s admonition: “Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That’s what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I’m letting you know today so that you don’t think you’re going to question your experts about facts and rely on that,” (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is unsupported by the evidence, incomplete and misleading.

Dr. Marshall did not analyze any trade-off based on the amount of discounts that Benco (or Schein or Patterson) would have had to offer, the degree of cannibalization that Benco (or Schein or Patterson) would have experienced, or the amount of new business (if any) that Benco (or Schein or Patterson) would have gained. (Marshall, Tr. 3373).

Furthermore, Dr. Marshall’s studies were flawed because he failed to consider the alternative uses to which Benco put its resources. Every firm has limited resources, and therefore must decide how to allocate its resources. (RX2834 at 40, ¶ 63; J. Johnson, Tr. 4840-4842; Marshall, Tr. 3375-76). To determine whether a firm has acted contrary to its

own self-interest, it is inappropriate to consider one action in isolation, because that does not consider the opportunity cost, such as alternative potential uses for the resources in question. (J. Johnson, Tr. 4840-4842; RX2834 at 40, ¶ 63). Rather, to determine whether an action is net profitable, it is necessary to conduct a counter-factual analysis, in which the profitability of a hypothetical action in question is weighed against the profitability of the action that was taken instead of the hypothetical action. (J. Johnson, 4842-4844; RX2834 at 40, ¶ 63). The only proper way to determine whether Benco would have gained or lost profits by seeking to deal with Smile Source is to conduct a counter-factual analysis. (J. Johnson, Tr. 4840-44; [REDACTED] Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380; [REDACTED] [REDACTED] Dr. Marshall's analysis was flawed from the outset because he did not conduct a counterfactual analysis. (Marshall, Tr. 3375-77; J. Johnson, Tr. 4843-44). Instead of supplying Smile Source, Benco used its resources to pursue its own business strategy, including pursuit of opportunities with other, more profitable customers, and to successfully complete its expansion into Southern California and the Pacific Northwest. (See Cohen, Tr. 401, 632-33, 637-39, 823-34).

D. Dr. Marshall's Schein-Smile Source 2012 Profitability Study.

1675. Dr. Marshall studied the profitability of Schein's relationship with Smile Source in two instances. (Marshall, Tr. 2872-2876; [REDACTED] [REDACTED].

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1676. First, Dr. Marshall studied the end of Schein's relationship with Smile Source in 2012. (Marshall, Tr. 2873; [REDACTED]).

Schein's Response:

No response, other than to note that Dr. Marshall is an expert witness and not the fact finder with respect to the facts surrounding Smile Source's termination of Schein in 2012.

Patterson's Response:

No specific response, except to note that Dr. Marshall acknowledged that his Case Study 4 relates to Schein and Smile Source's relationship one year prior to when Patterson allegedly joined a conspiracy and "does not speak to February 2013" when Patterson allegedly acted contrary to its self-interest. (Marshall, Tr. 3211 "Q. It has nothing to do, Dr. Marshall, nothing to do with whether Patterson acted contrary to its self-interest starting in February 2013, does it? A. It doesn't speak to February 2013.")

Benco's Response:

Benco has no specific response.

1677. This Schein-Smile Source 2012 profitability study is different from Dr. Marshall's other profitability case studies because the other profitability studies examined the relationship of a distributor signing up with a buying group, while in comparison, the Schein-Smile Source 2012 profitability study examined a scenario of the end of a distributor relationship with a buying group. (Marshall, Tr. 2873-2874; [REDACTED]).

Schein's Response:

No response except to note that all of Dr. Marshall's studies suffer from significant flaws that cause his conclusions to be irrelevant and suspect.

Patterson's Response:

Patterson joins Schein and Benco's responses.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, incomplete and misleading. This Schein-Smile Source 2012 profitability study is not "different from Dr. Marshall's other profitability case studies." Rather, it suffers from the same flaws as his other studies. Specifically, this study was based on inaccurate theory because his analysis conflated conspiratorial behavior with non-conspiratorial oligopolistic behavior, (Carlton, Tr. 5384, 5386-87; RX2832 at 45, RX2832 at 48-49, ¶¶ 70-71), it did not follow any accepted method of economic analysis, (J. Johnson, Tr. 4837-38; Marshall, Tr. 3241), and it ignored the multiple reasons why a distributor might choose not to deal with a buying group other than cannibalization. (See Cavaretta, Tr. 5568-69; Cohen, Tr. 444-45, 780, 861; Ryan, Tr. 1034-36, 1082, 1166-67, 1179-80; RX2928; Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65; Marshall, Tr. 3380; Carlton, Tr. 5387-90). Furthermore, this study relied on a data set that included only a tiny fraction of dentists in the United States, focused on a buying group that was not representative of buying groups in general, failed to account for risk and uncertainty, failed to consider the cost of administrative fees and rebates, relied on unsupported assumptions, failed to control for other factors, and failed to conduct a counter-factual analysis. (J. Johnson, Tr. 4838-40, 4845-46, 4855-56; RX2834 at 37, ¶ 58; *id.* at 38, Exhibit 6; Wu, Tr. 5037, 5039-41, 5044-46, 5055-58; RX2833 at 10, ¶ 13; RX2832 at 54, ¶ 81; [REDACTED] Marshall, Tr. 3219-20, 3373).

(J. Johnson, Tr. 4840-44; Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380; [REDACTED])

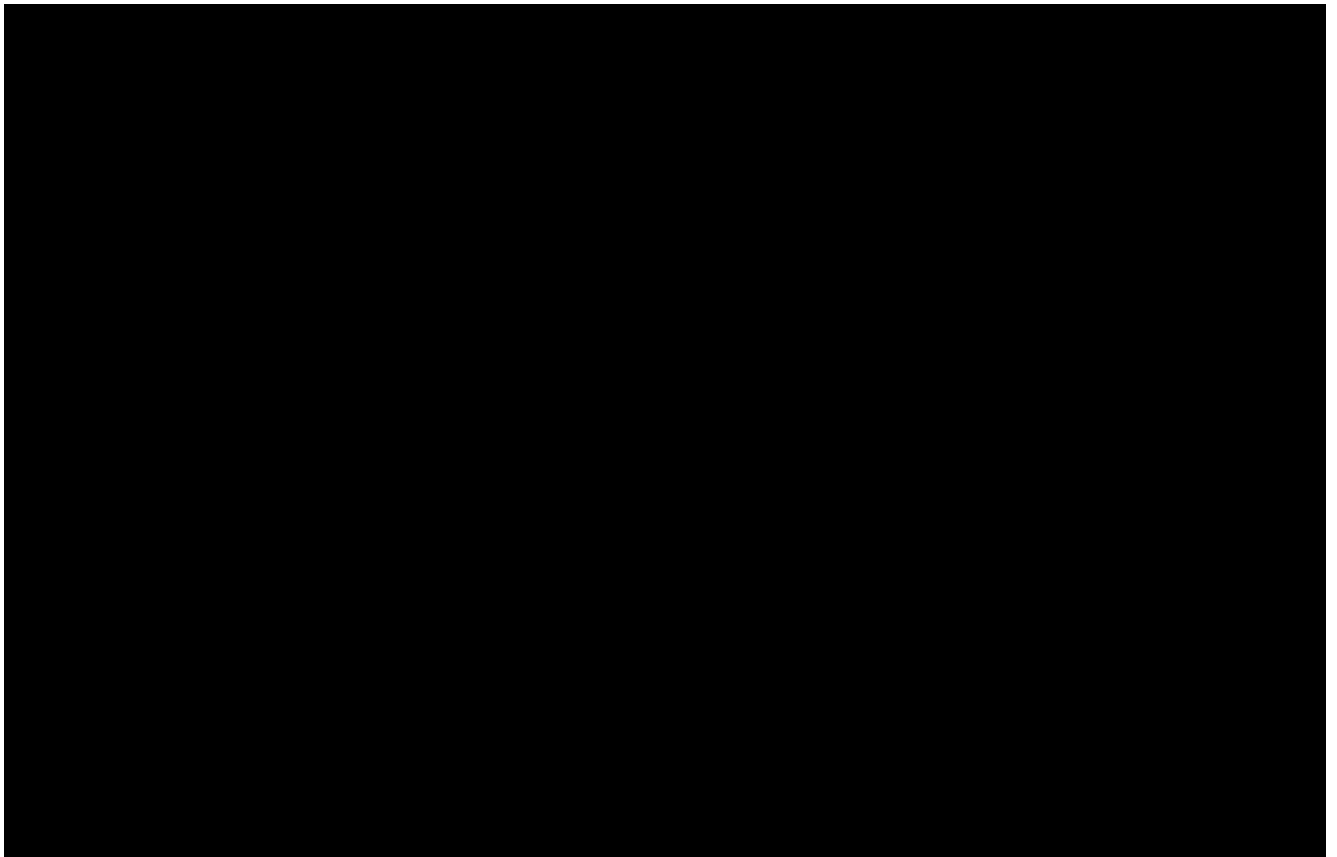
[REDACTED]. These multiple flaws render Dr. Marshall's Schein-Smile Source 2012 study inherently unreliable.

1678. [REDACTED]

Schein's Response:

The first part of the asserted fact – that the Smile Source contract was not profitable for Schein in 2012 among Smile Source's existing customers – is true. (RX 3058).

The second sentence of the asserted fact is false. Dr. Marshall attributed losses to Schein among customers that were *not* Smile Source customers at the time Schein was terminated. Nor did Dr. Marshall attempt to analyze the sales and profits that Schein would have earned had it continued to supply Smile Source. As Dr. Marshall conceded, Schein earned more profit by Burkhart winning the contract than if Schein had continued to supply Smile Source at its pre-termination margins and market share levels. This was demonstrated in RXD 0014. (RXD 0014-041 (showing that Schein would have lost over [REDACTED] if it continued to supply Smile Source, but only lost [REDACTED] by Burkhart picking up the contract); *see also* Marshall, Tr. 3098 [REDACTED]).



Moreover, Dr. Marshall did not study the but-for “counterfactual” in which Schein continued to discount to Smile Source after 2012. (SF 1715-21; Carlton, Tr. 5390-91; Marshall, Tr. 3026, 3056). Indeed, as the cross examination of Dr. Marshall demonstrated, Schein could very well have lost even more if it continued discounting to Smile Source. (SF 1719-20; Marshall, Tr. 2926-27, 2986-87, 3002-03, 3031-68, 3096-98; RXD 0014). In order to avoid the result of Dr. Marshall’s study that discounting to Smile Source was unprofitable for Schein, Dr. Marshall and Complaint Counsel improperly resort to *ex post* experience rather than Schein’s *ex ante* expectations. (SF 1728-29). Indeed, based on Dr. Goldsmith’s testimony, it would not have been reasonable to anticipate Smile Source’s continued growth in 2012. (Goldsmith, Tr. 1995).

Patterson's Response:

Patterson joins Schein's response. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Benco joins in the response of Schein.

1679. [REDACTED]

[REDACTED]

Schein's Response:

False. Existing Smile Source customers bought roughly the same amount of supplies from Schein before and after the termination. (RX 3058).

Moreover, the largest decrease in purchases from Schein occurred between 2010 and 2011 while Schein was still discounting to Smile Source. (CX 7100-178). There was a smaller decrease from 2011 to 2012 and a similar small decrease from 2012 to 2013 after which sales remained relatively steady and actually increased in 2015. (CX 7100-178). While sales volume may have decreased slightly, Schein's profitability among these customers increased. (RX 3058; Marshall, Tr. 3073, 3076).

Patterson's Response:

Patterson joins Schein's response. This Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25-26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Benco joins in the response of Schein.

1680. [REDACTED]

Schein's Response:

False. (See SRF 1678-79). Among the dentists subject to Dr. Marshall's 2012 Schein-Smile Source study, Schein increased its profitability by [REDACTED]. (RX 3058; Marshall, Tr. 3073, 3076).

Moreover, Schein would have lost an additional [REDACTED] had Schein continued to supply Smile Source at pre-termination shares and margin levels, and had Smile Source continued to grow its membership. (SF 1727; Marshall, Tr. 3096-98).

As noted, Dr. Marshall and Complaint Counsel seek to avoid these results by improperly resorting to *ex post* experience rather than Schein's *ex ante* expectations. (SRF 1678; SF 1728-29). Not only is doing so improper, Dr. Marshall does so by adding the results from his 2012 Burkhart-Smile Source and 2013 Atlanta Dental-Smile Source studies to his 2012 Schein-Smile Source results (which are all unreliable for the reasons noted). (SRF 1663-74; *see also* SF 1660-1752). Dr. Marshall thus adds apples and oranges and says they're all bananas.

Patterson's Response:

Patterson joins Schein's response. This Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr.

25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Benco joins in the response of Schein.

E. Dr. Marshall's Schein-Smile Source 2017 Profitability Study.

1681. Dr. Marshall confirmed that it was profitable for Schein to do business with a buying group when he studied the profitability of Schein's subsequent 2017 partnership with Smile Source. (Marshall, Tr. 2875; [REDACTED])

Schein's Response:

False, for many reasons.

First, Dr. Marshall's 2017 Schein-Smile Source analysis failed to include the rebates and administrative fees that Schein paid under the contract. (Marshall, Tr. 3121-22). Once included, the analysis showed that Schein lost over [REDACTED] in 2017 as a result of discounting to Smile Source. (Marshall, Tr. 3121-22). Thus, the study does not support the conclusion asserted in CCF 1681. (*See also* SF 1733-35).

Second, Dr. Marshall's and Complaint Counsel's conclusion depends upon the incorrect assumption that Schein was not interested in contracting with Smile Source prior to 2017. Schein's repeated expressions of interest and 2014 bid invalidates any such assumption. (SF 1156-86).

Third, Dr. Marshall's profitability studies are fundamentally flawed for the reasons explained above and in SF 1660-1752. (*See also* SRF 1637-80). In a nutshell, Dr. Marshall's profitability studies cannot support his conclusion because (i) they are contrary to the evidence of Schein's actual behavior towards buying groups; (ii) they find false positives outside of the alleged conspiracy period; (iii) they fail to analyze the but-for

world; (iv) they are limited to two atypical buying groups; (v) they fail to distinguish between oligopolistic interdependence and conspiracy; (vi) they show the alleged conspiracy was irrational; and (vii) they show that Schein's business with Smile Source in 2012 and 2017 was unprofitable.

Patterson's Response:

Patterson joins the response of Schein. Patterson also notes that Dr. Marshall testified that his Case Study 5 relates to Schein and Smile Source's relationship two years after the alleged conspiracy ended. (Marshall, Tr. 3213) ("Q. All right. So your study section V.D.4.2 relates to Schein's sales to Smile Source in 2017; correct? A. Yes. Q. Two years after the conspiracy was over; right? A. Correct.) Moreover, Marshall testified that "all it's showing is the unilateral incentive to bid given the competitive landscape at that time" in 2017, after the alleged conspiracy. (Marshall, Tr. 3213) ("Q. Demonstrating the unilateral incentive to bid at that time, yes. Q. All right. And you're not telling the court that somehow your study of the Schein-Smile Source sales in 2017, two years after the conspiracy was over, shed light on whether Patterson participated in a conspiracy two years earlier, are you? A. All it -- I'm sorry. All it's showing is the unilateral incentive to bid given the competitive landscape at that time where both Burkhart and Atlanta Dental were supplying Smile Source and Patterson was pursuing the business.").

With regard to the statement that it was profitable for Schein to do business with a buying group, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals,

speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Benco joins in the response of Schein.

1682. Dr. Marshall's Schein-Smile Source 2017 study differed from his other profitability case studies because the competitive landscape was different during the time period of this particular profitability study. (Marshall, Tr. 2875-2876). In contrast to previous profitability studies where the regional distributor was the only bidder for the buying group, this 2017 case study examined the profitability of bidding when there were two other regional distributors already supplying Smile Source, as well as Patterson bidding on Smile Source in competition with Schein's bidding. (Marshall, Tr. 2875-2876).

Schein's Response:

Irrelevant and misleading.

As an initial matter, Burkhart, Atlanta Dental, and Nashville Dental still did not cover significant portions of the country. As such, it is not clear that there is a material difference between the 2017 analysis and the other Smile Source analyses based on that distinction. Neither Dr. Marshall nor Complaint Counsel explains or presents evidence indicating that the facts that Smile Source had three regional distributors and that Patterson also bid in 2017 are meaningful or material.

Moreover, as noted, once the administrative fees and rebates are properly included in the 2017 analysis, it shows that Schein lost money discounting to Smile Source (SRF 1681), just as Schein lost money discounting to Smile Source in 2011, when there were no

regional distributors, or any other distributors, involved with Smile Source. (SF 1722-35; RX 3058; Marshall, Tr. 3073, 3121-22).

Patterson's Response:

Patterson joins Schein and Benco's response.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, incomplete and misleading. This Schein-Smile Source 2017 study is not "different from [Dr. Marshall's] other profitability case studies." Rather, it suffers from the same flaws as his other studies. Specifically, this study was based on inaccurate theory because his analysis conflated conspiratorial behavior with non-conspiratorial oligopolistic behavior, (Carlton, Tr. 5384, 5386-87; RX2832 at 45, RX2832 at 48-49, ¶¶ 70-71), and it did not follow any accepted method of economic analysis, (J. Johnson, Tr. 4837-38; Marshall, Tr. 3241). Furthermore, this study relied on a data set that included only a tiny fraction of dentists in the United States, focused on a buying group that was not representative of buying groups in general, failed to account for risk and uncertainty, failed to consider the cost of administrative fees and rebates, relied on unsupported assumptions, failed to control for other factors, and failed to conduct a counter-factual analysis. (J. Johnson, Tr. 4838-40, 4845-46, 4855-56; RX2834 at 37, ¶ 58; *id.* at 38, Exhibit 6; Wu, Tr. 5037, 5039-41, 5044-46, 5055-58; RX2833 at 10, ¶ 13; RX2832 at 54, ¶ 81; [REDACTED]; Marshall, Tr. 3219-20, 3373). (J. Johnson, Tr. 4840-44; Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380; [REDACTED])

[REDACTED] These multiple flaws render Dr. Marshall's Schein-Smile Source 2017 study inherently unreliable.

1683. Even in the more competitive 2017 landscape, Dr. Marshall found that it was profitable for Schein to win Smile Source's business 2017. (Marshall, Tr. 2876: [REDACTED]).

Schein's Response:

False. Dr. Marshall admitted that his 2017 Smile Source analysis contained a clerical error or mathematical mistake because his team failed to include rebates and administrative fees (unlike all his other profitability analyses). Once those fees and rebates were included, Schein lost [REDACTED] (Marshall, Tr. 3122 [REDACTED]).

[REDACTED]

[REDACTED]

[REDACTED]).

Patterson's Response:

Patterson joins Schein's response. With regard to the statement that it was profitable for Schein to win Smile Source's business 2017 (*sic*), this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Benco joins in the response of Schein.

1684. Based on his profitability studies, Dr. Marshall concluded that, in addition to being a profitable opportunity for a regional distributor such as Burkhardt and Atlanta Dental, buying group opportunities are also profitable for a larger full-service distributor like Schein. (Marshall, Tr. 2874, 2872; [REDACTED] [REDACTED].

Schein's Response:

There are two fundamental flaws in this proposed finding. *One*, as noted, Dr. Marshall's analysis fails to account for the rebates and administrative fees paid by Schein under its 2017 agreement with Smile Source. Once included, discounting to Smile Source was not profitable for Schein. (SRF 1681-83). *Two*, Dr. Marshall did not conclude that "buying group opportunities" writ large are profitable for larger distributors like Schein. In fact, even Dr. Marshall agreed that "a distributor with a large customer base and large sales might find it less profitable to supply such buying groups." (CX 7100-175-76). Moreover, there is no basis for the conclusion in this proposed finding, given that it was unprofitable for Schein to discount to Smile Source in 2012 and 2017. (SF 1722-35; RX 3058; Marshall, Tr. 3073, 3121-22). There is also no basis to extrapolate one experience with Smile Source as indicative of what would happen with any other buying group. (SF 1661, 1689-95). Dr. Marshall specifically disclaimed any such opinion at trial: [REDACTED] [REDACTED] Marshall, Tr. 3002-03).

Patterson's Response:

Patterson joins Benco and Schein's response.

Benco's Response:

Complaint Counsel's proposed finding is misleading and not supported by the evidence. Dr. Marshall's narrow 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 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. (Wu, Tr. 5039; Wu, Tr. 5040-5041; Wu, Tr. 5044). 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. (Wu, Tr. 5040-5041; Wu, Tr. 5045-5046; RX2833 at 10, ¶ 13).

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. (CX4060; Rogan, Tr. 3754-55; Cohen, Tr. 792; RX1039; Reese, Tr. 4493-95; Kois, Sr., Tr. 273; RX1042; Wu, Tr. 5044-45, 5057-58; Marshall, Tr. 3260 ("I understand that

if the conclusion is incoherent management, I can understand someone walking away from that.”)). Smile Source was not representative of other buying groups because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Marshall, Tr. 3256; Wu, Tr. 5044-45).

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). (Carlton, Tr. 5396; Wu, Tr. 5046-55; RX2834 at 39, ¶ 61; see also BFF 1063-1079). For example, Burkhart had a substantial presence and extensive name recognition in the Seattle region (Reese, Tr. 4357) and therefore was well positioned to increase its business with Kois Buyers Group members by entering into an agreement with the Kois Buyers Group. (RX2834 at 39, ¶ 61 and Exhibit 7). 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. (Cohen, Tr. 632-633; RX2834 at 39, ¶ 61 and Exhibit 7). 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. (RX2834 at 39, ¶ 61). 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.

Second, Dr. Marshall's studies were extremely limited in scope, and the number of 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 Bois Buyers Group and Smile Source included a total of only [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Third, Dr. Marshall's theoretical basis for his analysis was inaccurate because his analysis conflated conspiratorial behavior with non-conspiratorial oligopolistic behavior. (Carlton, Tr. 5384, 5386-87; RX2832 at 45, RX2832 at 48-49, ¶¶ 70-71). Dr. Marshall's studies did not follow any accepted method of economic analysis. (J. Johnson, Tr. 4837-38; Marshall, Tr. 3241). Although there are multiple reasons why a distributor might choose not to deal with a buying group, (*see* Cavaretta, Tr. 5568-69; Cohen, Tr. 444-45, 780, 861; Ryan, Tr. 1034-36, 1082, 1166-67, 1179-80; RX2928; Kois Sr., Tr. 248-49; Kois Jr., Tr. 312-13; Maurer, Tr. 4964-65; Carlton, Tr. 5387), Dr. Marshall ignored them all except for cannibalization. (Marshall, Tr. 3380; Carlton, Tr. 5387-90).

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. (J. Johnson, Tr. 4838-40, 4845-46, 4855-56; RX2834 at 37, ¶ 58; *id.* at 38, Exhibit 6; Wu, Tr. 5037, 5039-41, 5044-46, 5055-58; RX2833 at 10, ¶ 13; RX2832 at 54, ¶ 81; Marshall, Tr. 3112-13, 3115-18, 3121-22, 3219-20, 3373).

Fifth, Dr. Marshall failed to conduct counter-factual analyses for Benco (or Patterson or Schein). The only proper way to determine whether Benco (and Schein and Patterson) were 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. (J. Johnson, Tr. 4840-44; [REDACTED])

[REDACTED] Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380; [REDACTED]

[REDACTED]

[REDACTED] 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. (*See* Cohen, Tr. 401, 637-39, 823-34). During the time period of Dr. Marshall's studies, Benco successfully completed its expansion into Southern California and the Pacific Northwest. (Cohen, Tr. 632-33). Further, Dr. Johnson demonstrated that proper counter-factual analysis of Dr. Marshall's data demonstrates 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]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

XXIV. RESPONDENTS HAVE FAILED TO REBUT COMPLAINT COUNSEL'S EVIDENCE OF AN UNLAWFUL AGREEMENT.

A. Respondents' Purported Independent Business Justifications are Contradicted by the Evidence.

1. Respondents' Claim that Buying Groups Cannot Drive New Business is Contradicted by the Evidence.

1685. Buying groups are profitable for distributors, even without contractual volume guarantees. (CCFF ¶¶ 1320, 1381, 1385-1387, 1651, 1656, 1681, 1686-1687, 1689, 1718, 1723-1724, 1726).

Schein's Response:

Overbroad, and in most instances, not true.

First, not all buying groups are the same, very few can deliver volume, many pose serious risks of cannibalization, and some are likely to fail. (*E.g.*, Reece, Tr. 4460, 4484-85, 4487-88; CX 0319 (Reece, IHT at 76 (“[T]hen there are other ones that are ... a couple of guys that over cocktails decided they wanted to save money on supplies, so they formed a group of buddies.”)); Titus, Tr. 5270 (“Klearimpakt is a testimony that not all are created equal[.]” (quoting CX 2208)); Meadows, Tr. 2489 (“Not all buying groups could provide us with new customers....”)).

Second, for this reason, Complaint Counsel’s own expert conceded that he was [REDACTED] Marshall, Tr. 3002-03). Because the [REDACTED] that impacts whether a particular buying group *might* present a profitable opportunity, each buying group [REDACTED] [REDACTED] (Marshall, Tr. 3003). But Dr. Marshall did not study any buying group other than Smile Source and the Kois Buyers Group. (Marshall, Tr. 2863, 2970-73, 2986). Indeed, Dr. Marshall’s Schein-Smile Source analyses showed that Schein lost money discounting to Smile Source in 2011 and 2017. (SF 1722-35; RX 3058; Marshall, Tr. 3073-75, 3121-22).

Third, not all distributors have the same experience with buying groups, and one distributor’s experience is not indicative of what another distributor’s experience would be. Dr. Marshall made this point as well. While he believed “[i]t makes economic sense that a distributor with a small customer base and small sales would find it profitable to supply such buying groups..., a distributor with a large customer base and large sales might find it less profitable to supply such buying groups.” (CX 7100-175-76). Schein’s actual

experience bears this out. MeritDent failed to deliver incremental volume (SF 975-78), and both the Dental Co-Op of Utah and Steadfast took sales *away* from Schein. (SF 591-95, 599, 1218-19).

Fourth, Complaint Counsel does not cite any record evidence for the asserted fact, just other proposed findings. As noted in Schein's specific responses to those proposed findings, they do not support the assertion. Smile Source was *not* profitable for Schein in 2012 or 2017. (SF 1722-35; RX 3058; Marshall, Tr. 3073-75, 3121-22). Benco's affiliate buying group, EDA, is a one-of-a-kind program that cannot be relied upon to make any generalized inferences. (SRF 1381, 1385-87). Dr. Marshall did not study whether the Kois Buyers Group would have been profitable for any distributor other than Burkhart. (SRF 1651, 1656). Moreover, Dr. Marshall improperly resorts to *ex post* experiences rather than Schein's *ex ante* expectations, further rendering his opinions irrelevant. (*E.g.*, SRF 1678; SF 1728-29).

Patterson's Response:

Patterson joins the responses of Schein and Benco. The proposed finding is inaccurate and unsupported by the citations to Complaint Counsel's Findings of Fact. (*See also* Replies to CCFF ¶¶ 1320, 1381, 1385-1387, 1651, 1656, 1681, 1686-1687, 1689, 1718, 1723-1724, 1726).

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding.

The proposed finding improperly lumps together all “distributors,” and, in doing so, seeks to use facts pertaining to other entities to extend to Benco when, in fact, there is no evidence in the record justifying the proposed finding with respect to Benco.

Benco’s unilateral economic self-interest was not to do business with buying groups because they came between Benco and its customers and did not permit Benco to reduce its costs. (BFF ¶¶ 903-928).

a) Buying Groups Drove Sales to Other Full-Service Distributors During the Conspiracy.

1686. [REDACTED] *see also* CX8021 (Reece, Dep. at 88)).

Schein’s Response:

Incomplete. [REDACTED]

[REDACTED]

[REDACTED] (Goldsmith, Tr. 2075-78; RX 0290-021). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Goldsmith, Tr. 2076).

Patterson’s Response:

Patterson joins Schein’s response.

Benco's Response:

The proposed finding refers to a distributor other than Benco and, in doing so, seeks to use facts pertaining to another distributor to extend to Benco when, in fact, there is no evidence in the record justifying the proposed finding with respect to Benco.

Benco's unilateral economic self-interest was not to do business with buying groups because they came between Benco and its customers and did not permit Benco to reduce its costs. (BFF ¶¶ 903-928).

1687.

see also CX8021 (Reece, Dep. at 87-88)).

Schein's Response:

Incomplete.

(Goldsmith, Tr. 2076; RX 0290-021 ("You have utilized our dental supply vendor program for at least seventy-five percent (75%) of your dental supply purchases during the Test Period. You must provide us copy of all invoices for dental supply purchases during the Test Period to support meeting this requirement.")).

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

Benco's unilateral economic self-interest was not to do business with buying groups because they came between Benco and its customers and did not permit Benco to reduce its costs. (BFF ¶¶ 903-928).

1688. EDA members were not contractually required to purchase from Benco. (Cohen, Tr. 467).

Schein's Response:

Incomplete. Members of EDA make a firm purchase commitment to Benco. Every EDA member practice must make a minimum purchase commitment, which is factored into the discount they receive from Benco. (Cohen, Tr. 468, 817 ("they're required to purchase a certain amount to get the discount"))).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

EDA is structurally different than any buying group Benco has ever seen. It is more like a DSO, but without common ownership. (Cohen, Tr. 818-22; Ryan, Tr. 1228). Based on EDA's wholly unique characteristics, which were different than any other buying group, Benco determined that it was in its own unilateral economic interest to partner with Cain Watters on EDA. (Cohen, Tr. 469; 820-23). (See also BFF ¶¶ 232-70).

1689. The Kois Buyers Group does not have any purchasing requirements for its members. That is, there is no requirement that Kois members purchase any particular quantity of product or from any particular vendor. (Kois Jr., Tr. 319; *see also* CX0321 (Kois Jr., IHT at 62)).

Schein's Response:

While the Kois Buyers Group does not impose any purchasing requirements on its members, Burkhart's discounts to the group are contingent on the group as a whole meeting a certain volume threshold. (CX 4223-001 [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED].

Patterson's Response:

No specific response.

Benco's Response:

Benco's unilateral economic self-interest was not to do business with buying groups because they came between Benco and its customers and did not permit Benco to reduce its costs. (BFF ¶¶ 903-928).

1690. Dentists are not required to purchase from the buying group vendors, but they have an incentive to do so to take advantage of savings. [REDACTED] CX4223 at 001 (Kois Burkhart contract exclusivity terms); CCFB ¶¶ 1386, 1411, 1686, 1687, 1688, 1691, 1692, 1728, 1727, 1731).

Schein's Response:

The cited evidence does not support the asserted fact.

First, not all buying groups are the same, and thus blanket statements about requirements and incentives are improper.

Second, Complaint Counsel's assertion that dentists have "an incentive [to purchase from buying group vendors] ... to take advantage of the savings" is not supported by reliable evidence. The evidence shows that even dentists who switch to buying group vendors purchase a majority of their supplies from non-buying groups vendors (CX 7100-153, -163, -171), undermining the notion that there is a significant incentive to purchase from buying group vendors.

Third, the fact that there are generally no barriers to signing up with buying groups and most buying groups are extremely small (with the largest far less than 1% of dentists) indicates that there is no significant incentive to purchase from buying groups.

Fourth, the so-called “incentive” to purchase through a buying group vendor is simply the price that the vendor offers. But there is no evidence that, after accounting for fees the member must pay to the buying group and deducting any fees the vendor must pay to the buying group, members realize any significant savings in purchasing through a buying group, especially considering the significant discounts that dentists can negotiate directly with FSCs. (SF 115-19). Indeed, as Dr. Goldsmith testified, [REDACTED]

[REDACTED] (SF 117; Goldsmith, Tr. 2055, 2061, 2066). There is no evidence of Smile Source, or any buying group, obtaining discounts at that level.

Fifth neither do the Kois-Burkhart contract exclusivity terms support the asserted fact. The fact that Burkhart is the exclusive distributor for Kois Buyers Group does not mean dentists join “to take advantage of savings.” Indeed, there is no evidence that any Kois Buyers Group member was unable to get a comparable or better discount from a distributor other than Burkhart. (*See, e.g.*, RX 2082-002 [REDACTED]

[REDACTED] SRF 1250).

Patterson’s Response:

Patterson joins Schein’s response.

Benco's Response:

Benco's unilateral economic self-interest was not to do business with buying groups because they came between Benco and its customers and did not permit Benco to reduce its costs. (BFF ¶¶ 903-928).

1691. Some buying groups offer additional savings if its members' purchases to reach a certain threshold. For example, [REDACTED]

(Kois Jr., Tr. 345-350;

CX0321 (Kois Jr., IHT at 59-61).

Schein's Response:

False.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CX 4223-001-02). Thus, as the Kojs Buyers Group grew from 2014 to 2016, [REDACTED]

[REDACTED]

[REDACTED] This demonstrates the questionable profitability of the original contract to Burkhart, and does not establish the claim that [REDACTED]

[REDACTED] as Complaint Counsel asserts.

Moreover, regardless of what the Kojs-Burkhart contract provides, there is no indication that buying groups offer additional savings if its members' purchases reach a certain threshold.

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

Benco's unilateral economic self-interest was not to do business with buying groups because they came between Benco and its customers and did not permit Benco to reduce its costs. (BFF ¶¶ 903-928).

1692. Indeed, the main reason that dentists join buying groups is to save money on products. (Steck, Tr. 3681-3682; [REDACTED] Reece, Tr. 4365).

Schein's Response:

Overbroad and lacks foundation. Complaint Counsel does not cite to testimony from a single dentist that is a member of any buying group, or to any study or poll of dentists that would indicate the "main reason" they join buying groups. Further, no evidence has been presented to support the claim that dentists actually save money as a result of joining a buying group. (See SF 115-19).

None of the cited evidence supports the asserted fact. Mr. Reece just defined what a buying group is "to Burkhardt," not the "main reason" dentists join them. (Reece, Tr. 4365). Nor would he have the foundation to so testify. Complaint Counsel asked Mr. Steck whether "[i]t's fair to say that buying groups negotiate lower supply prices on behalf of their members," to which Mr. Steck answered, "I think that's the goal of the buying groups. I'm not sure it's successful...." (Steck, Tr. 3681-82). Similarly, Mr. Maurer's testimony was contrary to Complaint Counsel's asserted fact. He testified that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CX 0322 (Maurer, IHT at 44-45)).

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

Benco's unilateral economic self-interest was not to do business with buying groups because they came between Benco and its customers and did not permit Benco to reduce its costs. (BFF ¶¶ 903-928).

1693. Dentists switch their purchases to buying groups contracted with full-service distributors to take advantage of discounts and lower prices. (CCFF ¶¶ 1690-1692).

Schein's Response:

As noted in Schein's responses to CCFF 1690-1692, none of the cited evidence supports the asserted fact. (SRF 1690-92). In fact, the evidence shows that most sales are cannibalized sales, not incremental volume. (See CX 7100-153, -163, -171; see also SF 1720-1735). With respect to dentists' intentions in joining buying groups, Complaint Counsel does not cite to a single dentist that is a member of any buying group, or to any study or poll of dentists that indicates dentists switch their purchases to "take advantage of discounts and lower prices." Complaint Counsel also ignores evidence that dentists are loyal to their full-service distributors for more reasons than price. (Kois Sr., Tr. 173-74, 176, 227; Meadows, Tr. 2508-10).

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

Benco's unilateral economic self-interest was not to do business with buying groups because they came between Benco and its customers and did not permit Benco to reduce its costs. (BFF ¶¶ 903-928).

1694. Burkart, Nashville Dental, and Atlanta Dental, all full-service distributors, profited from working with these and other buying groups during the conspiracy period. (CCFF ¶¶ 1297-1315).

Schein's Response:

Complaint Counsel does not cite to any record evidence in support of this assertion, but only cites its own proposed findings. Schein incorporates its specific responses to those proposed findings here. (SRF 1297-315).

The evidence does not support the asserted fact. Nashville Dental did not produce any evidence in this case, nor did Dr. Marshall study it. As such there is nothing to support any assertion about Nashville Dental. There is also no evidence to suggest that any business Atlanta Dental or Burkhardt gained could not have been accomplished by offering discounts outside of its relationship with a buying group.

The asserted fact is also irrelevant, as Complaint Counsel has produced no evidence that Burkhardt's, Nashville Dental's or Atlanta Dental's experience with buying groups is indicative of what another distributor's experience would be. Dr. Marshall made this point as well. While he believed "[i]t makes economic sense that a distributor with a small customer base and small sales would find it profitable to supply such buying groups..., a distributor with a large customer base and large sales might find it less profitable to supply such buying groups." (CX 7100-175-76). In fact, Schein's experience was quite different.

It lost money discounting to Smile Source in 2011 and 2017, as well as to Steadfast. (SF 1722-35; RX 3058; Marshall, Tr. 3073, 3121-22; CX 0170; Titus, Tr. 5250-51).

Patterson's Response:

Patterson joins Schein's response and further responds that this proposed finding is vague as it does not state which buying groups "these and other buying groups" are.

Benco's Response:

The proposed finding refers to distributors other than Benco and, in doing so, seeks to use facts pertaining to another distributor to extend to Benco when, in fact, there is no evidence in the record justifying the proposed finding with respect to Benco.

Benco's unilateral economic self-interest was not to do business with buying groups because they came between Benco and its customers and did not permit Benco to reduce its costs. (BFF ¶¶ 903-928).

1695. Distributors gained sales, and their partnerships with buying groups were profitable. (CCFF ¶¶ 1651-1656, 1663-1664, 1666, 1672-1673, 1683-1684).

Schein's Response:

Complaint Counsel does not cite to any record evidence in support of this assertion, but only cites its own proposed findings. Schein incorporates its specific responses to those proposed findings here. (SRF 1651-56, 1663-64, 1666, 1672-73, 1683-84).

The asserted fact is vague and overbroad. Which distributors? Which buying groups? Not all distributors found their partnerships with all buying groups to be profitable. Schein, for instance, lost money discounting to Smile Source in 2011 and 2017, as well as to Steadfast. (SF 1722-35; RX 3058; Marshall, Tr. 3073, 3121-22; CX 0170; Titus, Tr. 5250-51).

Complaint Counsel's own expert conceded that he was [REDACTED] [REDACTED] (Marshall, Tr. 3002-03). Because the [REDACTED] that impacts whether a particular buying group presents a profitable opportunity, each buying group [REDACTED] [REDACTED] (Marshall, Tr. 3003). But Dr. Marshall did not study any buying group other than Smile Source and the Kois Buyers Group. (Marshall, Tr. 2970-73, 2980, 2986). Dr. Marshall also found Schein's relationship with Smile Source was not profitable in either 2012 or 2017. (SF 1722-35). Schein's own experience with Steadfast and the Dental Co-Op similarly demonstrate that buying groups are not always profitable (SF 593-601, 1218-19), and there is no evidence that any buying group relationship has ever been profitable for Schein.

While Dr. Marshall opined that Burkhart's and Atlanta Dental's relationships with Smile Source and Kois were profitable (at least as to the dentists that chose to purchase through those buying groups), the experience of smaller distributors like Burkhart and Atlanta Dental are not indicative of what a larger distributor would experience. He believed "[i]t makes economic sense that a distributor with a small customer base and small sales would find it profitable to supply such buying groups..., a distributor with a large customer base and large sales might find it less profitable to supply such buying groups." (CX 7100-175-76).

Patterson's Response:

Patterson joins Schein's response. Moreover, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use

experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight.

Benco's Response:

The proposed finding refers to distributors other than Benco and, in doing so, seeks to use facts pertaining to another distributor to extend to Benco when, in fact, there is no evidence in the record justifying the proposed finding with respect to Benco.

Benco's unilateral economic self-interest was not to do business with buying groups because they came between Benco and its customers and did not permit Benco to reduce its costs. (BFF ¶¶ 903-928).

1696. INTENTIONALLY LEFT BLANK.

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

No response required.

1697. INTENTIONALLY LEFT BLANK.

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

No response required.

1698. Dental product manufacturers also gained market share by working with distributors that gave discounts to buying groups. (CCFF ¶¶ 1314-1315).

Schein's Response:

Complaint Counsel does not cite to any record evidence in support of this assertion, but only cites its own proposed findings. Schein incorporates its specific responses to those proposed findings here. (SRF 1314-15).

The asserted fact is irrelevant and is not supported by the weight of the evidence. *A manufacturer's* share or profitability in selling to buying group members is not relevant to this case. Even if it was, the evidence shows that not all manufacturers found buying group relationships to be beneficial. As Mr. Kois Jr. testified, 3M declined to discount to the Kois Buyers Group precisely because "any discounts would erode profits." (Kois Jr., Tr. 368-69). Ultradent also declined to partner with the Kois Buyers Group because "they had a bad experience with a buyers group, and going forward [were] not going to be partnering with any other buyers groups." (CX 0321 (Kois Jr., Dep. at 164).

In any event, the record does not contain any evidence that could reliably support the asserted fact. There are no documents or testimony from any manufacturer; nor does

the record contain any studies, reports, or expert testimony regarding manufacturers' profitability.

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

The proposed finding refers to distributors other than Benco and, in doing so, seeks to use facts pertaining to another distributor to extend to Benco when, in fact, there is no evidence in the record justifying the proposed finding with respect to Benco.

Benco's unilateral economic self-interest was not to do business with buying groups because they came between Benco and its customers and did not permit Benco to reduce its costs. (BFF ¶¶ 903-928).

1699. Dr. Marshall conducted an analyses of Atlanta Dental's partnership with Smile Source. (Marshall, Tr. 2871). Atlanta Dental is a regional distributor with a significant presence in Georgia. Similar to the other profitability studies, Dr. Marshall found that when Atlanta Dental signed up to supply Smile Source, it gained incremental volume of transactions for market share for Atlanta Dental. (Marshall, Tr. 2872). Similar to Burkhardt, Atlanta Dental decreased its margins because it was offering lower prices to the Smile Source customers but, in the end, there was an increase in profits for Atlanta Dental. (Marshall, Tr. 2872). Here, again, Schein, Patterson, and Benco incurred losses by not signing up to supply Smile Source. (Marshall, Tr. 2872).

Schein's Response:

The Atlanta Dental analysis is unreliable as it is infected by a very small sample size, as Dr. Marshall noted in his report and his testimony. (CX 7100-165 (¶390 n.662); Marshall, Tr. 3112-14). In fact, Dr. Marshall showed that Atlanta Dental's sales in 2010 were greater than in 2013 and similar to its sales in 2014. (CX 7100-172 (Fig. 75)). Thus, it is not clear that the decrease in margins – or the Smile Source contract – is responsible for Atlanta Dental's increase in sales. (SRF 1671-73).

Moreover, the asserted fact as to Schein is flawed because Dr. Marshall's Smile Source-Atlanta Dental study used false data. In particular, he intentionally used Schein's margins from 2011 (and sales from 2012) to calculate profits for 2012. Had he used 2012 margins (and sales), his analysis would show that Schein gained profit, not lost profit, as a result of Atlanta Dental's partnership with Smile Source. (Marshall, Tr. 3112-14; *see also* SRF 1669; RXD 0014-042).

Dr. Marshall did *not* study whether Schein "incurred losses by not signing up to supply Smile Source" because Dr. Marshall did not analyze how costly it would have been for Schein to continue discounting to Smile Source in 2013 if Smile Source had not fired it in 2013. (*E.g.*, Marshall, Tr. 3026, 3056 [REDACTED] Carlton, Tr. 5390-94; *see also* SF 1719-20). Indeed, Dr. Marshall's own analysis showed that Schein made more money from Smile Source member purchases after Smile Source fired it in 2012. (SF 1722-35; RX 3058; Marshall, Tr. 3073, 3121-22; *see also* CX 7100-176).

In any event, Dr. Marshall's Atlanta Dental analysis is irrelevant for the same reasons as his Burkhardt-Kois and Burkhardt-Smile Source analyses, which are explained in SRF 1651-1653 and 1664, and which Schein incorporates here. (*See also* SRF 1671-74, 1678-84 (showing that Marshall's analysis is insufficient to support the facts asserted here)). In short, the asserted fact is irrelevant because a gain in sales or share does not indicate whether it was a profitable gain, and neither Complaint Counsel nor Dr. Marshall has presented evidence or analysis that Atlanta Dental's experience with one buying group at a particular point in time is at all indicative of what Schein's or any Respondents' would have been. (*See* CX 7100-175-76). In fact, Schein's experience was quite different, losing

money discounting to Smile Source in 2012 and 2017 as well as to Steadfast. (SF 1722-35; Titus, Tr. 5250-51).

Patterson's Response:

Patterson joins Schein's response. This Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25-26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Dr. Marshall's profitability study of Atlanta Dental's partnership with Smile Source suffers from the same flaws as his other profitability studies. Specifically, this study was based on inaccurate theory because his analysis conflated conspiratorial behavior with non-conspiratorial oligopolistic behavior, (Carlton, Tr. 5384, 5386-87; RX2832 at 45, RX2832 at 48-49, ¶¶ 70-71), and it did not follow any accepted method of economic analysis, (J. Johnson, Tr. 4837-38; Marshall, Tr. 3241). Furthermore, this study relied on a data set that included only a tiny fraction of dentists in the United States, focused on a buying group that was not representative of buying groups in general, failed to account for risk and uncertainty, failed to consider the cost of administrative fees and rebates, relied on

unsupported assumptions, failed to control for other factors, and failed to conduct a counter-factual analysis. (J. Johnson, Tr. 4838-40, 4845-46, 4855-56; RX2834 at 37, ¶ 58; *id.* at 38, Exhibit 6; Wu, Tr. 5037, 5039-41, 5044-46, 5055-58; RX2833 at 10, ¶ 13; RX2832 at 54, ¶ 81; [REDACTED] Marshall, Tr. 3219-20, 3373). (J. Johnson, Tr. 4840-44; Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380).

Most fundamentally, Dr. Marshall failed to conduct counter-factual analyses for Benco (or Patterson or Schein). The only proper way to determine whether Benco (and Schein and Patterson) were 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. (J. Johnson, Tr. 4840-44; [REDACTED] Carlton, Tr. 5393-95; Marshall, Tr. 3375-77, 3380; [REDACTED]

[REDACTED]. Dr. Marshall failed to perform such an analysis. *Id.*

A proper analysis shows that, far from incurring losses, Benco profited and furthered its business interests by not signing up to supply Smile Source. 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. (See Cohen, Tr. 401, 637-39, 823-34). During the time period of Dr. Marshall's studies, Benco successfully completed its expansion into Southern California and the Pacific Northwest. (Cohen, Tr. 632-33). Further, Dr. Johnson demonstrated that proper counter-factual analysis of Dr. Marshall's data demonstrates that Benco's refusal to offer discounts to Smile Source, and its use of its resources to pursue other opportunities instead, was profitable. Dr. Johnson demonstrated that, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

These multiple flaws render Dr. Marshall's Atlanta Dental-Smile Source study inherently unreliable and the conclusions he draws from it wholly unsupported.

b) Respondents Profited from Buying Groups Before and After the Conspiracy

1700. Prior to 2011, Schein profitably worked with buying groups, and it gained new business and stole customers from competitors as a result. (*See infra* CCF 438, 441, 442, 443, 444, 446, 447, 448, 449, 450, 451).

Schein's Response:

Complaint Counsel does not cite any record evidence in support of this assertion, but only cites its own proposed findings. Schein incorporates its specific responses to those proposed findings here. (SRF 438, 441-44, 446-51).

Dr. Marshall did not conduct any profitability or win/loss studies of Schein's buying group business prior to 2011. The earliest profitability study he conducted was Schein's Smile Source relationship in 2012, which he found to be *unprofitable*. (SF 1722-35).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1701. By July 2011, Muller recognized the Dental Co-op of Utah as “one of the largest HSD account (over \$1M).” (CX2505 at 002).

Schein’s Response:

This proposed finding is identical to CCFF 446. Schein incorporates SRF 446 by reference here.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1702. Muller stated that while a customer of Schein’s Special Markets division, Smile Source brought in roughly \$3 million in sales. (CX2469 at 001 (Statement of Muller: “When they were with us they did \$3M, half from us and half they got us from our competitors.”)).

Schein’s Response:

This proposed finding is identical to CCFF 447. Schein incorporates SRF 447 by reference here. To the extent Complaint Counsel cites this evidence (or the proposed finding) for the truth of the matter asserted (*i.e.*, Smile Source did \$3 million in sales with Schein, half coming from Schein’s competitors), such evidence is pure speculation. Complaint Counsel did not lay a foundation necessary to establish that Mr. Muller had sufficient knowledge of the amount of business Smile Source members did with Special Markets or with Schein’s competitors from 2008 until 2011, when Smile Source switched to HSD. Nor did Mr. Muller perform any study or analysis necessary to determine the

amount of business that Schein received from its competitors through its relationship with Smile Source.

Mr. Muller's speculation is also unsupported by the data. Dr. Marshall calculated that Smile Source members purchased less than [REDACTED] from Schein in 2011, the year prior to its decision to fire Schein. (CX 7101-140).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1703. In 2010, Smile Source was the buying group that Sullivan identified in an email to his boss as the account he did not "want to lose" because "[t]hey are \$1 million and growing." (Sullivan, Tr. 3922-3923; CX2113).

Schein's Response:

The asserted fact is essentially the same as CCFF 448, thus Schein incorporates its response to that proposed finding here. (SRF 448). In a nutshell, Mr. Sullivan was simply addressing a concern that an FSC had raised about Smile Source's new multi-level marketing scheme, and balancing it against Mr. Muller's statement that – as a franchisor – Smile Source was not a typical buying group. Mr. Sullivan proposed a way of addressing the internal Schein conflict.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1704. In 2010, Sullivan was pointing out that Smile Source was an opportunity for \$1 million in revenue to Schein. (Sullivan, Tr. 3923; CX2113).

Schein's Response:

The asserted fact is essentially the same as CCFF 449, thus Schein incorporates its response to that proposed finding here. (SRF 449).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1705. Sullivan saw value in the potential \$1 million revenue opportunity from Smile Source. (Sullivan, Tr. 3923).

Schein's Response:

CCFF 1705 is the same as the proposed finding in CCFF 450, thus Schein incorporates its response to CCFF 450 here. (SRF 450).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1706. Foley and Muller also viewed the Smile Source relationship as an opportunity or benefit to Schein. (Foley, Tr. 4535 (Smile Source is “a great opportunity . . . to see some good growth with them”); CX8005 (Muller, Dep. at 53-54) (Smile Source provided Schein with new customers from competitors); CX0309 (Muller, IHT at 101) (Smile Source relationship was “beneficial” in that it brought customers to Schein who had been buying from a competitor)).

Schein’s Response:

CCFF 1706 is effectively the same as the proposed finding in CCFF 451, thus Schein incorporates its response to CCFF 451 here. (SRF 451). The asserted fact further ignores evidence that, had Smile Source not terminated its relationship with Schein, Schein would have lost over [REDACTED] by continuing to serve Smile Source under the same conditions. (RXD 0014-040-41). As Dr. Marshall conceded, [REDACTED]
[REDACTED]
[REDACTED] Marshall, Tr. 3097).

The asserted fact also ignores the fact that, in 2010, Smile Source had not experienced any significant growth, and had only between [REDACTED] members.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1707. Smile Source was “doing approximately \$900,000 in merchandise” when it worked with Schein Special Markets. (Foley, Tr. 4532-4533).

Schein’s Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1708. Discounting to buying groups presented revenue and profit opportunities to Schein. (CCFF ¶¶ 438, 446-453, 1256-1266).

Schein's Response:

CCFF 1708 is essentially the same as the proposed finding in CCFF 453, thus Schein incorporates its response to CCFF 453 here. (SRF 453). The asserted fact is overbroad and in most instances, untrue. Discounting to buying groups *might* have presented revenue and profit opportunities to Schein, but in most cases, it did not. (SRF 453). In the case of Smile Source, as Dr. Marshall showed, the 2011 contract was unprofitable for Schein. (SF 1722-29).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1709. Since 2015, all Respondents have profitably worked with and compete for buying groups. (See CCFF ¶¶ 466, 1316-1318, 1320-1322, 1349, 1364, 1385-1387, 1681, 1718, 1724-1725, 1732, 1734).

Schein's Response:

Complaint Counsel does not cite any record evidence in support of this assertion, but only cites its own proposed findings. Schein incorporates its specific responses to those proposed findings here.

The asserted fact is overbroad and without basis in the record. As to profitability, Dr. Marshall only studied one buying group relationship after 2015 – Schein's partnership with Smile Source. Dr. Marshall admitted that he failed to include the administrative fees and rebates that Schein pays under that agreement, and once included, Dr. Marshall's analysis indicates that Schein lost [REDACTED] by supplying Smile Source in 2017. (Marshall, Tr. 3122 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]).

Additionally, Schein continued to turn down buying groups that could not demonstrate an ability or willingness to drive compliance or otherwise bring value to Schein. For example, Schein negotiated with Dentistry Unchained for nearly a year starting in May 2015, but declined to move forward when, in April 2016, it became clear that Dentistry Unchained was promoting a competitor. (SF 690-705). Similarly, in 2016, Schein turned down the buying groups Direct Dental Sales in 2016 because it posed conflicts with Schein's existing customers (SF 726-731), IDBG because it offered no incentives other than discounts (SF 776-778), and Blue Chip Dental because it could not explain its value proposition (SF 399-401).

Moreover, Schein worked with buying groups before 2015, including Smile Source, the Dental Co-Op of Utah, Dentists for a Better Huntington, the Long Island Dental

Forum, Steadfast, Comfort Dental, Dental Partners of Georgia, Advantage Dental, and Universal Dental Alliance, among others. (*See, e.g.*, SF 188, 1627). Thus, there is no basis for Complaint Counsel’s assertion that Schein’s business with buying groups was “since 2015.”

Patterson’s Response:

Patterson unsuccessfully bid for the business of Smile Source in 2017. (Rogan, Tr. 3544-3545; Goldsmith, Tr. 2040–41). However, Smile Source is not a buying group. (Goldsmith, Tr. 2040–41 (“Q. And you consider Smile Source to be a franchisor; is that right? A. That is correct.”); Goldsmith, Tr. 2046) (“Q. Okay. Now, Smile Source considers itself a franchise DSO; right? A. Of sorts, yes. Q. You’ve called yourself a franchise DSO before to others in the industry? A. I’ve called myself or I called Smile Source a franchise.”); Maurer, Tr. 4970 (“We are a franchise group.”)). Both Smile Source witnesses who testified at trial said that Smile Source is not a buying group. (Goldsmith, Tr. 1949 (“Judge Chappell: Did you consider Smile Source or do you consider Smile Source to be a buying group or a -- what is it, GPO? . . . A: I do not consider it to be that. Judge Chappell: Either of those. A: Correct.”); Maurer, Tr. 4969 (“Mr. Maurer, if I heard your testimony right, Smile Source is not a buying group. Is that right? A. Correct.”). Smile Source’s witnesses testified that, instead, Smile Source is a franchisor. PF ¶ 109.

Complaint Counsel does not identify a single buying group that Patterson has “profitably worked with” since 2015.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding. None of the individual findings cited in this proposed finding contain evidence of Benco working with a buying group.

The proposed finding improperly lumps together all three Respondents, and, in doing so, seeks to use facts pertaining to one or more other Respondents to extend to Benco when, in fact, there is no evidence in the record justifying the proposed finding with respect to Benco.

Benco's unilateral economic self-interest was not to do business with buying groups because they came between Benco and its customers and did not permit Benco to reduce its costs. (BFF ¶¶ 903-928).

Benco developed its policy in 1996 and has applied it consistently before, during, and after Complaint Counsel's alleged conspiracy period. (BFF ¶¶ 166-270; 1285-1334).

1710. Schein entered into an agreement with buying group Teeth Tomorrow in May 15, 2017. (RX2684 at 001).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1711. Schein entered into an agreement with buying group Mastermind Group in August 2017. (RX2695 at 001).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1712. Schein entered into an agreement with buying group Klear Impakt in August 17, 2015. (R. Johnson, Tr. 5479; RX2162 at 001).

Schein's Response:

Schein began discussing a buying group partnership with Klear Impakt "sometime in 2014," which culminated in an agreement on August 17, 2015. (R. Johnson, Tr. 5479-80, 5490; Titus, Tr. 5269; RX 2162).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1713. Even Benco, which had a long-standing policy against buying groups, started working with buying groups since 2015. (See CCF ¶¶ 1385, 1386, 1325).

Schein's Response:

False. Benco started its own buying group, EDA. (Marshall, Tr. 3119 [REDACTED] [REDACTED]). In 2016, Benco announced an agreement with Elite Dental Alliance that effectively turned EDA into an affiliate of Benco. (Cohen, Tr. 816, 820-21). Mr. Cohen testified Benco has "veto power over vendors," has "control over the rules for admitting members," and receives 50% of the group's profits. (Cohen, Tr. 816-17, 820-21; CX 1282). Benco offered discounts to EDA members who met high volume thresholds that might not be available to non-members who could not meet such volume thresholds. (Cohen, Tr. 821-22).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding. None of the individual findings cited in this proposed finding contain evidence of Benco working with a buying group.

Benco's unilateral economic self-interest was not to do business with buying groups because they came between Benco and its customers and did not permit Benco to reduce its costs. (BFF ¶¶ 903-928).

Benco developed its policy in 1996 and has applied it consistently before, during, and after Complaint Counsel's alleged conspiracy period. (BFF ¶¶ 166-270; 1285-1334).

EDA is structurally different than any buying group Benco has ever seen. It is more like a DSO, but without common ownership. (Cohen, Tr. 818-22; Ryan, Tr. 1228). Based on EDA's wholly unique characteristics, which were different than any other buying group,

Benco determined that it was in its own unilateral economic interest to partner with Cain Watters on EDA. (Cohen, Tr. 469; 820-23). (See also BFF ¶¶ 232-70).

1714. Discounting to EDA provided Benco with new customers. (Cohen, Tr. 471).

Schein's Response:

No response other than to note that Benco's affiliate buying group, EDA, is a one-of-a-kind program that cannot be relied upon to make any generalized inferences. (SRF 1381, 1385-87).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

EDA is structurally different than any buying group Benco has ever seen. It is more like a DSO, but without common ownership. (Cohen, Tr. 818-22; Ryan, Tr. 1228). Based on EDA's wholly unique characteristics, which were different than any other buying group, Benco determined that it was in its own unilateral economic interest to partner with Cain Watters on EDA. (Cohen, Tr. 469; 820-23). (See also BFF ¶¶ 232-70).

1715. Discounting to EDA provided Benco with new sales. (Cohen, Tr. 472).

Schein's Response:

No response other than to note that Benco's affiliate buying group, EDA, is a one-of-a-kind program that cannot be relied upon to make any generalized inferences. (SRF 1381, 1385-87).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

EDA is structurally different than any buying group Benco has ever seen. It is more like a DSO, but without common ownership. (Cohen, Tr. 818-22; Ryan, Tr. 1228). Based on EDA's wholly unique characteristics, which were different than any other buying group, Benco determined that it was in its own unilateral economic interest to partner with Cain Watters on EDA. (Cohen, Tr. 469; 820-23). (See also BFF ¶¶ 232-70).

1716. Cohen believes EDA is a successful buying group. (Cohen, Tr. 471).

Schein's Response:

No response other than to note that Benco's affiliate buying group, EDA, is a one-of-a-kind program that cannot be relied upon to make any generalized inferences. (SRF 1381, 1385-87).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

The proposed finding purposefully misstates Cohen's testimony. (Cohen, Tr. 471). Cohen never called EDA a buying group. He only testified that he believed EDA has been

successful so far. (Cohen, Tr. 417). In fact, Cohen has repeatedly testified that EDA is not a buying, but rather is more like a DSO. (Cohen, Tr. 818-22).

EDA is structurally different than any buying group Benco has ever seen. It is more like a DSO, but without common ownership. (Cohen, Tr. 818-22; Ryan, Tr. 1228). Based on EDA's wholly unique characteristics, which were different than any other buying group, Benco determined that it was in its own unilateral economic interest to partner with Cain Watters on EDA. (Cohen, Tr. 469; 820-23). (See also BFF ¶¶ 232-70).

1717. Schein, Patterson, and Benco bid for buying groups since 2015 that they previously rebuffed. (See CCFB ¶¶ 1718, 1349, 1350).

Schein's Response:

Not true as to Schein. To support this fact, Complaint Counsel cites to three proposed findings regarding Schein's and Patterson's bids for Smile Source in 2017. Schein incorporates its responses to those proposed findings here.

In the years before 2017, Schein and Patterson behaved very differently in relation to Smile Source. Patterson met with Smile Source in October 2013 and informed Smile Source it was "not interested." (SF 1147-48). Schein, in contrast, repeatedly and consistently expressed interest in partnering with Smile Source. Even after Smile Source fired Schein in 2012, Mr. Sullivan wrote, [REDACTED] (SF 1354; RX 2090-001). Each time thereafter that Smile Source approached Schein, Mr. Sullivan responded with enthusiasm: "I would enjoy catching up with you" (Oct. 2013); "Yes, we absolutely would like to discuss further" (Nov. 2013). (CX 2580; RX 2328). There is thus no evidence that Schein ever "rebuffed" Smile Source. In fact, it was the other way around. Smile Source

rebuffed Schein twice: it fired Schein in 2012 and rejected Schein's proposal in 2014 in favor of Darby. (SF 114-15, 1163-67).

Patterson's Response:

The proposed finding is misleading. Complaint Counsel points to only a single alleged buying group—Smile Source—that Patterson declined to work with initially. But Patterson had good reasons for reconsidering its relationship with Smile Source in 2017. As Patterson witnesses testified, Patterson bid on Smile Source because Smile Source changed its business model and offered services in 2017 that it did not previously offer. (Rogan, Tr. 3544-3545). Moreover, they also testified that Patterson built in milestones into the Smile Source bid to compensate for the lack of volume commitment. (CX0317 (Rogan, IHT at 400-01). (See also responses to CCFF ¶¶ 1718-21). Patterson's bid for Smile Source's business in 2017 had nothing to do with the end of alleged conspiracy. (McFadden, Tr. 2833-34).

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding. **None of the individual findings cited in this proposed finding even mention Benco.**

The proposed finding improperly lumps together all three Respondents, and, in doing so, seeks to use facts pertaining to one or more other Respondents to extend to Benco when, in fact, there is no evidence in the record justifying the proposed finding with respect to Benco.

Benco's unilateral economic self-interest was not to do business with buying groups because they came between Benco and its customers and did not permit Benco to reduce its costs. (BFF ¶¶ 903-928).

Benco developed its policy in 1996 and has applied it consistently before, during, and after Complaint Counsel's alleged conspiracy period. (BFF ¶¶ 166-270; 1285-1334).

1718. In 2017, Schein and Patterson both bid for Smile Source's business, despite lack of volume guarantees and no change in Smile Source's business model. (*See* CCFF ¶¶ 544, 1681).

Schein's Response:

Schein began negotiations with Smile Source in August 2015 for the contract that culminated in 2017. (This followed Schein's unsuccessful attempt to win the contract in 2014). (SF 1181-86). There is no evidence that Schein was aware that Patterson was also negotiating with Smile Source, or vice versa.

Patterson's Response:

The proposed finding is inaccurate and misleading, and the citations to Complaint Counsel's Findings of Fact do not support the proposition cited. Patterson witnesses testified that Patterson bid on Smile Source because Smile Source changed its business model and offered services in 2017 that it did not previously offer. (Rogan, Tr. 3544-3545). Moreover, they also testified that Patterson built in milestones into the Smile Source bid to compensate for the lack of volume commitment. (CX0317 (Rogan, IHT at 400-01). (*See also* responses to CCFF ¶¶ 1719-21).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business and Patterson's business.

1719. Patterson bid on Smile Source in 2017 because there was potential for incremental sales. (Rogan, Tr. 3545-3546).

Schein's Response:

Misleading. Mr. Rogan testified that he didn't know if there was potential for incremental sales. (Rogan, Tr. 3545-46 ("Q. And it's fair to say that you believed that Smile Source could drive incremental sales towards Patterson? A. *I don't know. I don't know if I know that.* What I would say is that they were talking like they were going to, and that's why we structured the deal that if they did bring the spend, then it would be a good deal for them and a good deal for Patterson.")) (emphasis added)).

Patterson's Response:

Patterson joins Schein's response and adds that Rogan testified that Patterson bid on Smile Source because Smile Source changed its business model and offered services in 2017 that it did not previously offer. (Rogan, Tr. 3544-3545) (Q. Is it fair to say that by January 2017, that had changed? A. Well, I think what had changed is what they were going to provide. So when we first -- when GPOs/buying groups first came on the scene, all they wanted was a cheap price, and they weren't doing anything in -- providing any value to the customer, meaning we would still have to service the customer, which is expensive to service the customer, get a product the next day in a box, have service technicians, and we have 900 of them out there. That's very expensive. So just having people tie together a group of dentists and say, "Hey, we want a better deal," did not make business sense to us. Now what was interesting is Smile Source eventually started adding a bunch of marketing services. They started providing a bunch of things that Patterson actually provides, but we weren't going to have to provide those, and those things are

expensive. So they took cost out of the structure. So by 2017 -- and when I looked at their model, looked at what they were providing, what we wouldn't have to provide, the price we were going to charge, it made business sense. Because of the value they were going to provide that we didn't have to provide, this was going to be a profitable deal for us, and up until this point, we hadn't seen that with any other buying groups.”).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

1720. Rogan testified that Patterson's 2017 Smile Source bid was based on Smile Source's verbal assurances that it could be influential in its members' purchasing decisions. (CX0317 (Rogan, IHT at 399-402)).

Schein's Response:

The cited evidence does not support the asserted fact. Mr. Rogan testified that Smile Source's Mr. Maurer believed that Smile Source could be “very influential.” (CX 0317 (Rogan, IHT at 398-99)). The testimony does not support the contention that Patterson believed this to be true. Indeed, the proposal Patterson submitted had tiered pricing that would “revert[] back ... to regular pricing” if there was insufficient incremental spend. (CX 0317 (Rogan, IHT 399-403)).

Patterson's Response:

Patterson joins Schein's response and adds that Rogan stated that Patterson's bid was based its ability to build in milestones for Smile Source to meet. (CX0317 (Rogan, IHT at 400-01)) (“So in that situation they weren't saying that they were going to be able to get every single one of their signed up Smile Source customers to buy from Patterson Dental, but they were also saying that ‘We've built a really strong organization here and

we can be very influential, that Smile Source, us, all of their affiliates as a group, as an aggregate, when we drive spend to one place, we should -- we will get a better deal,' and so they were influential that way. That's what he was committing to me. One of the reasons also that we also hadn't historically signed up with buying groups, but I felt better about this one, and I also felt better about it because he allowed me to build in the milestones. If he would have just said 'No. I want this price. We're going to bring you that spend, and we're going to get it,' I would have passed again. But I said, okay. He's willing to help achieve bringing the spend to me. That seemed like a good business deal for me, and I could get out at any time.')). If Smile Source did not meet those milestones, Patterson would revert back to its regular pricing. (CX0317 (Rogan, IHT at 401) (Q. Were there any consequences for not -- Strike that. Were there any consequences for Smile Source for not meeting those milestones? A. Yeah, we would have gone to -- reverted back to our regular pricing.))

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

1721. However, Patterson's 2017 bid proposal to Smile Source did not contain "any volume commitments." (McFadden, Tr. 2735).

Schein's Response:

False. As Mr. Rogan testified, the Patterson proposal would "revert[] back to regular pricing" if there was insufficient incremental spend. (CX 0317 (Rogan, IHT 399-403)).

Patterson's Response:

Patterson joins Schein's response. Additionally, McFadden testified at trial that the manufacturer Dentsply asked Patterson to work with Smile Source, which is why Patterson made a proposal to Smile Source without volume commitments. (McFadden, Tr. 2735) ("Q. Was Smile Source -- as part of that proposal that you made to Smile Source, were there any volume commitments? A. There were not any volume commitments, so let me explain how we even got there. Dentsply, our partner, was doing \$5 million worth of business with Smile Source and considered them to be their number two client, so therefore, the vendor recognized them as a unique entity and wanted us to participate in this, so we did that. But we were told that they had influence, but to my knowledge, there were no actual buying guarantees in place.").

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

1722. [REDACTED]

Schein's Response:

[REDACTED] (SF 1186; CX 4099). Schein won back the Smile Source account after trying for three years. The President of Smile Source, Mr. Maurer, noted that Schein [REDACTED]

[REDACTED]

[REDACTED]

(RX 2091). Schein was not aware of any bidding context involving others, so the term [REDACTED] is a misnomer.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1723. Selling to Smile Source following the conspiracy was profitable.

Schein's Response:

False, for many reasons.

First, Dr. Marshall's 2017 Schein-Smile Source analysis failed to include the rebates and administrative fees that Schein paid under the contract. (Marshall, Tr. 3121-22). Once included, the analysis showed that Schein lost over [REDACTED] in 2017 as a result of discounting to Smile Source. (Marshall, Tr. 3121-22). Thus, the study does not support the conclusion asserted in CCFF 1723. (*See also* SF 1320, 1733-35).

Second, Dr. Marshall’s and Complaint Counsel’s conclusion depends on the incorrect assumption that Schein was not interested in contracting with Smile Source prior to 2017. Schein’s repeated expressions of interest and 2014 bid invalidate any such assumption. (SF 1156-67, 1175, 1178, 1181).

Third, Dr. Marshall's profitability studies are fundamentally flawed for the reasons explained above and in SF 1660-1752. (*See also* SRF 1637-80). In a nutshell, Dr. Marshall's profitability studies cannot support Dr. Marshall's conclusion because (i) they

are contrary to the evidence of Schein's actual behavior towards buying groups; (ii) they find false positives outside of the alleged conspiracy period; (iii) they fail to analyze the but-for world; (iv) they are limited to two atypical buying groups; (v) they fail to distinguish between oligopolistic interdependence and conspiracy; (vi) they show the alleged conspiracy was irrational; and (vii) they show that Schein's business with Smile Source in 2011 and 2017 was unprofitable.

Patterson's Response:

This Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1724. By doing business with Smile Source since 2017, Schein has gained business from its competitors, and has increased its business with existing customers. (Cavaretta, Tr. 5628).

Schein's Response:

Mr. Cavaretta testified that since working with Smile Source in 2017 Schein has gained some business. However, Mr. Cavaretta did not testify that Smile Source was profitable. (Cavaretta, Tr. 5628). In fact Schein lost over [REDACTED] in 2017 as a result of discounting to Smile Source. (Marshall, Tr. 3121-22).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1725. [REDACTED]
[REDACTED] Foley, Tr. 4534).

Schein's Response:

Vague as to time period. From 2008 to 2011 Schein offered DSO-level discounts to Smile Source members, yet Smile Source was only able to attract [REDACTED] members over the three-year period. (Foley, Tr. 4524; Goldsmith, Tr. 2103). Mr. Foley's testimony does not support the fact. Mr. Foley testified that he did "not know what happened after [Smile Source] went to HSD" and that he "only remember[ed] one [customer] out of the Utah area, when I was with Special Markets...." (Foley, Tr. 4534). Moreover, Dr. Goldsmith's testimony does not establish that distributors were otherwise unable to obtain the business of any new members Smile Source brought, or that such new members were profitable.

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1726. Schein manager, Kam Gantos, noted, "[w]e have found that [buying groups] often pull over significant business from doctors who in the past considered PDCO [Patterson] or Benco as their primary distributor." (CX2602 at 002).

Schein's Response:

CCFF 1726 is the same as the proposed finding in CCFF 1321, and Schein incorporates its response to CCFF 1321 here. (SRF 1321). In addition, there is no evidence that Ms. Gantos has personal knowledge of the extent to which buying groups can "pull over significant business from doctors who in the past considered PDCO or Benco." There is no evidence that Ms. Gantos has ever studied the question. Rather, Ms. Gantos was simply noting that Schein had a "strategy to compete in this space" based on work that was begun in late 2014 (with the development of a buying group offering as a "strategic priority") and that Schein intended to continue to be "very selective on who we partner with." (CX 2602-002; SF 295).

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1727. [REDACTED]

Schein's Response:

False.

Dr. Goldsmith *claims* [REDACTED] of Smile Source members used its distributors, but none of the [REDACTED] he purports to base his claim on are in evidence. Thus, Dr. Goldsmith's testimony is not admissible for its truth. Fed. R. Evid. 1002. Moreover, Dr. Marshall's analyses showed the Smile Source distributors were at most able to obtain little more than [REDACTED] of purchases (and often much less) even from members that did choose to purchase from that distributor. (CX 7100-163, -171, -178).

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

The proposed finding refers to distributors other than Benco and, in doing so, seeks to use facts pertaining to another distributor to extend to Benco when, in fact, there is no evidence in the record justifying the proposed finding with respect to Benco.

Benco's unilateral economic self-interest was not to do business with buying groups because they came between Benco and its customers and did not permit Benco to reduce its costs. (BFF ¶¶ 903-928).

Finally, Complaint Counsel's own expert testified during trial that Dr. Goldsmith's testimony on this point was not true. (Marshall, Tr. 3019-20).

1728. Kois Buyers Group members informed Kois that they save somewhere between 3% and 15% on their supplies by virtue of their membership. (CX0321 (Kois Jr., IHT at 62-63)). Kois testified that Kois Buyers Group members get "at least a 15 percent discount off" of the manufacturer's retail price through the Kois Buyers Group. (Kois Jr., Tr. 327).

Schein's Response:

The first sentence of the asserted fact lacks adequate foundation. Mr. Kois Jr. has no access to any records to show what savings, if any, members realized by buying through the Kois Buyers Group. It is also unclear what benchmark price is being used for comparison. Likewise, the fact that a random customer or two may have noted that they save between 3% and 15% does not establish what the average savings for all members are. Moreover, even the savings figure is misleading because it does not account for the fees that dentists had to pay to be Kois members. Kois' membership fees, for example, at one time ranged between \$2,400 and \$6,000 per year. (Kois Sr., Tr. 239; CX 0290). Finally, as Mr. Kois Jr. explained at trial, because Burkhardt does not know the basis of what the claimed savings are compared to, simply asserting a 15% savings creates "credibility problems." (Kois Jr., Tr. 360-61).

With respect to the second sentence of the proposed fact, the figure is irrelevant because it is compared to catalog prices, without any evidence that dentists typically pay catalog prices.

Patterson's Response:

Patterson joins Schein's response. Additionally, at his IH, Kois stated, "It depends on what [the dentists] were buying before. If you are buying additional products, it is difficult to account for the supply savings. I can tell you what dentists have told me that they've saved, and it is a percentage based on their practice, so on average dentists tell me they save somewhere between three and 15 percent. Some dentists watch that more closely than others." (CX0321 (Kois Jr., IHT at 63)). At trial, Kois testified at trial that a document *from the fall of 2017* stated Burkhardt Dental would offer members "15 percent or more off retail price from most manufacturers." (Kois Jr., Tr. 327; CX4045).

Benco's Response:

The proposed finding refers to distributors other than Benco and, in doing so, seeks to use facts pertaining to another distributor to extend to Benco when, in fact, there is no evidence in the record justifying the proposed finding with respect to Benco.

Benco's unilateral economic self-interest was not to do business with buying groups because they came between Benco and its customers and did not permit Benco to reduce its costs. (BFF ¶¶ 903-928).

1729. Dr. Marshall found that it was profitable for Schein to do business with Smile Source in 2017. (CCFF ¶¶ 1681-1684).

Schein's Response:

False, for many reasons.

First, Dr. Marshall's 2017 Schein-Smile Source analysis failed to include the rebates and administrative fees that Schein paid under the contract. (Marshall, Tr. 3121-22). Once included, the analysis showed that Schein lost over [REDACTED] in 2017 as a result of discounting to Smile Source. (Marshall, Tr. 3121-22). Thus, the study does not support the conclusion asserted in CCFF 1729. (*See also* SF 1733-35).

Second, Dr. Marshall's and Complaint Counsel's conclusion depends on the incorrect assumption that Schein was not interested in contracting with Smile Source prior to 2017. Schein's repeated expressions of interest and 2014 bid invalidate any such assumption. (SF 1156-67, 1175, 1178, 1181).

Third, Dr. Marshall's profitability studies are fundamentally flawed for the reasons explained above and in SF 1660-1752. (*See also* SRF 1637-80). In a nutshell, Dr. Marshall's profitability studies cannot support Dr. Marshall's conclusion because (i) they

are contrary to the evidence of Schein's actual behavior towards buying groups; (ii) they find false positives outside of the alleged conspiracy period; (iii) they fail to analyze the but-for world; (iv) they are limited to two atypical buying groups; (v) they fail to distinguish between oligopolistic interdependence and conspiracy; (vi) they show the alleged conspiracy was irrational; and (vii) they show that Schein's business with Smile Source in 2012 and 2017 was unprofitable.

Patterson's Response:

Patterson joins Schein's response. Additionally, with regard to the statement that it was profitable for Schein to do business with Smile Source in 2017, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1730. To win the bid for Smile Source in 2017, Schein offered Smile Source an aggressive discount, even without contractual volume guarantees. (CCFF ¶¶ 1731-1733).

Schein's Response:

Complaint Counsel does not cite any record evidence in support of this assertion, but only cites its own proposed findings. None of those proposed findings support a characterization that the Smile Source discounts were “aggressive ... even without contractual volume guarantees.” Schein incorporates its specific responses to those proposed findings here. (SRF 1731-33).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1731. Under its 2017 agreement with Smile Source, Schein offered discounts to Smile Source members on a product formulary. [REDACTED]

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1732. Schein entered into an agreement with the buying group Smile Source in or around February 2017. (Cavaretta, Tr. 5628).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1733. Schein's 2017 agreement with Smile Source is not exclusive. In addition to Schein, Smile Source has agreements with other full-service distributors, such as Burkhart Dental, Atlanta Dental, and Nashville Dental. (Cavaretta, Tr. 5628-5629).

Schein's Response:

While not exclusive, Smile Source did not have full-service distributors in large areas of the country, and thus, in those areas, Schein was effectively the exclusive full-service distributor.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1734. In addition to Smile Source, Patterson has been in conversations with "five or so" buying groups since late 2017. (CX8028 (Lepley, Dep. at 37)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

1735. Following the conspiracy period, Patterson also entered into agreements with other buying groups, including Dr. Levin's buying group and the Lake Harbor group, in or around May 2018. (CX8028 (Lepley, Dep. at 37-39)).

Schein's Response:

No response.

Patterson's Response:

Complaint Counsel's use of the phrase "[f]ollowing the conspiracy period" is misleading. Patterson contracted with Dr. Levin's group and the Lake Harbor group more than three years after Complaint Counsel alleges the conspiracy ended. (CX8028 (Lepley, Dep. at 37-39); Kahn, Tr. 19).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

1736. [REDACTED]

Schein's Response:

No response.

Patterson's Response:

[REDACTED]

[REDACTED]

[REDACTED] Otherwise, Patterson has no specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

1737. INTENTIONALLY LEFT BLANK.

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

No response required.

c) Respondents Lost Business by Refusing to Discount to Buying Groups

1738. During the time when Patterson did not do business with buying groups, it lost customers and revenues. (See, e.g., CX3089 at 001 (Patterson lost "high quality / high producing" customers to the Kois Buyers Group that was served by Burkhart, noting that "the cut is deep to us all."); Guggenheim, Tr. 1665-1667).

Schein's Response:

The asserted fact restates CCFF 640. Schein incorporates its response to that proposed finding here. (SRF 640). The asserted fact is overbroad and not supported by

the cited evidence. The cited document and testimony, refer to the loss of just two customers in the San Diego region who joined the Kois Buyers Group. They do not speak of buying groups generally and do not discuss, let alone analyze, whether Patterson would have lost even more revenue by discounting to the Kois Buyers Group.

Patterson's Response:

The proposed finding is misleading and overbroad. The cited document is an email in which a local branch manager writes that he lost *two* customers to a particular buying group—no more. (CX3089 at 1; Guggenheim, Tr. 1665-1667).

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

1739. When Patterson lost the bid for Smile Source in 2017, it lost Patterson customers who were Smile Source members and would now purchase supplies from a competing distributor. (Rogan, Tr. 3556; *see also* CX3186 at 009 (in one region in one period, Patterson lost four customers with total sales of \$110,000)).

Schein's Response:

Mr. Rogan did not testify that Patterson lost customers “when Patterson lost the bid for Smile Source in 2017.” He just testified that Patterson has lost customers to the distributors supplying Smile Source, including Schein. (Rogan, Tr. 3556 (“Q. Patterson has lost customers to competitors, like Schein and others, that were supplying Smile Source? A. Yes.”)). He did not testify to any causal link between the loss of the Smile Source bid and the loss of the customers. Nor does CX 3186-009 establish that Patterson would have done better than the negative 0.2% growth reported for that period if Patterson had won the Smile Source contract.

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's business.

1740. On February 22, 2013, Benco sales representative Gerald Barto posted a message on Benco's internal bulletin board, stating that he lost two customers because Benco's no buying group policy did not allow him to extend discounts to multiple offices that were not all under common ownership. (CX1149 at 001-002; Ryan, Tr. 1078-1080).

Schein's Response:

The Benco sales representative did not lose sales to a buying group but rather to Patterson. (CX 1149-001 ("I tried to get 6 other offices under partner sharing but I couldn't because it was mixed with different owners. It worked in reverse because Patterson gave my two offices [the] same deal that the 6 offices had.")). This fact is the same as CCF 1294, and Schein incorporates its response to that fact here as well. (SRF 1294).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

In CX1149, Gerald Barto, a Benco sales employee, posted about a situation in which he was unable to qualify multiple dental offices – that lacked common ownership – for discounted pricing under Benco's Partner Sharing program. (CX1149; Ryan, Tr. 1078-79). Benco's Partner Sharing (PS) program provides volume discounts to individual

customers who purchase more than \$100,000 per year in dental supplies. (CX1084; CX1100; Benco FF ¶ 152). Another Benco employee, Jeff McAdoo first responds to Gerald Barto's post suggesting a way to seemingly avoid Benco's rules on Partner Sharing by ignoring the common ownership requirement inherent in Benco's Partner Sharing volume discount. At this point, Pat Ryan responds to clarify Benco's policy that "[t]o be recognized as one customer, one of the following three situations" must apply. (CX1149; Ryan, Tr. 1080 ("I reply with the situations where we recognize somebody as one customer.")). Therefore, the exchange between Mr. Barto, Mr. McAdoo, and Mr. Ryan contained in CX1149 was not about Benco being "afraid" of Buying Groups – or even about Buying Groups at all – but rather, about Benco's Profit Sharing discount program. (Ryan, Tr. 1218).

1741. Barto wrote on the bulletin board: "there has to be some program that we have (even if made up) for what just happened to me . . . I'm frustrated and just wanted to get off my chest. One Dr. was fighting for me to get all, instead I lost two." (CX1149 at 001).

Schein's Response:

The Benco sales representative did not lose sales to a buying group, but rather to Patterson. (CX 1149-001 ("I tried to get 6 other offices under partner sharing but I couldn't because it was mixed with different owners. It worked in reverse because Patterson gave my two offices [the] same deal that the 6 offices had.")). This fact is the same as CCFF 1295, thus, Schein incorporates its response to that fact here as well. (SRF 1295).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

In CX1149, Gerald Barto, a Benco sales employee, posted about a situation in which he was unable to qualify multiple dental offices – that lacked common ownership – for discounted pricing under Benco's Partner Sharing program. (CX1149; Ryan, Tr. 1078-79). Benco's Partner Sharing (PS) program provides volume discounts to individual customers who purchase more than \$100,000 per year in dental supplies. (CX1084; CX1100; Benco FF ¶ 152). Another Benco employee, Jeff McAdoo first responds to Gerald Barto's post suggesting a way to seemingly avoid Benco's rules on Partner Sharing by ignoring the common ownership requirement inherent in Benco's Partner Sharing volume discount. At this point, Pat Ryan responds to clarify Benco's policy that "[t]o be recognized as one customer, one of the following three situations" must apply. (CX1149; Ryan, Tr. 1080 ("I reply with the situations where we recognize somebody as one customer.")). Therefore, the exchange between Mr. Barto, Mr. McAdoo, and Mr. Ryan contained in CX1149 was not about Benco being "afraid" of Buying Groups – or even about Buying Groups at all – but rather, about Benco's Profit Sharing discount program. (Ryan, Tr. 1218).

1742. Benco sales representatives lost business by abiding by Benco's no buying group policy. (CCFF ¶¶ 1294-1295, 1740-1741, 1655, 1658, 1661).

Schein's Response:

Complaint Counsel does not cite any record evidence in support of this assertion, but only cites its own proposed findings. Schein incorporates its specific responses to those

proposed findings here. None of those proposed findings support an inference that Benco lost sales by not doing business with buying groups. (SRF 1294-95, 1740-1741, 1655, 1658, 1661).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding is general in nature and refers only to groups of proposed findings that are much narrower than the overly broad and unsupported proposition of this proposed finding.

Benco's unilateral economic self-interest was not to do business with buying groups because they came between Benco and its customers and did not permit Benco to reduce its costs. (BFF ¶¶ 903-928).

Benco developed its policy in 1996 and has applied it consistently before, during, and after Complaint Counsel's alleged conspiracy period. (BFF ¶¶ 166-270; 1285-1334).

2. Respondents' Concerns about their Competitors Dealing with Buying Groups Undermines Claims of an Independent Business Interest.

1743. Cohen reached out to Guggenheim about the New Mexico Dental Cooperative in February 2013, because he thought Guggenheim might not have known that Patterson was preparing a discounting arrangement with a buying group. Cohen testified: "I wanted to let him know about a situation in New Mexico that he might not have heard of that was taking place in one of their locations." (Cohen, Tr. 712).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

First, Chuck Cohen recalls focusing his attention on the claims in Dr. Mason's e-mail that the NMDC had "partnered with Patterson" and that the location for the NMDC's meeting was Patterson's Albuquerque, New Mexico office. (Cohen, Tr. 707-708). At that time, Chuck Cohen was not aware that Patterson had any Special Markets Division or any business operations focused on DSOs. (Cohen, Tr. 708). At that time, Chuck Cohen had not seen any evidence in the marketplace of Patterson selling to DSOs or any kind of group. (Cohen, Tr. 708). Therefore, Chuck Cohen's reaction to receiving Dr. Mason's e-mail was surprise to learn of the suggestion that Patterson was entering the DSO or group market because this would have been a significant shift in Patterson's business strategy. Accordingly, Chuck Cohen was "skeptical" of the truth of this information. (Cohen, Tr. 708-709).

Second, Chuck Cohen's rationale for forwarding the e-mail chain to Paul Guggenheim was that Cohen wanted to let Guggenheim know about a some noise about one of Patterson's branches that he might not have heard about and might want to know. (Cohen, Tr. 712-15). Chuck Cohen thought that Paul Guggenheim might not have known the information contained in Dr. Mason's e-mail, and if the shoe had been on the other foot, hoped that Guggenheim would have let him know of information about Benco that he might not have known. (Cohen, Tr. 712-13). It was not Chuck Cohen's intent to form any kind of agreement with Paul Guggenheim about anything. (Cohen, Tr. 713).

The February 8, 2013 e-mail from Chuck Cohen to Paul Guggenheim, and Guggenheim's response, is not probative evidence of any alleged conspiracy between Benco and Patterson.

1744. In August 2014, Benco's Pat Ryan told Benco's Mitchell Huber in an internal conversation about buying groups: "Shit. I know Burkhart got Nashville and Atlanta involved. If it's just Darby, I don't care as much...but when full-service guys get in..." (CX0015 at 001).

Schein's Response:

This is essentially the same quote that Complaint Counsel presented in CCFF 431. Schein incorporates its response to that proposed finding here. (SRF 431). In a nutshell, the asserted fact is incomplete and imprecise. As the full chat shows, the concerns were primarily about manufacturers offering "exclusive" discounts to buying group customers, and refusing to give such discounts to a Benco customer. (CX 0015-001).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Complaint Counsel asked Pat Ryan at his deposition about the quoted phrase from the cited exhibit numerous times. (Ryan, Dep. at 344-46). Ryan consistently explained that he was simply distinguishing between Darby and the other distributors on the basis that Darby did not have a service department. (Ryan, Dep. at 344-46). Accordingly, Darby's business model has a more narrow appeal to dentists. (Ryan, Dep. at 344-46).

1745. On October 7, 2014, Ryan told Chuck Cohen via text message: “Schein just dumped the last GPO they had. In Utah.” (CX0057 (Excel worksheet “Chats” tab row 100); *see also* CX0057_EXCERPT at 009). Cohen understood that Ryan was telling him that Schein had stopped working with their last buying group in Utah. (Cohen, Tr. 570-571).

Schein’s Response:

Complaint Counsel cites to internal texts in which Pat Ryan informs Chuck Cohen that Schein had terminated the Dental Co-Op over three months after Schein ended the relationship. (SF 615; RX 2947 (Cavaretta, Dep. at 68-69)). There is no evidence that this information came from anything more than an exchange of typical competitive intelligence and does not reflect any inter-firm communications between Schein and Benco. (Cohen, Tr. 909-10 (noting that this was “simply speculation about Schein’s views about ... buying groups” and there were no discussions with Mr. Sullivan about the Dental Co-Op, and denying that there was an agreement “to slowly terminate buying groups over time.”); *see also* SF 591-615). Moreover, Mr. Ryan’s comment that the Dental Co-Op was “the last GPO [Schein] had” was wrong. In 2014, Schein was doing business with Alpha Omega, the Long Island Dental Forum, OrthoSynetics, Comfort Dental, Dental Partners of Georgia, Advantage Dental, Stark County Dental, Universal Dental Alliance, Dental Gator, and MeritDent, among others. (*See, e.g.*, SF 673, 979, 1627). Moreover, around the same time as Mr. Ryan’s text message, Schein was beginning negotiations with Klear Impakt, which would result in a contract in August 2015. (SF 815).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit and testimony.

First, Pat Ryan never spoke to anyone at Schein about the Dental Co-Op of Utah. (Ryan, Tr. 1257). Ryan is just speculating without personal knowledge. (Cohen, Tr. 910).

Second, Cohen understood Ryan's text only to contain unverified market intelligence that he did not know whether it was accurate or not. (Cohen, Tr. 909). Chuck Cohen did not know whether the Dental Co-Op of Utah was Schein's last GPO. (Cohen, Tr. 909).

Third, Cohen did not know why Schein's relationship with the Dental Co-Op of Utah ended. (Cohen, Tr. 909-910). Cohen never spoke to Tim Sullivan about the Dental Co-Op of Utah. (Cohen, Tr. 910).

1746. In July 2017, Ryan alerted Cohen to the fact that Schein was working with 5-10 buying groups. On July 12, 2017, Ryan told Cohen via text message: "Schein recognizing 5-10 GPOs." Cohen responded to Pat Ryan: "Which GPOs? Do you know the deal?" Ryan responded: "Smile[]Source for sure. They're opening the door. They don't think they can grow now without it." (CX1527 (Excel worksheet "Chats" tab rows 39-41); *see also* CX1157_EXCERPT at 004).

Schein's Response:

There is no evidence that this text message reflects anything more than an exchange of typical competitive intelligence. And there is no evidence to support Complaint Counsel's argument that the asserted fact indicates a change in Schein's dealings with buying groups. (CC Br. 38 & n.327). As an initial matter, an internal text message between Benco employees is not evidence of Schein's business practices. The evidence shows that Schein has always done business with at least "5-10" buying groups starting well before and continuing through the alleged conspiracy period, including Alpha Omega, Long Island Dental Forum, the Dental Co-Op, Dental Partners of Georgia, OrthoSynetics, Smile Source, Comfort Dental, Advantage Dental Group, the Denali Group, Dentists for a Better Huntington, Khyber Pass, Dental Associates of Virginia, Intermountain Dental Associates,

Universal Dental Alliance, Nevada Dental Cooperative, Steadfast Medical, MeritDent, the Schulman Group, Dental Gator, Klear Impakt, Stark County Dental Society, Corydon Palmer Dental Society, Tralongo, Breakaway, and others. (SF 377-1335). Schein was not “opening the door” in July 2017 – it had long been open.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited exhibit.

Pat Ryan was simply what he had observed in the market, that Smile Source was doing business with Schein in July 2017. (Ryan, Tr. 1137-38).

1747. After learning about Schein doing business with buying groups in 2017, Cohen responded to Ryan: “Interesting...We have to push EDA to [the] next level.” (CX1527 (Excel worksheet “Chats” tab row 42); see also CX1527_EXCERPT at 004). Cohen testified that EDA referred to the Elite Dental Alliance. (Cohen, Tr. 479-480).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

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

on EDA's wholly unique characteristics, which were different than any other buying group, Benco determined that it was in its own unilateral economic interest to partner with Cain Watters on EDA. (Cohen, Tr. 469; 820-23). (See also BFF ¶¶ 232-70).

Benco determined that it was in its economic interests to partner with Cain Watters and EDA. (Cohen, Tr. 823-824), and decided to partner with Cain Watters on EDA on a one-year trial basis, and when the trial worked out well, Benco decided to continue on. (Cohen, Tr. 463; 823). Benco announced its partnership with Cain Watters and EDA at its sales meeting in early 2016. (Cohen, Tr. 823).

EDA's one-year trial basis was ending around the time of the cited exhibit and Cohen was reiterated, in his text message, the success so far of EDA and Benco's desire to push EDA to the next level. (Cohen, Tr. 479-80). Cohen explained that "the market is changing and we need to make sure that our offering in the segment is as good as it can be." (Cohen, Tr. 480-81).

1748. After learning from Ryan that Schein was recognizing 5-10 GPOs in July 2017, Cohen sent this information to Julie Radzynski via text message. Julie Radzynski was Benco's Vice President of Business Development, and was in charge of Benco's relationship with the Elite Dental Alliance. (Cohen, Tr. 480). Cohen texted Radzynski "[j]ust heard from Pat that Schein is recognizing 5-10 GPOs. We need to get EDA to the next level." (Cohen, Tr. 480; *see also* CX1527 (excel worksheet "Chats" tab row 161); *see also* CX1527_EXCERPT at 018).

Schein's Response:

CCFF 1748 is duplicative of CCFF 1746, and Schein incorporates its response to that proposed finding here. (SRF 1746).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete, inaccurate, and mischaracterizes the cited testimony.

EDA is structurally different than any buying group Benco has ever seen. It is more like a DSO, but without common ownership. (Cohen, Tr. 818-22; Ryan, Tr. 1228). Based on EDA's wholly unique characteristics, which were different than any other buying group, Benco determined that it was in its own unilateral economic interest to partner with Cain Watters on EDA. (Cohen, Tr. 469; 820-23). (See also BFF ¶¶ 232-70).

Benco determined that it was in its economic interests to partner with Cain Watters and EDA. (Cohen, Tr. 823-824), and decided to partner with Cain Watters on EDA on a one-year trial basis, and when the trial worked out well, Benco decided to continue on. (Cohen, Tr. 463; 823). Benco announced its partnership with Cain Watters and EDA at its sales meeting in early 2016. (Cohen, Tr. 823).

EDA's one-year trial basis was ending around the time of the cited exhibit and Cohen was reiterated, in his text message, the success so far of EDA and Benco's desire to push EDA to the next level. (Cohen, Tr. 479-80). Cohen explained that "the market is changing and we need to make sure that our offering in the segment is as good as it can be." (Cohen, Tr. 480-81).

B. Schein's Arguments Concerning the Alleged Agreement are Contradicted by the Evidence.

1. Schein Enforced a Policy against Buying Groups during the Conspiracy Period.

1749. Sullivan and other Schein executives rejected buying groups, and instructed Schein's sales force not to engage with buying groups by referring to a policy not to deal with buying groups. (CCFF ¶¶ 696-870).

Schein's Response:

False.

Complaint Counsel does not cite any record evidence in support of this assertion, but only cites its own proposed findings. Schein incorporates its specific responses to those proposed findings here.

Substantively, there is no evidence of Mr. Sullivan rejecting a buying group during the alleged conspiracy period. Nor is there evidence of him (or any other Schein executive) instructing the Schein sales force not to engage with buying groups or referring to a policy not to deal with buying groups. Such a policy did not exist.

Schein has always evaluated each buying group on a case-by-case basis, primarily looking for exclusivity, compliance, and stickiness. (Meadows, Tr. 2495, 2506, 2544; Sullivan, Tr. 4088, 4098-99; Cavaretta, Tr. 5574-76; Titus, Tr. 5199-202; Foley, Tr. 4638-39, 4614-15; *see also* RXD 0015-001). It has worked with buying groups from as early as the late 1990s through the present. (Sullivan, Tr. 4020 (Schein provided discounts to and competed for the business of new buying groups for Mr. Sullivan's "entire 21 years at Schein"); Titus, Tr. 5191-93 (Ms. Titus, who started at Schein in 1994 and retired in 2018, testified: "I worked with buying groups for essentially my entire career up until the time I retired."); Cavaretta, Tr. 5535-36 (confirming that Schein was working with buying groups when he started in 2001 and never stopped working with buying groups during his 18 years at Schein); Foley, Tr. 4600 ("I'd been working with buying groups from the day I started with Special Markets [in 2009] until the day I retired [in 2016]."); *see also* (SF 377-1335).

And every Schein witness who testified at trial denied giving and/or receiving any instructions not to do business with buying groups. (Sullivan, Tr. 4019-20, 4352; Cavaretta, Tr. 5530-34, 5592; Meadows, Tr. 2468, 2476, 2578, 2580, 2594-95, 2620-21;

Foley, Tr. 4601-02; Steck, Tr. 3709-10; Titus, Tr. 5192-93, 5247-48). Nor was there any policy at Schein not to do business with buying groups. (*E.g.*, Sullivan, Tr. 4086-87). To the contrary, Mr. Sullivan specifically directed Mr. Cavaretta to come up with a strategy to work with buying groups during the alleged conspiracy. (Cavaretta, Tr. 5530-31; *see also* Titus, Tr. 5221).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1750. Schein rejected or instructed sales representatives against working with numerous buying groups or potential buying groups during the conspiracy period, including but not limited to: (1) the Academy of General Dentistry Buying Group (CX0166 at 002 (August 25, 2011, email from Schein's Cavaretta: "I haven't heard anything about this but I doubt this will happen. Once the buying groups entire [*sic*] our market the dental model as we know it will change"); Cavaretta, Tr. 5646-5648); (2) Business Intelligence Group (CX0165 at 001 (February 1, 2011, email from Schein's McCarroll to Cavaretta, Cavaretta writes: "[d]ealing with GPOs is incredibly risky on many fronts." to which McCarroll replies "I will let them know that we only deal with dental practices directly.")); (3) Kois Buyers Group (CX2469 at 002-003 (September 8, 2014, email from Schein's Sullivan to Muller regarding announcement of the Kois Buyers Group: "I still believe this is a slippery slope . . . don't plan to take the lead role."); CX2470 at 001 (September 9, 2014, email from Schein's Sullivan to Breslawski regarding the Kois Buyers Group: "I don't think we want to be the first in this game."); Sullivan, Tr. 4005-4006); (4) Pacific Group Management Services (CX2251 at 001 (July 17, 2014, email from Schein's Titus to Showgren regarding PGMS GPO: "It went to Tim [Sullivan] and he shot it down."); (5) Synergy Dental Partners (CX0185 at 001 (July 17, 2011, email from Schein's Sullivan to Mlotek: "I don't think you will ever see a full service dealer get involved with GPOs."); (6) Unified Smiles (CX2062 at 001-002 (December 21, 2011, email from Schein's Foley to Unified Smiles' Knysz: "we no longer participate in Buying Groups."); and (7) Pearl Network (CX2456 at 001 (December 7, 2011, email from Schein's Sullivan to Kess: "I am still of position that we do NOT want to lead in getting this initiative started in dental.")).

Schein's Response:

In general, since at least 2010 when HSD and Special Markets leadership established guidance for evaluating buying groups, Schein declined to partner with buying groups that did not have the ability to drive volume or otherwise bring value to Schein. (E.g., SF 206-07, 212-16, 446-67, 1078-81). Complaint Counsel does not contest that the 2010 Guidance was established before the alleged conspiracy or that it constitutes legitimate and unilateral business considerations.

As to the seven specific examples cited in CCFF 1750, Schein offered discounts to some where it made sense, declined to do so where it did not, and attempted to negotiate partnerships with others:

1. **Academy of General Dentistry.** Three years after the email Complaint Counsel cites, and during the alleged conspiracy, Schein “presented an option to work with [the Academy of General Dentistry] offering several of [Schein’s] Business Solutions products ... at a discount and drive this program at the local and national level. This has been approved by ... Tim [Sullivan] and AGD Executive Team.” (CX 2439-002).
2. **Business Intelligence Group.** In February 2011, *before the alleged conspiracy*, the Business Intelligence Group, a consulting firm, approached Schein seeking to negotiate a Groupon-based discount for whitening products. (SF 446-67; CX 0165). Special Markets’ Kathleen Titus declined, noting that the participants are all “Private Practice customers which rules [Special Markets] out.” (SF 451-53; CX 0165-002). While she referred the matter to Joe Cavaretta for HSD’s consideration, she cautioned that cannibalization was likely to be high, as “their targets are invariably going to be existing HSD customers.” (SF 452; CX 0165-002). Mr. Cavaretta concurred. (SF 454-55; CX 0165).
3. **Kois Buyers Group.** Schein *tried to negotiate* with the Kois Buyers Group, but it demanded a contract before providing the information Schein requested and decided to go with Burkhart before negotiations with Schein concluded. (SRF 809, 928; SF 893-913).
4. **Pacific Group Management Services.** After a thorough evaluation, Mr. Cavaretta decided not to move forward with Pacific Group Management Services because it would not commit to driving compliance. (SF 1053-72; SRF 794, 796, 798, 931).

5. **Synergy Dental Partners.** Schein declined to do business with Synergy Dental over a year *before the start of the alleged conspiracy* and did not change that position, because Synergy had no ability to drive compliance. (SF 87, 212-16; SRF 408, 954).
6. **Unified Smiles:** Mr. Foley decided not to offer Unified Smiles a contract because it insisted on DSO pricing despite having no members and no compliance. (SF 1288-1301; Foley, Tr. 4691; SRF 719-20, 743, 1628).
7. **PEARL Network:** Consistent with Schein's concerns over cannibalization, Schein decided not to pursue the PEARL Network because given Schein's market share, contracting with PEARL "could be a disaster...." (SF 1078-81).

Of course, Schein continued to do business with new and existing buying groups during the alleged conspiracy period as well. These included MeritDent, Sunrise Dental, Dental Partners of Georgia, the Schulman Group, Smile Source, Dental Gator, Klear Impakt, Breakaway, Alpha Omega, Long Island Dental Forum, OrthoSynetics, Comfort Dental, Advantage Dental, Stark County Dental, and the Universal Dental Alliance. (S. Br. 35-63; SF 1627). The list goes on.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

2. Schein's Asserted "Buying Groups" Do Not Disprove its Participation in the Conspiracy.

1751. Acuity is an entity whose members are hospitals, hospital clinics, and dental schools. (RX2962 (Wingard, Dep. at 21)). Schein only entered into an agreement with Acuity in 2018. (RX2962 (Wingard, Dep. at 23); CX2919 at 001 (February 5, 2018, email from Schein's Harrison referencing Acuity agreement just signed by Meadows)). Acuity changed its name in 2017, and was previously known as the Greater New York Hospital Association, and its membership includes 300 hospital and health systems and health related facilities. (CX2922 at 001).

Schein's Response:

No response, other than to note that Schein did not list Acurity as a buying group of independent dentists. (See SF 375-1335, 1627).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1752. Schein first began working with Advantage Dental in 2009. (CX8005 (Muller, Dep. at 238)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1753. The Arizona Association of Community Health Centers is an entity that represents Community Health Centers. (CX8005 (Muller, Dep. at 239)).

Schein's Response:

No response, other than to note that Schein did not list Arizona Association of Community Health Centers as a buying group of independent dentists. (See SF 375-1335, 1627).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1754. Ascension Health Resource and Supply Management Group, LLC is a medical group purchasing organization that serves facilities run by Catholic charities, such as hospitals and clinics. (CX8005 (Muller, Dep. at 239); CX2706 at 018 (Schein's 2015 Agreement with Ascension defining Ascension Health as a non-profit corporation "comprised of health ministries, hospitals, facilities and affiliates")). Hal Muller testified that Ascension Health is a "traditional medical GPO" and "there are no solo practitioners involved in this agreement." (CX0309 (Muller, IHT at 191-192)).

Schein's Response:

No response, other than to note that Schein did not list Ascension Health Resource and Supply Management Group as a buying group of independent dentists. (See SF 375-1335, 1627).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1755. As of August 2015, Schein considered Breakaway to be a combination of a DSO and an MSO that centrally managed and controlled its members' dental products purchases. (Cavaretta, Tr. 5633; CX8033 (Cavaretta, Dep. at 237-238); CX2482 at 001). In August 2015, Cavaretta told Sullivan: "Break away is a DSO/MSO combo with complete control of the check book." (CX2482 at 001). By "complete control of the check book," Cavaretta testified that he meant that Breakaway owned or controlled the practices. (CX8033 (Cavaretta, Dep. at 237-238)).

Schein's Response:

Breakaway is a hybrid buying group. As Complaint Counsel notes in CCFF 873, Breakaway has a “GPO component.” A few Breakaway offices are owned by the group’s founder (DSO-like), some offices receive Breakaway’s suite of nonclinical business support services (MSO-like), and other offices elect to receive discounts only (buying group). (CX 2190-003 (an internal Schein document listing Breakaway’s “several divisions”)). Breakaway’s “smallest arm” is their owned offices, while the group’s “largest arm” are its “support members, which [is] similar to ... a buying group arm.” (CX 8009 (Wingard, Dep. at 156); SF 405). In fact, Randy Foley referred to Breakaway as the “anti-DSO,” because the group’s “whole premise ... is that they assist dentists, private dentists, that are working with DSOs on how to break away from the DSO and go into practice by themselves.” (Foley, Tr. 4634; SF 406).

Complaint Counsel cites a 2015 email from Mr. Cavaretta that reflected his understanding of Breakaway at the time. But Mr. Cavaretta was not responsible for the negotiations with Breakaway; Ms. Titus was. (RX 2718). As Ms. Titus wrote, “There is no question” that “Breakaway’s business model has a GPO component and we are supporting it. I would compare this to something like Smile Source.” (RX 2718-001). On June 29, 2015, Schein formalized its historical relationship with a new written agreement. The agreement did not require Breakaway to have any ownership interest in the member locations, but did prohibit it from offering the discounts to dentists that did not commit [REDACTED] of their business to Schein. (RX 2348). Other internal Schein documents similarly refer to Breakaway as a buying group. (CX 2088).

Mr. Cavaretta’s comment that Breakaway was a “DSO/MSO combo” simply meant that it was a hybrid, with owned locations and independent practice locations. While

Complaint Counsel reads the term “MSO” synonymously with “DSO,” the term MSO can include buying groups that offer some management services. (*See, e.g., Meadows, Tr. 2419-20* (“Q. And similarly, ... you used the term ‘GPO’ to describe anything that generally looked like a buying group? A. I would use that term or ‘**MSO**’ or ‘buying group. Judge Chappell: MSO? A. Managed service organization. ***It’s just another term that a buying group would like to refer to themselves as versus a buying group....***”)(emphasis added)). Mr. Cavaretta’s comment that it had “control of the checkbook” simply meant that they had sufficient control to drive compliance. As Mr. Cavaretta testified, he viewed Breakaway “really ... [as] more of a buying group.” (Cavaretta, Tr. 5633-34, 5655). Mr. Cavaretta would know – he is now the president of the company that owns Breakaway. (Cavaretta, Tr. 5599).

Importantly, Benco also viewed Breakaway as a buying group, and recognized that Schein did business with them. (CX 0010 (January 15, 2015 email exchange with Pat Ryan)). Thus, if there were a conspiracy, one would expect Mr. Ryan to immediately reach out to Schein to confront it about Schein’s buying group activities. But there is no evidence or allegation that such a communication ever occurred.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1756. As of August 2015, Schein did not believe that Breakaway was a buying group or had a buying group component. (CX8033 (Cavaretta, Dep. at 238-39) (“Q. So as of the time of this email in August 2015, you weren’t aware of the buying group component? A. No.”); CX2482 at

001). At trial, Cavaretta testified that he did not know whether he aware of any buying group component to Breakaway in August 2015. (Cavaretta, Tr. 5633-5634). Cavaretta's testimony was contradicted by his prior sworn deposition testimony in this matter, in which he testified that he was not aware of any buying group component to Breakaway in August 2015. (Cavaretta, Tr. 5636-5637; CX8033 (Cavaretta, Dep. at 238-39)). Cavaretta's trial testimony is also contradicted by Cavaretta's own emails from 2015, in which he stated that Breakaway was a combination of a DSO and an MSO. (CX2482 at 001).

Schein's Response:

The asserted fact is essentially the same as CCFF 1755 and Schein incorporates its response to that proposed finding here. (SRF 1755; *see also* SF 402-445 (detailing the nature of Breakaway's buying group operation and Schein's business with it)). As noted in CCFF 873, Schein was aware of Breakaway's "GPO component" in May 2014. (CCFF 873; SRF 873; RX 2385; Titus, Tr. 5296). Complaint Counsel's attempt to create a contradiction between Mr. Cavaretta's trial testimony and his deposition is misplaced. As an initial matter, there is no dispute that Breakaway in fact had a buying group component, that internal Schein documents consider Breakaway to be a buying group, and that the Schein-Breakaway contract does not require any ownership. The question of how Mr. Cavaretta, who was not primarily responsible for negotiations with Breakaway, categorized the group is therefore not particularly relevant.

Moreover, there is no contradiction between Mr. Cavaretta's deposition and trial testimony, or with his 2015 emails. At his deposition, Mr. Cavaretta testified that his August 2015 email reflected his understanding of Breakaway "at the time of the email." (CX 8033 (Cavaretta, Dep. at 237-39)). He also notes that he didn't know if he "knew that it was ... that involved" in members' purchasing decisions, as he had not yet met with them. (CX 8033 (Cavaretta, Dep. at 238)). After the email, he and Ms. Titus had further discussions with Breakaway in which they heard about Breakaway's "buying group component" directly. (CX 8033 (Cavaretta, Dep. at 238-39)). This is perfectly consistent

with Mr. Cavaretta's trial testimony. (Cavaretta, Tr. 5633-34 (distinguishing his understanding "at the time of this email" from after "due diligence ... [after which] we understood that it was more of a buying group")).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1757. Children's Hospital Association is an organization comprised of children's hospitals, and it does not represent private practice dentists. (CX8005 (Muller, Dep. at 240)).

Schein's Response:

No response, other than to note that Schein did not list Children's Hospital Association as a buying group of independent dentists. (See SF 375-1335, 1627).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1758. Colorado Community Health Network is an entity that represents Community Health Centers, and its members do not include any private practice dentists. (CX8005 (Muller, Dep. at 240)).

Schein's Response:

No response, other than to note that Schein did not list Colorado Community Health Network as a buying group of independent dentists. (See SF 375-1335, 1627).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1759. Comfort Dental is a customer that Schein considers to be an elite DSO. (Sullivan, Tr. 3969 (“Q. Comfort Dental was an elite DSO? A. It was.”); CX2021 at 013 (Tim Sullivan identifying Comfort Dental as an “Elite DSO” customer)).

Schein's Response:

False. The asserted fact is similar to CCFF 1099 and Schein incorporates its response to that proposed finding here. Comfort Dental's members consist of private practices focused on pediatric dentistry. (SF 494; Foley, Tr. 4632-33). Comfort Dental is a “franchisee/franchisor-type buying group, similar to Smile Source.” (SF 495; Foley, Tr. 4632-33). While some internal Schein documents refer to Comfort Dental as an “Elite DSO” (SF 502, 504), Mr. Sullivan explained that he felt Comfort Dental exhibited “primarily buying group type attributes.” (SF 504). Special Markets managed the relationship with Comfort Dental, and Special Markets confirmed that Comfort Dental is a buying group. (Foley, Tr. 4632-33). Mr. Foley testified that Comfort Dental is not a DSO, and instead is a “very anti DSO” group that “never attended any DSO meetings.” (SF 507; Foley, Tr. 4633). In internal documents, Mr. Foley consistently described Comfort Dental's business model as “more of a GPO, Franchisor-Franchisee.” (SF 507; CX 2109-002). Moreover, Mr. Muller noted that a buying group with “500 offices moving to 1500 clearly fall into the elite-DSO model” even though “they are all individually owned” “like

Comfort Dental[,]" as groups like this were "sophisticated buying group[s] – their goal is to help offices compete with the DSOs...." (CX 2119-001).

The "elite DSO" categorization is used for Schein's internal accounting purposes between Special Markets and HSD rather than a description of the precise organizational structure of a particular customer. (SF 504; RX 2767-002). As Mr. Meadows testified at trial, a group that Complaint Counsel agrees is a buying group – Dental Gator – was also "rolled into the elite DSO" category within Schein. (SF 504; Meadows, Tr. 2657).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1760. The Commonwealth Purchasing Group is an entity that represents Community Health Centers, and its members do not include any private practice dentists. (CX8005 (Muller, Dep. at 241)).

Schein's Response:

No response, other than to note that Schein did not list Commonwealth Purchasing Group as a buying group of independent dentists. (See SF 375-1335, 1627).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1761. Council Connections is an entity comprised of Community Health Centers, and its members do not include any private practice dentists. (CX8005 (Muller, Dep. at 241)).

Schein's Response:

No response, other than to note that Schein did not list Council Connections as a buying group of independent dentists. (See SF 375-1335, 1627).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1762. Louisiana Primary Health Care Association is an entity comprised of Community Health Centers, and its members do not include any private practice dentists. (CX8005 (Muller, Dep. at 251); RX2270 at 017 (2011 supply agreement between Schein and Louisiana Primary Care Association stated: "Schein is offering [Louisiana Primary Health Care Association] members the discount schedule it has established for Primary and Community Health Centers across the nation.")).

Schein's Response:

No response, other than to note that Schein did not list Louisiana Primary Health Care Association as a buying group of independent dentists. (See SF 375-1335, 1627).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1763. OrthoSynetics is a MSO. (RX2276 at 002 (2014 Schein Primary Vendor agreement with OrthoSynetics states: "OrthoSynetics is a company that manages, owns or is under contract to

provide services to specific dental offices.”)). OrthoSynetics has centralized purchasing and provides management and hiring services for its offices. (Foley, Tr. 4529-4532; CX2710 at 001).

Schein’s Response:

False. While Schein’s agreement with OrthoSynetics states that “OrthoSynetics is a company that manages, owns *or* is under contract to provide services to specific dental offices,” Mr. Foley, who negotiated the agreement with OrthoSynetics, confirmed that OrthoSynetics does not own or formally manage its members’ offices. (RX 2276-002 (emphasis added); SF 1034; Foley, Tr. 4625, 4627). Moreover, OrthoSynetics fits Complaint Counsel’s own definition of a buying group: it is comprised of individual private practice orthodontists that receive discounts based on the group’s collective purchases. (SF 1026, 1036; Foley, Tr. 4627; CX 0309 (Muller, IHT at 202); CX 8009 (Wingard, Dep. at 92)).

Patterson’s Response:

Patterson joins Schein’s response. Furthermore, Patterson viewed OrthoSynetics as a buying group during the alleged conspiracy period, as internal documents and witness testimony confirm. (CX3081 at 1 (June 29, 2014 internal Patterson email asking to discuss the “pros/cons” of “buying group” OrthoSynetics); McFadden, Tr. 2728 (“Orthosynetics is a quasi-buying group that focus[es] on orthodontics”). Otherwise, Patterson has no specific response.)).

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1764. Corydon Palmer Dental Society was not a buying group; it was strictly a rebate program. (Baytosh, Tr. 1889-1890).

Schein's Response:

False. Internal Schein documents refer to Corydon Palmer as a buying group. (CX 2287-006). Notably, in CCFF 1767, Complaint Counsel cites CX 2287 for the proposition that the groups listed in the document, including Corydon Palmer, are in fact buying groups. Complaint Counsel's attempt to have it both ways – with Corydon Palmer being a buying group when it wants it to be and not being a buying group when it does not suit their purposes – is improper.

While Complaint Counsel argues that Corydon Palmer does not qualify as a buying group in their eyes because Corydon Palmer chose a rebate program with Schein over a direct discount program (Schein had offered both), Schein considered Corydon Palmer to be a buying group. (SF 518-45; (CX 8020 (Brady, Dep. at 210-12); Baytosh, Tr. 1883-84, 1906-07, 1910-12). From Schein's perspective, its contracts with Corydon Palmer are no different than a contract with a buying group that chose up-front discounts or passed the rebates on to its members. (SF 546). Corydon Palmer decided to use the rebates to keep membership dues low. (SF 544; Baytosh, Tr. 1890-91, 1904).

The more Corydon Palmer members purchased from Schein, the greater the rebate, and there is no restriction in Schein's agreement with Corydon Palmer on what Corydon Palmer can do with its rebate. (SF 515, 543; Baytosh, Tr. 1913; CX 4092; RX 2033). Schein's agreement with Corydon Palmer provides a monetary benefit to those dentists by helping reduce their membership fees based on their collective purchases. (SF 546). As such, Corydon Palmer is a buying group under Complaint Counsel's definition. (SF 526).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1765. A rebate program for a dental society in exchange for free exhibit space is not a buying group. (Baytosh, Tr. 1888-1890 (Corydon Palmer Dental Society is not a buying group), 1892-1893, 1895-1897 (Corydon Palmer signed a contract with Schein for rebates paid to the society. The contract included free exhibit space at the society's continuing education seminars); [REDACTED]).

Schein's Response:

The asserted fact is misleading. The rebate program Schein established with Corydon Palmer was akin to a program Schein had already established with another local dental society in Ohio, the Stark County Dental Society, under which Schein would pay a rebate to the society based on a percentage of the members' total purchases from Schein. (SF 530; Baytosh, Tr. 1883, 1890). Under both the 2015 and 2017 agreements with Corydon Palmer, Schein agreed to pay Corydon Palmer a rebate calculated as a percentage on members' "total merchandise purchases" from Schein. (SF 514; CX 4092; RX 2033). The more Corydon Palmer members purchased from Schein, the greater the rebate. (SF 515; Baytosh, Tr. 1913). That the agreement also provided for exhibit space does not change the fact that Schein effectively sold supplies to Corydon Palmer members at a lower price based on their collective purchases. (SF 542-43). From Schein's perspective, its contracts with Corydon Palmer were in effect no different than a contract with a buying group that negotiated up-front discounts for, or passed the rebates on to, its members. (SF 546). The fact remains that *Schein* considered Corydon Palmer a buying group. (SF 545; CX 8020 (Brady, Dep. at 210-12)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1766. In 2015, Corydon Palmer signed a contract with Schein for rebates payable to the Corydon Palmer Dental Society. (Baytosh, Tr. 1888-1890, 1892-1893, 1895-1897; [REDACTED]). Under the agreement, Corydon Palmer dentist members did not receive a discount off catalog pricing from Schein. (Baytosh, Tr. 1892-1893; [REDACTED]).

Schein's Response:

Corydon Palmer decided to benefit its members by using the rebates to help keep their membership dues low. (SF 515, 543-44; Baytosh, Tr. 1903-04, 1913; CX 4092; RX 2033). From Schein's perspective, its relationship with Corydon Palmer was no different than providing a discount off catalog price.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1767. Schein executives did not know that Schein engaged with certain buying groups and learned about them only after the conspiracy. On May 10, 2016, Brady wrote to Steck: "Want to make sure you aren't in the dark on this. . . .We discovered four existing buying groups dating back to 2004." (CX2287 at 001.) Steck was not aware of those four existing buying groups dating to 2004. (CX8031 (Steck, Dep. at 129) ("Q. Were you aware of the four existing buying groups dating to 2004? A. No.")). On May 10, 2016, Steck referred to the four existing buying groups as

“inherited messes.” (CX2287 at 001) (“[U]nfortunately, part of your job is cleaning up inherited ‘messes’.”)).

Schein’s Response:

False.

At most, the cited testimony is that Mr. Steck did not recall the four specific buying groups referenced in CX 2287, *i.e.*, Stark County, Corydon Palmer, Dentists for a Better Huntington, and Long Island Dental Forum. (*See* CX 2288). (As an aside, Corydon Palmer, which Complaint Counsel now contends is a buying group, was opened during the alleged conspiracy period, and thus, does not “dat[e] back to 2004”). Mr. Steck’s testimony does not establish that Schein executives did not know about these buying groups, just that Mr. Steck did not recall them. On May 10, 2016 – over a year after the alleged conspiracy ended – Mr. Brady sent Mr. Steck an email noting a problem with the rebates, namely that they were being paid directly to dentists, exceeded the 3% safe-harbor, and could violate the anti-kickback statutes. Mr. Brady was responsible for addressing this legal compliance issue, which is what Mr. Steck referred to when he said, “part of your job is cleaning up inherited ‘messes.’” (CX 2287; CX 8031 (Steck, Dep. at 128-29)).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1768. MB2 Dental Solutions (“MB2”) is a DSO. It was a growing and important customer for Schein’s Special Markets Division, doing over \$2 million in business with Schein in 2014, and considered one of the top 50 customers for Schein Special Markets. (CCFF ¶¶ 1769, 1776-1779).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1769. MB2 is a DSO. (Puckett, Tr. 2201-2202).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1770. Justin Puckett is the President of MB2. (Puckett, Tr. 2201).

Schein's Response:

No response, other than to note that Mr. Puckett was also part owner of the Dental Gator buying group. (Puckett, Tr. 2222).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1771. MB2 currently has 112 locations in eight states. (Puckett, Tr. 2203-2204).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1772. All of MB2's locations, or affiliate practices, are under common ownership. (Puckett, Tr. 2205).

Schein's Response:

No response, assuming that the reference to MB2 excludes Dental Gator.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1773. Each of MB2's locations operates as a dental practice or office. (Puckett, Tr. 2207).

Schein's Response:

No response, assuming that the reference to MB2 excludes Dental Gator.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1774. MB2 provides a number of centralized management services to its locations including marketing, billing and collections, compliance, legal, IT, procurement, and a call center. (Puckett, Tr. 2205-2206).

Schein's Response:

No response, assuming that the reference to MB2 excludes Dental Gator.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1775. As a part of its procurement services, MB2 centrally purchases dental products for all of its locations, including merchandise and equipment. (Puckett, Tr. 2206).

Schein's Response:

No response, assuming that the reference to MB2 excludes Dental Gator.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1776. MB2 is a large DSO customer of the Schein Special Markets Division. (Puckett, Tr. 2212-2213; Sullivan, Tr. 3989). MB2 has been a Schein customer for 11 years. (Puckett, Tr. 2210).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1777. MB2 is one of the top 50 customers for Schein Special Markets. (Foley, Tr. 4570; CX8005 (Muller, Dep. at 166)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1778. Schein considered MB2 an "elite DSO" and a "very" important DSO customer. (Foley, Tr. 4570).

Schein's Response:

No response, assuming "MB2" excludes Dental Gator.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1779. Puckett believed MB2 was an important customer of Schein because MB2 spent a lot of money with Schein. (Puckett, Tr. 2214).

Schein's Response:

No response, other than to note that Mr. Puckett's belief as to the importance Schein places on MB2 as a customer is inadmissible speculation and irrelevant.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1780. In the past twelve months, MB2 purchased approximately \$8 million from Schein. (Puckett, Tr. 2214).

Schein's Response:

No response, other than to note that recent purchases made by a DSO outside of the alleged conspiracy period are irrelevant.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1781. MB2's annual purchases through Schein has grown each year since MB2s inception. (Puckett, Tr. 2214).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1782. In 2014, MB2 was doing at least \$2 million or more in merchandise business with Schein. (Foley, Tr. 4570; RX2294 at 001 (Statement of Foley: "MB2 is a \$2M plus merchandise customer."); CX8003 (Foley, Dep. at 292); CX0188 at 001 (Statement of Muller: "Please remember this is a \$2M+ customer.")).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1783. In 2014, MB2 Dental Solutions created a separate company called Dental Gator. (Puckett, Tr. 2214-2215). Dental Gator was a buying group of private practice dental offices not affiliated with MB2. (Puckett, Tr. 2215-2216). MB2 created Dental Gator as a way to identify potential acquisition targets for MB2. (Puckett, Tr. 2221; CX2482 at 001 (“[Dental Gator] is a recruiting arm for MB2.”)). Dental Gator sought to secure greater discounts for independent dentists than the dentists could secure on their own. (Puckett, Tr. 2220). At its largest, Dental Gator had 27 members. (Puckett, Tr. 2267). Dental Gator no longer exists after being legally dissolved in late 2018. (Puckett, Tr. 2267).

Schein's Response:

MB2 used Dental Gator as a way of identifying potential acquisition targets. In exchange, Dental Gator offered independent dentists a variety of services, including discounts on supplies through Schein. (SF 653; Puckett, Tr. 2279-80; CX 4016). As such, Dental Gator as originally envisioned had MSO characteristics. (CX 2427). (As noted, the term MSO is fluid, and spans the range from near total management control, similar to a DSO, to the provision of modest and selective management services, such as Smile Source). (See Meadows, Tr. 2419-20).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1784. Dental Gator was a customer of Special Markets. (Sullivan, Tr. 3997).

Schein's Response:

MB2 was a customer of Special Markets. Beginning in January 2015, new Dental Gator members were signed up under a variant of the G plan that was available to HSD customers. (SF 305; CX 2372).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1785. In January or February of 2014, Justin Puckett, President of MB2, met with Schein representatives to discuss a request for proposal on the MB2 business to include Dental Gator. (Puckett, Tr. 2227).

Schein's Response:

In February 2014, MB2 did not yet have a concrete proposal or plan to establish Dental Gator, and Dental Gator did not even exist as a name or legal entity. (Puckett, Tr. 2228). It was just "this idea." (Puckett, Tr. 2228).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1786. At the 2014 meeting, MB2 representatives told Schein about their idea to create Dental Gator to help "procure dentists who were not affiliated with MB2" "by using dental supplies and other services to get them to sign up" with MB2. (Puckett, Tr. 2228).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1787. Schein asked if MB2 would have an equity ownership in Dental Gator customers. (Puckett, Tr. 2229).

Schein's Response:

Schein asked the "standard due diligence questions" of a buying group to get a better understanding of Dental Gator. (SF 642).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1788. Schein told MB2 that it did not work with buying groups. Hight of Schein told Puckett that Schein did not work buying groups "formed for the sole purpose of just saving money on supplies with no true affiliation with each other." (Puckett, Tr. 2237-2238). Puckett testified at his deposition that Schein told MB2 it had a policy not to work with buying clubs. (CX8006 (Puckett, Dep. at 67)). Puckett uses the terms "buying group" and "buying club" interchangeably to refer buying groups. (Puckett, Tr. 2216). Schein told Dental Gator it was concerned that Dental Gator was a pure buying club. (CX8006 (Puckett, Dep. at 82)). Schein asked MB2 whether it would be managing the Dental Gator practices. (Puckett, Tr. 2231). Schein asked MB2 whether it was seeking to acquire ownership in the Dental Gator practices. (Puckett, Tr. 2253). Schein told MB2 that an ownership interest was required in the Dental Gator members' practices. (CX8006

(Puckett, Dep. at 68-69)). After MB2 formed Dental Gator, Schein continued to ask questions about Dental Gator's business model. (CX8006 (Puckett, Dep. at 83-84)).

Schein's Response:

False. Complaint Counsel mischaracterizes the evidence. There is no evidence that Ms. Hight told Mr. Puckett that Schein did not work with buying groups (it did) or that Schein had a policy not to do business with buying groups (it did not). Instead, Ms. Hight, expressed some concerns about whether Dental Gator was going to be set up only as a "pure buying group[]," meaning that it was "formed for the sole purpose of just saving money on supplies," rather than also offering value-added services. (SF 643; Puckett, Tr. 2237-38; CX 8022 (Hight, Dep. at 161)). But, consistent with Schein's strategy relating to buying groups, Ms. Hight said that Schein "would work with groups that could offer more in terms of ... value-added services." (SF 643; Puckett, Tr. 2275). After Mr. Puckett explained that Dental Gator offered more to its members than just discounts, Schein opened Dental Gator as a buying group. (SF 644-45; CX 8006 (Puckett, Dep. at 82-83); Puckett, Tr. 2222).

Moreover, Mr. Puckett never testified that Schein required MB2 to have "ownership" of Dental Gator member offices. Instead, Mr. Puckett testified that "originally" Schein wanted common ownership but it "obviously delved off of that to ... membership models." But Schein "relaxed on that," and Dental Gator was opened. (CX 8006 (Puckett, Dep. at 69)). Mr. Puckett confirmed that "obviously [Schein] didn't" require ownership because "we opened Dental Gator" under "the very transparent nature of not having ownership." (CX 8006 (Puckett, Dep. at 69-70)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1789. Schein entered into a supply agreement with MB2 in 2014 (the "2014 MB2 Agreement"). (Puckett, Tr. 2211, 2225-2226).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1790. The 2014 MB2 Agreement was for the MB2 side of the business. (Foley, Tr. 4574). The 2014 MB2 Agreement that did not reference Dental Gator by name and there was no separate agreement for Dental Gator at that time. (Puckett, Tr. 2231-2232). Puckett negotiated the 2014 agreement with Andrea Hight, a Schein employee who reported to Randy Foley and Hal Muller. (Puckett, Tr. 2225-2226). Puckett signed the 2014 MB2 Agreement on behalf of MB2, and Foley signed it on behalf of Schein. (CX4001 at 006).

Schein's Response:

The contract did not mention Dental Gator by name because MB2 had not given its "idea" for a buying group a name at that point. (Puckett, Tr. 2228). Mr. Puckett believed, however, that the contract included Dental Gator. (Puckett, Tr. 2231). Schein also believed that the contract allowed for MB2 pricing to be extended to independent dentists for whom Dental Gator was providing management services, though it could not be extended solely to independent dentists simply seeking a discount from Schein without any volume

commitments or otherwise. (CX 2427-001 (April 1, 2014 email from Ms. Hight: “MB2 now has their MSO side under way. It’s called Dental Gator.”)).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1791. In its 2014 agreement with MB2, Schein imposed limits on to whom MB2 was allowed to offer its Schein pricing. (Puckett, Tr. 2233; Foley, Tr. 4573-4574; CX4001 at 002).

Schein’s Response:

As with many of Special Markets contracts with DSOs, the MB2 agreement did not permit MB2 to arbitrage its DSO pricing to practices outside of MB2. (SF 648; *see also* SRF 868).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1792. The 2014 MB2 Agreement prohibited MB2 from using the agreement to form a buying group. The 2014 MB2 Agreement stated that “[t]his agreement may not be used to grow any Group Purchasing Organization (GPO) type relationship.” (CX4001 at 002; Puckett, Tr. 2235-2236; Foley, Tr. 4573-4574;). MB2 did not add this provision into the 2014 MB2 Agreement. (Puckett, Tr. 2236). Puckett believed that someone from Schein added this provision into the 2014 MB2 Agreement. (Puckett, Tr. 2236). There is no similar provision in the most recent version of MB2’s agreement with Schein, signed in November 2016 for the period of January 1, 2017 through the end of 2019. (Puckett, Tr. 2238, 2211; [REDACTED])

Schein's Response:

False, for two reasons.

First, the provision in the contract did not prevent MB2 from forming a buying group. The evidence is clear that MB2 did in fact form a buying group called Dental Gator. (SF 649). Instead, the provision was merely meant to preclude MB2 from passing its negotiated DSO pricing to non-DSO members. (SF 648). This provision was important because the pricing that Special Markets negotiated on behalf of DSOs was proprietary to the manufacturer, Schein, and the DSO. (Foley, Tr. 4696-97; *see also* SRF 868). MB2 was always free to open a buying group to which Schein could offer discounts under a separate sales plan (which it did). (CX 8022 (Hight, Dep. at 134, 136, 161-62)). Moreover, Mr. Puckett believed that the 2014 contract allowed Dental Gator to offer discounts to its members. (Puckett, Tr. 2231 (“It was lumped into one contract.”)).

Second, as MB2 initially described it, Dental Gator would be providing at least some management services to its members, and would not solely be promoting the Schein discounts to independent dentists. It should be noted that MB2's purpose in creating Dental Gator was to identify practices for which it could eventually acquire, and thus, providing at least some management services was a necessary first step in the process. (SF 641; Puckett, Tr. 2221, 2228). As such, Dental Gator would not be a “pure GPO.” This type of buying group was not prohibited by the 2014 MB2 contract. (CX 2427-001 (reporting on a meeting in which MB2 stated that “they have their MSO side under way.”)).

As discussed below, a dispute arose as to whether Dental Gator was in fact just promoting the discounts without providing services, or whether it was providing both. That dispute was initially resolved by Dental Gator agreeing to more heavily emphasize the

services they offered, and later – when Dental Gator could not abide by that requirement – by offering Dental Gator a separate contract.

With respect to Complaint Counsel’s assertion that “there is no similar provision in the most recent version of MB2’s agreement with Schein,” the assertion is misleading. Unlike the original MB2 contract – which was designed to permit MB2 and its then-unnamed affiliate (later called Dental Gator) to extend its prices to any practice that it provides some management services to, so long as the practice committed to the purchase commitments in the contract – by 2016, Schein had entered into two separate contractual relationships. The contract with MB2 is clearly limited to “MB2 and their current and future affiliated or completely managed offices....” (RX 2359-001). This prevents MB2 from engaging in any arbitrage because it does not permit MB2 to offer its pricing to independent dentists for whom it merely has a consulting relationship. In contrast, Schein’s contract with Dental Gator had special HSD pricing (not DSO pricing), and the parties agreed that Dental Gator would have to provide at least some services to their members, even though it did not need to have complete control over the offices. Thus, the difference between the 2014 MB2 contract and the 2015 Dental Gator/2016 MB2 contracts is simply that different pricing applies to different types of entities. MB2 is still prohibited from using its pricing for purposes of creating a pure buying group. (RX 2359).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1793. Schein added a provision into the 2014 MB2 Agreement to prevent Dental Gator from becoming a “typical GPO.” In an October 2014 email to Sullivan and other Schein executives, Foley stated: “In our prime vendor agreement we spelled out specific terms and restrictions about these consulting offices to prevent Dental Gator from becoming a typical GPO.” (RX2294 at 001). Foley testified that he was referring to the provision in the 2014 MB2 Agreement stating: “[t]his agreement may not be used to grow any Group Purchasing Organization (GPO) type relationship.” (Foley, Tr. 4572-4574; *see also* CX2665 at 002 (April 1, 2014 email in which Foley, in reference to MB2 Dental, writes: “There is also concern that in addition to the \$2M for the practices owned by MB2, that they are also trying to expand their presence as a Buying Group. We added stipulations in their agreement to prevent this.”))).

Schein’s Response:

This asserted fact is a restatement of CCFF 1792. Schein incorporates its response to that proposed finding here. Put simply, the provision is consistent with MB2’s stated purpose for forming Dental Gator, which was *not* to profit from middleman fees, but to identify potential acquisition targets and begin the process of taking control over aspects of their operations through the provision of at least some management services. As Mr. Foley wrote, “MB2 goes after offices by setting them up as ‘consultant practices’ to win them eventually as MB2 owned offices.” (RX 2294-001).

The contract *fully* allows for this type of buying group, requiring *only* that the relationship between Dental Gator and the practice involve the provision of some management services and that Dental Gator’s purpose is not just to profit from middleman fees. (CX 4001-002 (“Dental practices which are not owned in whole or in part by MB2 must have a formal affiliate agreement” in which “the primary relationship will comprise business management services,” will “include the ability to require offices to comply with the purchasing commitment” and “whose purpose is to generate revenue for [MB2] by allowing *others* to benefit from the terms of the agreement.”) (emphasis added))).

The provision was included to preclude MB2 from arbitraging its proprietary DSO pricing to dentists for which MB2/Dental Gator was not offering at least some service in

addition to marketing the Schein discount. (Foley, Tr. 4574 (“This language was added so that the DSO pricing would only apply to MB2 and not to Dental Gator.”). Nothing precluded MB2 from opening a buying group (which it did), and nothing precluded Schein from offering discounts to such a buying group (which it did).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1794. The agreement also stated, “[d]ental practices which are not owned in whole or [in] part by MB2, must have a formal affiliate agreement in place with MB2. MB2, or such associated entity, agrees that for all such offices, the primary relationship will comprise [the] business management services and shall include the ability to require offices to comply with the purchasing commitment and payment terms of this agreement.” (CX4001 at 002; Puckett, Tr. 2239; Foley, Tr. 4573-4574).

Schein’s Response:

Complaint Counsel has improperly changed the meaning of the quote through the *improper* use of brackets.

The contract does *not* say that the “primary relationship will comprise [*the*] business management services;” it just says the “primary relationship will comprise business management services.” (CX 4001-002 (emphasis added)). The inclusion of the word “the” is material. Complaint Counsel’s addition suggests that Dental Gator must take complete control over “*the* business management” of the practice, while the contract simply notes that Dental Gator must provide *some* service in addition to just pure discounts. Properly read, so long as Dental Gator provides some services and the independent dentists

agree to comply with purchasing requirements, the discounts provided by the contract can be extended to them.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1795. Special Markets did not pursue the Dental Gator relationship, and never submitted a bid for Dental Gator's business. (CX8005 (Muller, Dep. at 169, 268)). Schein never bid for Dental Gator's business when it was established. (Sullivan, Tr. 3991). Dental Gator became a Schein customer without Schein's knowledge initially. (CX8005 (Muller, Dep. at 268)).

Schein's Response:

The asserted fact is misleading and inaccurate. There is no evidence that Dental Gator ever solicited a separate RFP in 2014; indeed, Dental Gator did not even exist at the time. (Puckett, Tr. 2228). As Mr. Puckett testified, he believed that Dental Gator and MB2 were "lumped into one contract." (Puckett, Tr. 2231). While MB2 started its buying group without input from Schein, it informed Schein of its buying group plans in early 2014 before the buying group even had a name. (Puckett, Tr. 2227-28; CX 0306 (Foley, IHT at 191)). In 2015, Schein submitted and entered into a separate agreement for Dental Gator. (Puckett, Tr. 2231-32). Throughout the entire time of Dental Gator's existence, Schein offered substantial discounts to Dental Gator. (SF 663, 673).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1796. Schein viewed MB2's use of the 2014 Agreement for Dental Gator as a breach of the 2014 MB2 Agreement. MB2 formed Dental Gator without Schein's permission, and without talking to Schein first. (CX0309 (Muller, IHT at 103-104)). In January 2015, Muller stated in an internal Schein email: "I don't believe we have an Agreement on these offices – and that they were introduced to us without our choice. . . our arrangement with MB2 was never predicated on a buying group and it is against what we want to do as a Company." (CX2641 at 002).

Schein's Response:

As noted above, a dispute arose as to whether Dental Gator was extending Schein discounts to practices beyond those (i) for which it provided at least *some* management services and (ii) that committed to the purchase commitment in the Prime Vendor Agreement. Schein was receiving reports that Dental Gator was doing so, effectively arbitraging the DSO pricing Schein offered to random independent dentists for which no affiliation and no services were being provided, and breaching the agreement because the purpose of the relationship was simply to profit from the middleman fees (up to \$3,600/yr) that Dental Gator was charging dentists. (SF 646-52; CX 2671; CX 2033-002). MB2 had a different view, believing that all practices within their buying group fell within the scope of contract. (Puckett, Tr., 2231).

In June 2014, shortly after MB2/Dental Gator began promoting Schein's discounts to prospective Dental Gator members, Schein and Dental Gator entered into discussions concerning the practice. (SF 652-53). Ms. Andrea Hight explained that Schein was not interested in having MB2 pricing marketed to random dentists – what she called a "pure buying group" – but that Dental Gator could extend MB2 pricing to dentists for which it

provides some level of management services, so long as it does not just market the discount. (Puckett, Tr. 2230-31, 2237-38; CX 0247 (noting that Dental Gator would meet “MSO criteria,” *i.e.*, provide some management services as well as discounts on supplies)). MB2 agreed. (SF 646-47). Contrary to Complaint Counsel’s suggestion, Special Markets never had a policy not to do business with buying groups, and Schein continued to do business with Dental Gator after the date of the email cited in the proposed finding. (SF 662-63, 1341; CX 8005 (Muller, Dep. at 223-24)). Ultimately, when Dental Gator continued to market the Schein discount, collect middleman fees, and fail to provide meaningful services, Schein offered Dental Gator a separate contract for those members. (*See* SF 663).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1797. On April 1, 2014, Schein’s Hight wrote to Foley regarding a conversation with Dental Gator: “We continue to stress that if it looks at any time like a GPO we will disenroll.” (CX2427 at 001).

Schein’s Response:

The asserted fact is misleading. As Ms. Hight explained, she simply meant that the MB2 contract was written for MB2 and the members to whom Dental Gator would provide at least some business services. If Dental Gator was merely trying to profit from the middleman fees it charged in exchange for arbitraging the MB2 pricing – rather than offer “consulting services” as a step towards future acquisition – then Schein reserved the right to dis-enroll those practices. (CX 8022 (Hight, Dep. at 147-48)). The evidence is clear

that Schein never dis-enrolled any Dental Gator member, continued to extend them discounts, and signed a contract to service those members. (SF 649, 663).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1798. In June 2014, Schein's Hight spoke to MB2 by phone, including Puckett, about MB2's breach of the 2014 MB2 Agreement through Dental Gator. Hight reported on the call with MB2 to Foley and Muller: "Dr. T and Justin Puckett, general counsel for MB2, just called me. As expected they were very worried about being in breach – to the point of stuttering. . . . They have assured me they are shutting down the GPO aspect of what happened immediately. . . . They assured me they will make sure they meet MSO criteria moving forward and will stay clear of anything remotely GPO in nature." (CX0247 at 001).

Schein's Response:

False and misleading.

The contract, as written, clearly allowed MB2 to offer independent dentists the discounted MB2 prices, so long as its purpose was to provide at least some management services to the independent dentists and not merely to collect middleman fees through the arbitrage of the MB2 prices. (CX 4001). Thus, the contract distinguished between two types of groups, one of which Ms. Hight referred to as an MSO, and the other of which she referred to as a GPO.

Both, however, are buying groups of independent dentists. Complaint Counsel plays at semantics, equating all MSOs to DSOs, and all GPOs to buying groups. Such definitional games are of Complaint Counsel's making. The contract itself is very clear about which types of buying group relationships are permitted and which are not. Buying

groups that provide some “business management services” and can “require offices to comply with the purchasing commitment” can take advantage of the MB2 prices, but buying groups that merely seek “to generate revenue” through middleman fees “by allowing others to benefit from the terms” of the contract, are outside the scope of the contract. (CX 4001-002). Not only is this abundantly clear under the contract, but the contract *expressly limits* the definition of “GPO” to the latter, thus excluding from the definition groups that provide some services but are focused on the eventual acquisition of the practice.

Ms. Hight’s comment in her email that Dental Gator is “shutting down the GPO aspect of what happened” simply refers to practices where Dental Gator was trying to arbitrage MB2 pricing in exchange for middleman fees, and not promote the added services that Dental Gator had originally planned to provide. (CX 0247; SF 655-56, 659).

Testimony shows that during Ms. Hight’s conversation with Mr. Puckett, she did not ask Mr. Puckett to “shut down” the Dental Gator buying group. (Puckett, Tr. 2251; CX 8022 (Hight, Dep. at 191-92)). Nor did Ms. Hight ask Mr. Puckett for proof that MB2 was acquiring ownership in the Dental Gator offices. (Puckett, Tr. 2251). Ms. Hight did not ask Mr. Puckett for assurances that Dental Gator would meet MSO criteria. (Puckett, Tr. 2251-52). Ms. Hight also did not ask Mr. Puckett for assurances that Dental Gator would “stay clear of anything remotely GPO in nature,” nor did Ms. Hight say anything about Schein purportedly shutting down other buying groups. (SF 654; Puckett, Tr. 2251-52). Schein notes, however, that Mr. Puckett agreed at trial that a third-party vendor had issued a Dental Gator advertisement that included a “false statement” and violated the agreement. (SF 652-53).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1799. On June 9, 2014, Hight drafted a letter to send to MB2 regarding Dental Gator; she wrote: "As you know, we discussed how very important Schein's position is in that we do not support nor contract with GPOs. To that end, we also included GPO language in the prime vendor agreement." (CX2431 at 001-002; CX8022 (Hight, Dep. at 175) (testifying that the email was a draft letter to MB2)). In a later email on the chain, Hight wrote to Cavaretta: "[MB2] signed a PVA that very specifically said no GPO relationship. This was a point of some discussion with them on negotiations. We dug our heels in and they agreed." (CX2431 at 001). In response, Cavaretta replied: "Shut this down. The letter is very well written. In [*sic*] 100% behind you on this." (CX2431 at 001).

Schein's Response:

The asserted fact is misleading, fails to put Ms. Hight's email in context, and ignores explanatory testimony. As Ms. Hight testified, "Schein doesn't have a policy not to contract with GPOs." (CX 8022 (Hight, Dep. at 176)). Indeed, she acknowledged that, at the time of writing the email, she had "multiple buying groups and GPOs that went back several years." (CX 8022 (Hight, Dep. at 176)). Therefore, Ms. Hight explained that "[t]he point was that clearly for this customer in this situation, we had defined what the Prime Vendor Agreement was for and that they had ... misused it." (CX 8022 (Hight, Dep. at 176-77; *see also* SRF 1792-98). Schein did not "[s]hut [Dental Gator] down" but instead resolved its issues with MB2's arbitrage of its DSO prices and continued discounting to Dental Gator members. (SF 647-48, 662-63).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1800. Schein's Hight also reported on her June 2014, phone call with MB2 about Dental Gator to Cavaretta. In an email to Cavaretta on June 10, 2014, Hight wrote: "[T]hey will make sure they do not represent in their marketing anything that looks like a GPO and that they will focus on practice management. . . . I did in process of conversation let them know we had identified a couple of GPO models in Texas and were in the process of closing those down." (CX2425 at 001).

Schein's Response:

The asserted fact is misleading as it ignores the surrounding context of Schein's relationship and negotiations with MB2 and Dental Gator.

In particular, Complaint Counsel equates the term "GPO" to the term "buying group." But the contract expressly defines "GPO" as only those types of buying groups that do not provide any management services, cannot require compliance with purchasing commitments, and *only* seek to generate revenue through the collection of middleman fees. (CX 4001). The contract clearly permits Dental Gator to operate as a buying group – like Smile Source – so long as it provides at least some "consulting" services with an eye towards eventual acquisition. (RX 2294-001).

During its negotiations with Schein, Dental Gator agreed not to advertise that it was merely a "pure buying group" that provided deep discounts to its members. (SF 651; Puckett, Tr. 2237-38). Instead, Dental Gator agreed that it would advertise all of the value-added services that it provided to help dentists. (SF 651; Puckett, Tr. 2241-42). Nevertheless, in June 2014, Schein became aware that Dental Gator advertised that it could save Dental Gator members up to 60% on Schein supplies, which caused Schein concern. (SF 652; Puckett, Tr. 2248). Mr. Puckett testified that such an advertisement (which was

put out by a third-party vendor) was a “false statement,” “misleading for sure,” and contrary to what Dental Gator had agreed to do with respect to marketing. (SF 652; CX 8006 (Puckett, Dep. at 79-80); Puckett, Tr. 2248, 2278). This led to a conversation between Ms. Hight and Mr. Puckett regarding both MB2’s failure to comply with the 2014 MB2 Agreement by extending its DSO pricing to Dental Gator, and Dental Gator’s improper advertising of the discounts provided by Schein. (SF 653). During their conversation, Ms. Hight did not ask Mr. Puckett for assurances that Dental Gator would “stay clear of anything remotely GPO in nature,” nor did Ms. Hight say anything about Schein purportedly shutting down other buying groups. (SF 654; Puckett, Tr. 2251-52).

Dental Gator rectified the advertising issue by taking its advertisement down and agreeing that, going forward, it “would market itself as a value-added partner of Henry Schein, providing a broad spectrum of services to dentists.” (SF 653; Puckett, Tr. 2253-54, 2279-80). This satisfied Ms. Hight, who wrote that “[w]e really do look forward to seeing your great success continue and to be true partners with you to help make that happen.” (SF 653; CX 4067-001).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1801. In an October 2014 email, Tim Sullivan inquired about what type of customer Dental Gator was, and whether it was a GPO. (RX2294 at 002 (“Who are they? What are they? Is this a GPO?”)).

Schein's Response:

RX 2294 is taken out of context. The email chain starts with concerns voiced by FSCs and Regional Managers about cannibalization, and the transfer of former HSD customers to Special Markets upon becoming members of Dental Gator. (RX 2294). Mr. Cavaretta notes the concerns, and the “confusion in the field” that this caused. (RX 2294-003). Unsatisfied with the response from Mr. Muller, Mr. Cavaretta then elevates his concerns to Mr. Sullivan, expressing his view that “[t]his is a problem....” (CX 2761-001). Mr. Sullivan disagrees, noting that “[i]f these [practices] convert to ownership office[s]” eventually, “I would not put [it] in[to] the *straight* GPO bucket.” (CX 2761-001 (emphasis added)). Not being fully conversant with Dental Gator’s business model, Mr. Sullivan sent an email to Mr. Foley and Mr. Muller a few minutes later for additional details about Dental Gator. (RX 2294-002). Mr. Foley responds that Dental Gator offers “consulting” and is therefore not a “typical GPO.” (RX 2294-002).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1802. Schein viewed Dental Gator as a buying group, and was concerned about maintaining a consistent strategy with respect to other buying groups. (Sullivan, Tr. 3991-3993; CX2761 at 001). In October 2014, Cavaretta told Sullivan: “This is a straight up GPO and if we allow, I’m not sure how we say no to other GPOs. . . . Understandably, they want to leave it alone because they don’t want to upset MB2. I don’t think that is a consistent strategy with where we want to go per our last meeting with you [Sullivan] and Dave [Steck].” (CX2761 at 001).

Schein's Response:

Schein agrees that it viewed Dental Gator as a buying group.

The issue Dental Gator presented was the kind of buying group it was – namely, whether it was one that offered additional consulting services and could drive compliance, or whether it was one that just promoted the Schein discounts and profited from middlemen fees. Under the 2010 Guidance, the former type of buying group was consistent with Schein's strategy, while the latter was not. (SF 210). Likewise, the former type of buying group was within the scope of the 2014 MB2 contract, while the latter was not. (CX 4001).

In Schein documents, emails, and testimony, the latter is referred to as a GPO (as defined under the contract itself), a "straight up GPO," a "pure GPO," or a "typical GPO." The cited October 21, 2014 email expresses Mr. Cavaretta's initial opinion that Dental Gator was a "straight up GPO." (CX 2761-001). Mr. Sullivan disagreed, noting that "I would not put it in[to] the straight up GPO bucket." (CX 2761-001). Mr. Foley similarly confirmed that Dental Gator was not a "typical GPO." (RX 2294-001).

While that appeared to resolve the issue for a period of time, within a month, additional complaints were arising from the field. (CX 2360; CX 2032; CX 2362). Mr. Meadows was particularly concerned, and scheduled a further meeting with Mr. Sullivan to discuss Dental Gator and present "the GPO issue." (CX 2362; CX 2032).

As part of the efforts to ensure that Schein's buying group approach was consistent across divisions, Mr. Sullivan and Mr. Muller continued to discuss what to do with Dental Gator into early 2015. (SF 301). Mr. Muller proposed placing Dental Gator on a new pricing plan that was used for other Mid-Market customers. (SF 302). Mr. Sullivan viewed Mr. Muller's proposal as a "good compromise" and a way to resolve the internal conflict between Special Markets and HSD. (SF 302). Schein ultimately reached a consensus on

an ongoing plan for Dental Gator in January 2015: “continue to support [Dental Gator by] allowing them to use the G plan pricing going forward,” which was the “same pricing HSD can offer groups of offices” with FSCs keeping full commission. (SF 305).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1803. Sullivan told Cavaretta that Dental Gator was not a buying group if its members converted to offices that were owned by MB2, and became a part of the DSO. (Sullivan, Tr. 3993-3994; CX2761 at 001 (“If these convert to ownership office I would not put in to the straight up GPO bucket.”)). Sullivan referred to an ownership model of other Schein customers that were DSO customers, such as Heartland, Comfort Dental, and Mortenson. (Sullivan, Tr. 3993; CX2761 at 001).

Schein’s Response:

False.

Mr. Sullivan noted that, if the purpose of the buying group was to “convert to ownership” it would not be a “straight up GPO.” (CX 2761-001). Rather, it would be a buying group that offers some level of services and has some ability to drive compliance – exactly the type of buying group Schein agreed that it would partner with under the 2010 Guidance. (SF 210; SRF 1099, 1759).

Mr. Sullivan did **not** equate Dental Gator to a DSO. He noted that Heartland employs the same strategy of identifying acquisition targets by first offering to provide consulting services as well as discounted supplies, a fact confirmed by Mr. Foley. (RX 2294-001 (“Similar to Heartland Dental, MB2 goes after offices by setting them up as

‘consultant practices’ to win them *eventually* as MB2 offices.’”) (emphasis added)). Mr. Sullivan did *not* say that Comfort Dental was structured as a DSO. Rather, Comfort Dental, like Smile Source, is a franchisor that also provides management services as well as discounts to independent dentists. (SF 54-46, 493-511; CX 2109-002; Foley, Tr. 4632-33). There was no testimony concerning Mortenson’s go-to-market strategy, and Complaint Counsel did not ask Mr. Sullivan why he included Mortenson in the list of entities that were not “straight up GPOs.”

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1804. Schein struggled internally with how to treat Dental Gator because MB2 was such a large customer and Schein did not want to upset MB2 over the Dental Gator issue. (Sullivan, Tr. 3991).

Schein’s Response:

False. The struggle was not because MB2 was such a large customer, but because MB2’s arbitrage of its DSO pricing to Dental Gator was causing conflicts with Schein’s FSCs and manufacturer partners. (SF 655-56). Schein’s partnership with Dental Gator also created issues with Schein’s other DSO and buying group customers. In May 2014, Floss Dental, a DSO customer of Schein’s, wanted to “mimic MB2” with the creation of a buying group arm, like MB2 did with Dental Gator, and as Schein did with Dental Gator, it ultimately set this buying group up under the “G Plan.” (SF 290, 293, 305). Despite

these conflicts, Schein wanted to keep both the MB2 and Dental Gator business and found a way to do so with a discount plan tailored to Dental Gator. (SF 663).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1805. Schein was concerned about losing MB2 as a customer if it tried to end the relationship with Dental Gator. (CX0175 at 001 (in a July 29, 2014, email, Schein's Kyle wrote: "If we do this it could cost us the MB2 business."); CX2425 at 001 (in a June 10, 2014 email, Schein's Hight wrote that Foley instructed Hight "not to do anything as it would be putting \$2million plus a year at risk" regarding Dental Gator); CX0188 at 001 (in a January 28, 2015 email, Schein's Muller wrote about Dental Gator: "Please remember this is a \$2M+ customer.")).

Schein's Response:

Certain individuals within Special Markets recognized that MB2 was a large customer. The cited evidence, however, does not support the contention that Schein wanted to or "tried to end the relationship with Dental Gator," let alone that Schein "was concerned about losing MB2 as a customer if it did so."

The cite to Mr. Kyle's email is misplaced, as Mr. Kyle was a lower-level Zone Manager, and was not directly involved in the decision-making concerning the MB2/Dental Gator contract. (See CX 0307 (Kyle, Dep. at 15)). Moreover, he was not "concerned" about losing the MB2 business, so much as speculating that Schein might lose the business "for the short term but I suspect they will be back." (CX 0175-001).

The cite to Mr. Muller's January 2015 email is similarly inapposite. There, Mr. Muller was simply saying that Dental Gator was not a "true buying group" but rather a

“\$2M+ customer using [Dental Gator’s consulting service/discount offering] as a way to look under the covers – it is not just a pay \$699/month type group....” (CX 0188-001). Thus, this email has nothing to do with, and does not suggest, any concerns about losing MB2 as a customer if Schein tried to terminate Dental Gator. Indeed, by this point, there was agreement on a new contract for Dental Gator. (CX 2144).

The cite to Ms. Hight’s email is also misplaced. While Ms. Hight reassured Mr. Foley that she would not lose MB2 as a customer, there is no indication that Schein expected to lose MB2 as a customer by requiring MB2 to live up to its contractual commitments to focus on practices where it provided at least some management services. (CX 2425). Nor is there any indication that Schein was concerned what might happen if it suggested the need to terminate the Dental Gator relationship if it did not live up to those contractual commitments, especially since Ms. Hight made “the point” to MB2 when she spoke with them. (CX 2425-001).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1806. Sullivan and other HSD executives sought to end the relationship between Special Markets and Dental Gator. Sullivan tried to end the relationship between Special Markets and Dental Gator, and discussed this with Hal Muller, head of Special Markets. (CX0246 at 001). In a July 1, 2015 email, Schein’s Sullivan wrote: “The Dec ‘offsite’ last year I left with a goal to see if we could get Hal to shut it down, but knew that could be a challenge due to the parent company being a EDSO of ours in [Special Markets].” (CX0246 at 001). In a July 2014 email, Schein sales manager Kyle wrote to Cavaretta: “We really need to shut the Dental Gator down.” (CX0175 at 001). Cavaretta replied: “I agree...as this is the second big GPO we will be shutting down...Co-op is the other.” (CX0175 at 001). In an October 2014 email, Cavaretta stated that he was not comfortable

promoting Dental Gator. (RX2294 at 003 (“This is going to create major confusion in the field and I’m not comfortable at all promoting this GPO.”)).

Schein’s Response:

False. Despite any internal issues, HSD never pressured or asked Special Markets to shut down or dissolve Dental Gator. (SF 657; CX 0306 (Foley, IHT at 198); CX 8003 (Foley, Dep. at 351, 418); CX 8022 (Hight, Dep. at 192)). Complaint Counsel’s reliance on CX 0246 is misplaced. When Mr. Sullivan wrote that at “[t]he Dec ‘offsite’ last year I left with a goal to see if we could get Hal to shut it down....”, he was talking specifically about getting MB2 to stop arbitraging its DSO pricing to Dental Gator outside the scope of the MB2 contract. (SF 658; Sullivan, Tr. 4255-56). Mr. Sullivan never had the goal of shutting down Special Markets’ relationship with Dental Gator. (SF 658; Sullivan, Tr. 4255-56). Rather, Mr. Sullivan wanted Special Markets to modify the pricing it offered to Dental Gator to be more in line with what HSD was developing for its buying group offering, which is “ultimately what happened.” (SF 304-05, 661; Sullivan, Tr. 4255). On January 28, 2015 – during the alleged conspiracy period – Mr. Sullivan wrote to his boss Jim Breslawski that he was going to “approve moving forward with [Mr. Muller’s] proposal” regarding Dental Gator, and that Schein was “‘in’ on approving Buying Groups.” (SF 308; CX 2144-001).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1807. Sullivan and Muller disagreed about how to handle Dental Gator. (Sullivan, Tr. 3991). Special Markets wanted to keep the Dental Gator relationship, as it was a way of keeping MB2 as its customer. (CX8005 (Muller, Dep. at 169-170)).

Schein's Response:

Not true. The actual facts are significantly more nuanced.

When Mr. Cavaretta expressed concern to Mr. Muller and others about Dental Gator, Mr. Muller said he felt “good at the point we are at with them,” though he also stated that he was “not happy with Dental Gator either....” (RX 2294-002; CX 0244-001). Mr. Sullivan did not suggest changing the relationship with Dental Gator at the time, and in fact disagreed with Mr. Cavaretta that Dental Gator was a “straight up GPO.” (CX 2761-001).

When concerns continued to be raised from the field, Mr. Sullivan convened a meeting of senior leadership in November 2014, but did not provide any clear direction. (CX 2034, SF 301-305). As such, there is no evidence of any disagreement, but rather only agreement that Dental Gator created a conflict between HSD’s FSCs and corporate accounts. (CX 2034; SF 304).

Two months later, in late January 2015, Mr. Muller received a call from a manufacturer complaining about Dental Gator. (CX 2641-001-02 (“I think we need to do something – and now – Our suppliers were called by one of our competitors and at least one [supplier] is saying ‘we will not honor charge backs.’ [T]his means our profitability on these locations gets cut.... We need to understand that this move could cost us the account, but our arrangement with MB2 was never predicated on a buying group and it is against what we want to do as a Company ..., and our *suppliers* feel the same way.”) (emphasis added)). Given this *manufacturer* pressure, Mr. Muller proposed *the very same*

day the compromise plan that would shift new Dental Gator members to the HSD pricing plan. (CX 2144). Mr. Sullivan *agreed* with this compromise. (CX 2144).

As such, there was never any disagreement between Mr. Sullivan and Mr. Muller, though they each had a different perspective on the issue.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1808. Sullivan was involved in decisions concerning Dental Gator, a buying group handled through Special Markets, because the members were private practice dentists. (Sullivan, Tr. 3997).

Schein's Response:

Mr. Sullivan was involved in decisions for a number of reasons, including that by 2014, primary responsibility for buying groups had moved from Special Markets to HSD; that MB2's arbitrage of DSO pricing to Dental Gator was causing conflict's with HSD's FSCs; and that Dental Gator members were private-practice dentists who would otherwise be HSD customers, all of which created internal conflicts at Schein. (Sullivan, Tr. 3997; SF 33, 309, 656).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1809. Muller told Sullivan and Breslawski in January 2015 that Dental Gator was “not a pure buying group- they have 12 services they offer.” (CX0188 at 001). Muller testified that he felt he had to defend Dental Gator to Sullivan and Breslawski, by telling them Dental Gator was not a typical buying group, and that it was part of one of Schein’s largest customers. (CX0309 (Muller, IHT at 181-182)).

Schein’s Response:

There is no dispute that Dental Gator offers services in addition to discounts on supplies. As such, it is not a “pure buying group,” defined as an entity that does nothing other than collect middleman fees in exchange for promoting discounts offered by the distributor. While Mr. Muller may have felt that he had to defend Dental Gator, the proposal that Mr. Muller presented was in direct response to a complaint from a manufacturer and a manufacturer’s threat to withhold chargebacks. (CX 2641-002). Mr. Muller’s statement that Dental Gator was not a “pure buying group” just reassured Mr. Sullivan and Mr. Breslawski that doing business with Dental Gator was consistent with the 2010 Guidance they had previously agreed to. (CX 0188).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1810. Schein would not have done business with Dental Gator, but for Schein’s relationship with MB2. (CX8005 (Muller, Dep. at 197)).

Schein's Response:

The asserted fact is an irrelevant hypothetical, and in any event, not supported by the evidence. Mr. Muller only testified that Schein “*likely*” would not have done business with Dental Gator if it weren’t for the relationship with MB2. (CX 8005 (Muller, Dep. at 197) (emphasis added)). If Schein did not have a relationship with MB2, it may have sought a partnership with Dental Gator instead. Still, as Mr. Muller pointed out, because Dental Gator had so few customers, it likely did not have enough volume to be an appealing relationship to Schein on its own. (CX 8005 (Muller, Dep. at 198)).

Moreover, the relevant fact is what actually happened: Schein extended discounts to the Dental Gator buying group during the alleged conspiracy. (SF 673).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1811. In January 2015, Breslawski, to whom both Sullivan and Muller reported directly, told Sullivan and Muller: “It is important that while accommodating for unique reasons here, we don’t help open the floodgates on buying groups!” (CX0188 at 001).

Schein's Response:

As Mr. Breslawski testified, his comment referred to “price-only groups that are not adding additional value.” (CX 8012 (Breslawski, Dep. at 135-36)). Mr. Breslawski went on to explain that “price-only buying groups do not align naturally with our value proposition....” (CX 8012 (Breslawski, Dep. at 138)). As Schein evaluated every buying group on a case-by-case basis, every time Schein did business with a buying group (or

decided not to) it was for reasons unique to that group. (*E.g.*, SF 162, 168, 172, 174, 176-82).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1812. Schein also imposed guidelines on how MB2 could advertise Dental Gator that applied to all of Dental Gator's advertising. (Puckett, Tr. 2241-2242). Schein told Dental Gator that it could not advertise itself as a buying club. (CX8006 (Puckett, Dep. at 72)).

Schein's Response:

Complaint Counsel mischaracterizes the evidence. Schein asked Dental Gator, just like it asked other buying groups, not to publicly promote the percentage discount it received from Schein. (CX 8005 (Muller, Dep. at 189)). Instead, Schein preferred that Dental Gator advertise its value-added services, which aligned with Schein's approach and value proposition. (CX 8003 (Foley, Dep. at 316-17)).

Moreover, as Mr. Puckett testified, Schein did not tell Dental Gator it could not advertise itself as a buying club, but rather asked Dental Gator to not promote itself as a "price only" buying group. (CX 8006 (Puckett, Dep. at 71-72); CX 8003 (Foley, Dep. at 317); SF 651-53).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1813. Puckett testified that MB2 "agreed that [Dental Gator] would never advertise . . . that we were a strict buying group for the sole purpose of buying Henry Schein supplies to save money." (Puckett, Tr. 2242). This applied to all of Dental Gator's advertising. (Puckett, Tr. 2242).

Schein's Response:

No response, other than to note the words "strict" and "sole" are important qualifications. (See SF 651-53).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1814. Dental Gator's website was "DentalGator.com." (Puckett, Tr. 2243).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1815. As a result of Schein's advertising restrictions, Dental Gator added a statement on its website that it was not a buying group. Dental Gator had a frequently asked question on its website that said, "Question: Are you a buying group?" followed by "Answer: No." (Puckett, Tr. 2243-2244; CX4016 (February 18, 2015, email from Gill to Puckett: "Is Dental Gator a buy [*sic*] group? Dental Gator is not a buy [*sic*] group"). This statement was added to Dental Gator's website in February 2015. (Puckett, Tr. 2247; CX5002 (web capture of Dental Gator website from February 2015)).

Schein's Response:

Complaint Counsel concedes that Dental Gator was a buying group. (SF 634).

Complaint Counsel quotes only a snippet of the Dental Gator website, which simply makes clear that Dental Gator was not a "price only" buying group but offered much more. The full quote is: "Is Dental Gator a buy group? Dental Gator is not a buy group. Our members see significant savings on variable cost, but our main goal is to help doctor's grow their practice." (CX 5002-001; CX 4016; Puckett, Tr. 2244). Benco and Patterson also viewed Dental Gator as a buying group and were aware of Schein's business with Dental Gator, but made no effort to reach out or otherwise communicate with Schein or each other about Schein's Dental Gator business. (*See, e.g.*, SF 127-34, 138-39).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1816. Puckett testified that the statement that Dental Gator was not a buying group was on the website because of "the advertising guidelines that [MB2 and Dental Gator] agreed to with Henry Schein, to provide clarity that we were not formed as a buying group." (Puckett, Tr. 2244).

Schein's Response:

Complaint Counsel concedes that Dental Gator was a buying group. (SF 634). Complaint Counsel quotes only a snippet of the Dental Gator website, which simply makes clear that Dental Gator was not a “price only” buying group but offered much more. The full quote is: “Is Dental Gator a buy group? Dental Gator is not a buy group. Our members see significant savings on variable cost, but our main goal is to help doctor’s grow their practice.” (CX 5002-001; CX 4016; Puckett, Tr. 2244). As Mr. Puckett testified, Dental Gator was a buying group, but not “a pure buying group.” (Puckett, Tr. 2244). Benco and Patterson also viewed Dental Gator as a buying group and were aware of Schein’s business with Dental Gator, but made no effort to reach out or otherwise communicate with Schein or each other about Schein’s Dental Gator business. (*See, e.g.*, SF 127-34, 138-39).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1817. Schein also objected to a fax and a YouTube video marketing Dental Gator’s promised savings on Henry Schein supplies. (Puckett, Tr. 2248-2249, 2253-2254).

Schein's Response:

Schein objected because, in one of its advertisements, Dental Gator advertised that it could save Dental Gator members up to 60% on Schein supplies, which Mr. Puckett testified was a “false statement” and “misleading for sure.” (SF 652; CX 8006 (Puckett, Dep. at 79-80); Puckett, Tr. 2278).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1818. Dental Gator initially offered is members pricing from the 2014 MB2 contract with Schein. (Puckett, Tr. 2256).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1819. In 2015, Schein raised pricing by cutting the discounts for new Dental Gator members. (Puckett, Tr. 2256). The discount cut only applied to Dental Gator accounts, and not to MB2 accounts. (Puckett, Tr. 2258). Schein cut the discounts to Dental Gator by 10 to 15 percent. (Puckett, Tr. 2256-2257; CX4015 at 001 (February 18, 2015 email from Dental Gator President Patrick Gill telling Puckett that Schein raised prices 10 to 15%: "We really don't have anything special for [Dental Gator] on supplies. If a doctor is getting a decent deal on supplies right now, he will Probably be paying a little more with [Dental Gator] for those same supplies")). Puckett understood Patrick Gill to be saying that independent dentists would be paying more for dental supplies with Schein's discount cut. (Puckett, Tr. 2259-2260).

Schein's Response:

False. In February 2015, due to certain manufacturers' refusal to extend chargebacks to Dental Gator members and other internal conflicts caused by MB2's arbitrage of its DSO pricing to Dental Gator members, Special Markets, in consultation

with HSD, created a new Dental Gator sales plan that was separate from MB2. (SF 655-63). The new discount plan did not apply to all Dental Gator accounts. Special Markets *grandfathered all existing* Dental Gator members and maintained their current pricing, which was the same DSO pricing that MB2 members received. (SF 663). Under the new plan, Schein set new Dental Gator members up on formulary pricing with discounts that were “competitive” for independent dentists. (SF 663; CX 4026-001 (the new Schein sales plan “is still competitive for an independent dentist”)). The new discount plan was still “more aggressive” than what other distributors offered Dental Gator, and after the new discount plan was implemented, sales to Dental Gator members increased. (SF 664-65; Puckett, Tr. 2293, 2297).

Complaint Counsel’s citation to an email from Dental Gator’s Patrick Gill is not reliable evidence of a comparison between the prices that Dental Gator received and the prices that independent dentists received. Complaint Counsel has not shown that Mr. Gill has personal knowledge of the pricing that independent dentists received. Indeed, Mr. Gill’s email itself reflects speculation, noting that his statement is only “probably” true, and even then only applies to dentists that have negotiated a “decent deal.” (CX 4015). In any event, there is no obligation for Schein to allow Dental Gator to offer better pricing to independent dentists than the pricing that Schein’s own FSCs can offer to those same independent dentists.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1820. Schein's price increases hurt Dental Gator, and affected Dental Gator's growth; Dental Gator started to see sales dwindle and decrease after Schein's price increase. (CX8006 (Puckett, Dep. at 90-91)).

Schein's Response:

False. The evidence shows the opposite. The new discount plan was still "more aggressive" than what other distributors offered Dental Gator, and after the new discount plan was implemented, sales to Dental Gator members actually increased. (SF 664-65; Puckett, Tr. 2293, 2297).

But well before Schein rolled out its new Dental Gator sales plan in January 2015, the owners of MB2 had already decided not to fund Dental Gator because of Dental Gator's stagnant growth. (SF 666; Puckett, Tr. 2299-300). There were a number of market factors and issues internal to Dental Gator that slowed Dental Gator's growth, none of which had anything to do with Schein. (SF 667; Puckett, Tr. 2306). These included, for example, competition from other buying groups, Dental Gator's high membership fee, and declining performance and engagement by Patrick Gill, the President of Dental Gator. (SF 667-68; Puckett, Tr. 2306, 2298, 2301, 2303-05).

Therefore, before Schein changed any pricing, Dental Gator had realized that it had either built a bad business model or did not have the right people employed. (SF 669; Puckett, Tr. 2298-302).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1821. Dental Gator’s growth slowed at the time of Schein’s reduced discounts in 2015. (Puckett, Tr. 2263; CX4021 at 001 (March 6, 2015 “DG Feb update” email from Gill to others at MB2 reporting on Dental Gator membership numbers); CX4027 at 001 (August 6, 2015 “DG July update” email from Gill to others at MB2 reporting on Dental Gator membership numbers)). Dental Gator did not grow much between March and July 2015, and only added one member. (Puckett, Tr. 2263-2266; CX4021 at 001 (2015 “DG Feb update”: Dental Gator had 23 members in March 2015); CX4027 at 001 (2015 “DG July update”: Dental Gator had 24 members in July 2015)).

Schein’s Response:

The asserted fact is essentially the same as CCF 1820, and Schein incorporates its response to that proposed finding here. (SRF 1820). In a nutshell, Dental Gator’s growth was not slowed by any pricing change from Schein. Instead, Dental Gator’s growth had already slowed prior to any price change to the point that the owners could not justify injecting any more personal equity to try to take the group to the next level. (SF 666). Moreover, the new discount plan was still “more aggressive” than what other distributors offered Dental Gator, and after the new discount plan was implemented, sales to Dental Gator members actually increased. (SF 664-65; Puckett, Tr. 2293, 2297).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1822. In March 2015, after the discount cut, Dental Gator was looking to partner with another distributor other than Schein. (Puckett, Tr. 2265).

Schein's Response:

No response, other than to note that Dental Gator ultimately chose to keep its relationship with Schein because the new Schein sales plan was "still competitive for an independent dentist." (CX 4026-001).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1823. Dental Gator ceased operations and was legally dissolved in late 2018. (Puckett, Tr. 2267).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

3. Imperfect Compliance with an Agreement Does Not Disprove the Existence of an Agreement.

1824.

[REDACTED]

Schein's Response:

The proposed finding is vague. To the extent that existing regional distributors did not cover regions where actual or potential Smile Source members were located, Smile Source pursued a number of strategies, including looking at regional full-service distributors, national full-service distributors, and national non-full-service distributors. As Smile Source continued to grow, Smile Source chose multiple regional full-service distributors and a national non-full-service distributor, rejecting Schein's offers in 2014 and 2016. (SF 1167, 1183-85). Indeed, as Mr. Maurer testified, Schein's 2014 offer was essentially the same as Burkhart's: "The only benefit we would have seen [in Schein's offer] is a national footprint, but the pricing was the same" and "[w]e rejected this." (Maurer, Tr. 4945). As such, as of Schein's 2014 offer, a national footprint was not important enough for Smile Source to switch distributors.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1825. Dr. Goldsmith reached out to Tim Sullivan and John Chatham of Henry Schein to schedule a meeting. [REDACTED]; RX2328 at 001 (November 20, 2013, email from Goldsmith to Sullivan and Chatham)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1826. In early 2014, Dr. Goldsmith and Trevor Maurer of Smile Source met with John Chatham and Tim Sullivan of Henry Schein at Schein's office in West Allis, Wisconsin. [REDACTED]
[REDACTED]; Maurer, Tr. 4940-4941).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1827. Schein presented a partnership proposal to Smile Source. [REDACTED]
[REDACTED]; CX2508; CX2536; Sullivan, Tr. 4007; Maurer, Tr. 4942).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1828. The partnership proposal presented to Smile Source was dated February 13, 2014. On August 25, 2014, Steck sent Cavaretta an email with an attachment titled, "SmileSource14 copy.pptx." (CX2508 at 003-013). The attached partnership proposal was dated February 13, 2014. (CX2508 at 003). Steck testified that the attachment was the final version of the proposal presented to Smile Source. (Steck, Tr. 3783-3784). Similarly, on September 9, 2014, Sullivan asked to see "the proposal that we outlined to Smile Source earlier this year." (CX2536 at 002). In response, Dave Steck forwarded an attachment titled, "SmileSource14 copy.pptx". (CX2536 at 001). The attached partnership proposal was dated February 13, 2014. (CX2536 at 005).

Schein's Response:

No response, other than to note that, while the presentation was dated February 13, 2014, it appears it was not actually presented until late March 2014. (RX 2419-001 (March 18, 2014 email noting that the offer would be presented the following week)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1829. Schein's partnership proposal to Smile Source in early 2014 offered a 7% discount off of catalog for private label brand merchandise. (CX2508 at 011; CX2536 at 014; [REDACTED] Steck, Tr. 3790).

Schein's Response:

Misstates the evidence. HSD Vice President Dave Steck, who prepared the Smile Source proposal, explained that the merchandise discounts consisted of 7% on branded products, 14% on private label products, and an additional 2% rebate for purchasing at least \$30,000 in supplies and meeting other qualifying conditions. (Steck, Tr. 3782-87, 3793-94). In addition, Schein offered substantial discounts on equipment, business solutions, and other services. (CX 2508-011). These discounts were substantially greater

than what similarly situated non-member independent dentists could get under Schein's standard Volume Purchase Agreements ("VPAs"). (Steck, Tr. 3791-93, 3849-50; CX 2508-011; CX 2828). Complaint Counsel's expert, Dr. Marshall, performed an analysis of Schein's discounts, and concluded that Smile Source members [REDACTED] [REDACTED] [REDACTED] (CX 7101-066-67 (Table 7)).

In addition, Schein increased its offer in April 2014, offering discounts of 9% on branded product and 18% on private label, along with the 2% volume rebate and other discounts. (Steck, Tr. 3795-97; CX 2591). This offer was superior to Schein's top VPA, which is typically reserved for customers with at least \$75,000 in volume. (Steck, Tr. 3795-97; CX 2828-001).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1830. Schein's 2014 partnership proposal to do business with Smile Source members offered [REDACTED] compare Steck, Tr. 3777-3778 (the discount to Smile Source members in 2011 was [REDACTED] with Steck, Tr. 3790 (Schein's 2014 offer to Smile Source was for 7% off standard products); CX2536 at 014).

Schein's Response:

There is no dispute that in 2011 Smile Source was receiving DSO pricing from Special Markets and that, had Smile Source not terminated Schein, Schein would have

suffered losses as a result of their DSO-priced deal. (Marshall, Tr. 3097). Nor is there a dispute that DSO pricing is based on a variety of factors including contractual volume commitments and manufacturer chargebacks, or that DSOs are lower-cost to serve because they generally do not need the hands-on education and consulting services offered by FSCs. (JF 39-49). By contrast, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] JF 39-49).

Schein's 2014 offer reflects the fact that Smile Source is a buying group, not a DSO.

Schein believed that its buying group offer to Smile Source was "compelling," "aggressive" and a "good effort," and was disappointed that it didn't win the business. (CX 2130-001 (Tim Sullivan "felt it was a very compelling offer" and so did one of Smile Source's "key guys."); CX 2508-001 (describing proposal as a "good effort;" and suggesting that it be "use[d] as a template with changes for GPOs going forward"); CX 2683-001 (Mr. Sullivan noting that "[w]e made a very aggressive and inclusive proposal to them that many of their execs liked...."); CX 2591-002; Sullivan, Tr. 4173-74; Steck, Tr. 3783-84; RX 2338-003 ("even though [Smile Source] didn't ultimately sign with us ... yet")). Mr. Foley, who had previously worked with Smile Source in Special Markets, testified at trial that Dave Steck reached out to him for help on pricing to make sure the proposal was "aggressive enough" to win the Smile Source bid. (Foley, Tr. 4654-55 (noting that HSD's 2014 proposal to Smile Source looked "like a winnable proposition"

and that it “was even more aggressive than what [Special Markets] once had offered in 2010”).

Indeed, Schein’s offer was objectively similar to Burkhart’s deal with Smile Source. (CX 4105-009 (Schein: supplies: 7-14%, plus 2% volume rebate; equipment, 10% plus 2% volume rebate); RX 2043-007 [REDACTED])

[REDACTED]

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1831. Steck wrote that the Smile Source 7% discount proposal “bombed.” (CX2508 at 001).

Schein’s Response:

The asserted fact is taken out of context and is misleading. Mr. Steck’s comment simply reflects his disappointment that his proposal, which he worked very hard on, was not accepted. It is hardly a reflection of Smile Source’s view of the proposal. Indeed, there is no evidence that Mr. Steck personally spoke with Smile Source about their reaction to the proposal. In contrast, Smile Source’s view of the proposal was contemporaneously recorded in an April 23, 2014 email, reporting on a call with Dr. Goldsmith. Mr. Chatham wrote,

Just spoke with Andrew Goldsmith. They as a group have decided to probably go with Darby for their supply business. I truly believe he wanted us and was voted down by the group. We chatted for 20 minutes and I brought up some things had hadn’t thought of and he asked me to send an email based on the things we spoke about, i.e., Service rates, pro

repair, business solutions. I believe he is going to make one more run with the business leaders....

(CX 2591).

Other internal Schein documents also show that Smile Source viewed Schein's proposal favorably. Mr. Sullivan wrote, "We made a very aggressive and inclusive proposal to them that many of their execs liked." (CX 2683-001). Smile Source's President, Trevor Maurer, also testified that he believed Schein's offer was comparable to Burkhardt's, but that he stayed with Burkhardt out of loyalty. (Maurer, Tr. 4942-43, 4945). As this shows, Schein's proposal, while not accepted, did not "bomb."

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1832. Steck prepared the presentation for Smile Source dated February 13, 2014. (Steck, Tr. 3784; CX2508 at 003). Steck did not attend the meeting where the presentation was presented to Smile Source. (Steck, Tr. 3846). Steck does not have personal knowledge of the meeting with Smile Source and does not know what was discussed. (Steck, Tr. 3847).

Schein's Response:

Mr. Steck was closely involved in the Smile Source negotiations. While Mr. Steck was not on the phone calls during which Schein presented its improved offer, he specifically approved making the offer and had discussions with Mr. Chatham before and after the offer was made. (Steck, Tr. 3795-96).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1833. [REDACTED]

Schein's Response:

The evidence is conflicting, and Dr. Goldsmith's testimony at trial is not credible on this point (as well as many others). (SF 1122-28). Contemporaneous documents show that Dr. Goldsmith was in favor of accepting Schein's offer. (CX 2591). Even at trial, Dr. Goldsmith testified that, [REDACTED]

[REDACTED] (Goldsmith, Tr. 2158). Moreover, Dr. Goldsmith testified that [REDACTED] and thus, the weight of the evidence does not support the conclusion that the [REDACTED] [REDACTED] (Goldsmith, Tr. 2158-59).

Dr. Goldsmith's testimony also indicates that the discount level was not the [REDACTED] [REDACTED] but it was Schein's reluctance to put their [REDACTED] [REDACTED] instead of Schein. (Goldsmith, Tr. 2026).

Moreover, the asserted fact ignores that Schein attempted to "sweeten the pot" by increasing its proposed discounts by 2% on branded products and 4% on private label

products. (Steck, Tr. 3795; CX 2591-001-02 (“I think (as you and I discussed) we should increase the discount to 9/18 as our ‘best and final’ offer.”)). This increased Schein’s originally proposed discount from 7/14 to 9/18. (Steck, Tr. 3795; CX 2591-001-02). Schein’s new offer to Smile Source was superior to Schein’s top VPA, which is typically reserved for customers with at least \$75,000 in volume. (Steck, Tr. 3795-97; CX 2828-001).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1834. [REDACTED]

Schein’s Response:

The proposed fact is irrelevant and unsupported by the evidence cited.

As an initial matter, Dr. Goldsmith’s hopes or expectations about the price Smile Source members should pay are irrelevant. Many customers hope or expect prices to be lower than they are. But that does mean such hopes or expectations are realistic or even reasonable. That is not the way the world works. A customer’s uninformed expectations are not reliable evidence for what constitutes an appropriate or competitive price. Moreover, the reference to the number of locations is only a small factor in establishing price, as, unlike DSOs and large group practices, [REDACTED]

[REDACTED] (SF 52; Goldsmith, Tr. 2053-54).

While Dr. Goldsmith based his expectations on what Special Markets had offered to Smile Source in 2008 (and lost money on), the evidence is undisputed that Schein's Special Markets division typically set prices based on an assumption that volume commitments would be met and FSC support would not be required. (SF 23-25; JF 43-49). As Mr. Muller explained, at Special Markets pricing levels, Schein "usually ask[s] [its] field sales consultants to visit less often as ... profits have been cut. (CX 2296-001). Smile Source, however, not only wanted full FSC support, but also wanted all of the other services and benefits that HSD provided. (Maurer, Tr. 4943-44; Goldsmith, Tr. 2125-26)). Moreover, unlike Special Markets' DSO customers, Schein learned after Smile Source terminated it that Smile Source lacked the ability to deliver significant incremental volume, as Schein was able to maintain most of the Smile Source customers. (See SF 1724). As such, the offer originally negotiated by Special Markets in 2008 is not probative of what discounts Smile Source could expect when negotiating with HSD in 2014.

In any event, this case is not about whether Schein's offer to Smile Source was as high as Dr. Goldsmith wanted, but whether Schein refused to offer discounts to buying groups. Complaint Counsel has introduced no evidence to establish that Schein either refused to offer discounts to Smile Source or that its 2014 offer — and continued efforts to negotiate with Smile Source thereafter — was a sham.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1835. [REDACTED]

Schein's Response:

The asserted fact suffers from the same issues as CCFF 1830 and 1834. Schein incorporates its responses to those proposed findings here. In short, Dr. Goldsmith's expectation that a large buying group should receive pricing similar to a DSO, without having the same low cost-to-serve or volume commitment is unfounded, unreliable and irrelevant. (SRF 1830, 1834).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1836. [REDACTED]

Schein's Response:

Misstates the facts. Mr. Maurer did not testify that he expected a discount of at least [REDACTED] or better from Schein. [REDACTED]

[REDACTED] (Maurer, Tr. 5007). Mr. Maurer further testified that comparing a discount percentage is not a significant means of comparing offers, but in the end Burkhart and Schein arrived at the same pricing "level" in 2014:

Q. And Burkhart at that time was offering pricing of about a 20 percent discount?

A. Yes.

Q. And that is what you wanted from Schein as well?

A. Well, to be clear, the percent discount depends upon the, let's call it, sticker price. So when they say it will be a 20 percent or a 10 percent, it really depends on what price list they're talking about, so at the end of the day all we're interested in is the bottom-line net-net price paid by the dentists, so I don't want to march myself into a corner and say that they were both at 20 or they were both at 10, *but at the end they arrived at the same level.*"

(Maurer, Tr. 5004-05 (emphasis added)).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1837. [REDACTED]

Schein's Response:

The proposed fact is irrelevant. As an initial matter, Mr. Maurer's testimony simply reflects the fact that [REDACTED]

[REDACTED] Thus, the size of the discount that Smile Source needs for its business model had nothing to do with what constitutes an appropriate or competitive discount; it just means that distributors that do not want to cover Smile Source's "middle man tax" may not be a good fit for Smile Source's business model.

Moreover, Mr. Maurer's testimony was based on a hypothetical discount of [REDACTED] off a hypothetical [REDACTED] and bears no relation to Schein's actual bid or prices. (Maurer, Tr. 5007-08 [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Maurer, Tr. 5008).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1838. [REDACTED]

Schein's Response:

The proposed fact is contradicted by the evidence. According to Mr. Chatham, Dr. Goldsmith told him on April 23, 2014 that Schein's offer was "voted down by the group." (CX 2591-002). At trial, Dr. Goldsmith testified that [REDACTED]

[REDACTED]

[REDACTED] (Goldsmith, Tr. 2158-59). Mr. Maurer testified that Schein and Burkhart's offers were so similar that "[t]he only benefit we would have seen [in

Schein's offer] is a national footprint, but the pricing was the same," but the advisory council decided to stay with Burkhardt. (Maurer, Tr. 4945).

To the extent the proposed fact asserts that Schein's offer was rejected due to the discount, Dr. Goldsmith's testimony contradicts that assertion. Dr. Goldsmith testified that the discount was not the [REDACTED] it was Schein's reluctance to put their [REDACTED]

[REDACTED] instead of Schein. (Goldsmith, Tr. 2026).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1839. At the beginning of 2012, Smile Source had around [REDACTED] members. [REDACTED] RX2952 (Maurer, Dep. at 26-27) (at the end of 2011, Smile Source had around 28 members)). In 2014, Smile Source had around [REDACTED] RX2952 (Maurer, Dep. at 27) (at the end of 2013, there were 145 Smile Source locations)). See also CCFF ¶ 183.

Schein's Response:

Dr. Goldsmith's testimony was a guess as to the size of Smile Source in 2014. (Goldsmith, Tr. 2020 [REDACTED])

And, as discussed previously, there is no evidence that the size of a buying group's membership means that full-service distributors will or should offer volume-commitment-type pricing, particularly where the buying group affirmatively makes no volume commitments. (SRF 1830, 1834). Moreover, the asserted fact notably excludes Smile Source's three-year period where it was partnered with Schein, during which its growth

was stagnant. Smile Source was formed in 2006 and Schein started to offer discounts to Smile Source members in 2008. (Sullivan, Tr. 3914; Goldsmith, Tr. 2070). From 2008 to 2011 Schein offered DSO-level discounts to Smile Source members, yet Smile Source was only able to attract 28 members over the three-year period. (Foley, Tr. 4524; Goldsmith, Tr. 2103).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1840. Schein's offer to Smile Source was the same discount that it offered to individual dentists who agreed to purchase at least \$35,000 from Schein. (Steck, Tr. 3792-3794; *see also* [REDACTED])

Schein's Response:

False. Schein's initial offer was ***better*** than the discounts offered to individual dentists who committed to purchase at least \$35,000 from Schein, because Schein's Smile Source offer included a 2% volume rebate as well as substantial discounts on equipment, business solutions, and other services. (Steck, Tr. 3791-93, 3849-50; CX 2508-011; CX 2828). Schein's improved offer was even better than the discounts under Schein's best VPA, which was reserved for dentists purchasing at least \$75,000 in supplies. (Steck, Tr. 3795-97; CX 2828-001).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1841. [REDACTED]

Schein's Response:

False. Mr. Steck testified that he approved an additional discount, and that the discount was in fact offered to Smile Source by Mr. Chatham. (Steck, Tr. 3795). Complaint Counsel only cites to Dr. Goldsmith's lack of recollection to support its proposed finding. But lack of recollection does not contradict Mr. Steck's testimony or prove that Schein did not propose an additional discount. (See Goldsmith, Tr. 2161).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1842. Steck offered testimony regarding an alleged phone call between John Chatham and Dr. Goldsmith in which Schein made a 9/18 discount proposal to Smile Source. (Steck, Tr. 3796-3797). Steck was not on the alleged call between John Chatham and Dr. Goldsmith in 2014. (Steck, Tr. 3796-3797, 3847). Steck has no personal knowledge of that call. (Steck, Tr. 3847). The testimony that Steck offered about that phone call consists solely of information he heard from John Chatham. (Steck, Tr. 3847-3848).

Schein's Response:

Dr. Goldsmith was presented with CX 2591 and testified that [REDACTED]

[REDACTED]

[REDACTED]

(Goldsmith, Tr. 2159-61; CX 8039 (Goldsmith, Dep. at 148-49 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (objections omitted))). By contrast Mr. Steck testified "to [his] knowledge" Mr. Chatham "made the offer -- and it was turned down." (Steck, Tr. 3795-96). While Mr. Steck was not on the phone calls in which Schein's improved offer was presented, he specifically approved making the offer and had discussions with Mr. Chatham before and after the offer was made. (Steck, Tr. 3795-96).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1843. [REDACTED]

[REDACTED]

[REDACTED]; CX2571 at 001; *see also* CX2454 at 001 (January 27, 2011, email stating Smile Source customers receive [REDACTED] off catalog for non-formulary products) [REDACTED]).

Schein's Response:

There is no dispute that in 2011 Smile Source was receiving pricing from Special Markets akin to what Schein offers DSOs. Nor is there a dispute that DSO pricing is based on a variety of factors including volume commitments and manufacturer chargebacks, and that DSOs generally do not need the hands-on education and consulting services offered by field sales representatives, which further lowers a distributor's costs in serving them. (JF 39-49). There is also no dispute that, despite having [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Further, Dr. Marshall showed that, had Schein continued with its 2011 deal with Smile Source, Schein would have suffered losses. (Marshall, Tr. 3097 ("If Schein's shares and margins stay the same as ... when Schein actually had the business ... but Smile Source continued to grow, Schein's losses would continue to grow."))).

Moreover, this proposed fact ignores testimony from Mr. Foley acknowledging that HSD's 2014 proposal to Smile Source included additional value-added services and discounts that were not previously provided by Schein Special Markets, and that in Mr. Foley's view, he felt HSD's proposal "was even more aggressive than what [he] once had offered [Smile Source] in 2010." (Foley, Tr. 4654-55). As noted, Schein's 2014 proposal was similar to Burkhardt's offers at the time (Maurer, Tr. 4945), meaning Burkhardt did not offer the equivalent of DSO pricing that Schein gave Smile Source prior to 2012. They were so similar that "[t]he only benefit we would have seen [in Schein's offer] is a national footprint, but the pricing was the same," but the advisory council decided to stay with Burkhardt. (Maurer, Tr. 4945).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1844. [REDACTED]

Schein's Response:

Vague. The asserted fact does not identify what pricing it is referring to – 2009 2011, 2014, 2017? Further, as described, [REDACTED]
[REDACTED]
[REDACTED] (Goldsmith, Tr. 1976). A typical Schein customer does not pay catalog price. (Sullivan, Tr. 4064; *see also* CX 7101-067). Mr. Maurer testified that a comparison to catalog price is insufficient; price needs to be compared to [REDACTED] not the catalog price. (Maurer, Tr. 5008).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1845. On December 20, 2011, Brian Brady of Schein wrote to John Chatham, Dr. Goldsmith, and other Schein and Smile Source employees: "Since July 2009 he has received our highest discount

of [REDACTED] off in Hawaii, so he was already getting our highest discount. Smile Source is a larger discount but only by a couple % points.” (CX2571 at 001 [REDACTED]).

Schein’s Response:

Schein does not dispute that, in the only example of a Smile Source member complaining about not receiving the Smile Source discount after Smile Source was moved to HSD from Special Markets, [REDACTED]

[REDACTED] (Goldsmith, Tr. 2118; CX 2571-001-02; *see also* SF 911, 1134-37).

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1846. On December 20, 2011, Brian Brady of Schein wrote to Joe Cavaretta, John Chatham, Dr. Goldsmith, and other Schein and Smile Source employees: “Smile Source has incredibly aggressive pricing and just to confirm MORE aggressive than current [REDACTED] (CX2571 at 001) [REDACTED]

Schein’s Response:

Schein incorporates its reply to CCFF 1845 here. (SRF 1845; *see also* SF 1134-37).

The difference between Smile Source pricing and the dentist being discussed in CX 2571 was only [REDACTED] (Goldsmith, Tr. 2118; CX 2571-001-02).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1847.

Schein's Response:

Schein does not dispute that the

(CX 4128-003). Such requirements were not included in either the 2011 agreement with Smile Source (which was unwritten) or the 2014 offer to Smile Source.

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1848. Sullivan acknowledges that Smile Source wanted [REDACTED] off of catalog in 2014, and Schein would not make that offer. (CX2470 at 002 (September 9, 2014 email from Sullivan to Breslawski); Sullivan, Tr. 4003-4004; CX2683 at 001 (June 5, 2015, email); Sullivan, Tr. 4006-4008) [REDACTED]).

Schein's Response:

The cited evidence demonstrates that during and *after* the alleged conspiracy Mr. Sullivan was reluctant to offer a buying group large discounts without volume commitments. (Sullivan, Tr. 4004; SRF 1830). Mr. Sullivan's reluctance was justified. Dr. Marshall's analysis of Schein's contract with Smile Source in 2017, for instance, shows that Schein lost [REDACTED] by supplying Smile Source. (Marshall, Tr. 3122-23 [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1849. On September 9, 2014, Sullivan wrote to his boss, Breslawski and Muller regarding Smile Source: "We met with them earlier this year, made a great proposal and they turned us down. Yes, they would love to get back with us for [REDACTED] off catalog pricing to all their members with no commitments to purchase from us, plus a kickback to them. Not interested." (CX2470 at 002; Sullivan, Tr. 4003-4004; [REDACTED]). Sullivan testified that he was not interested in a deal with Smile Source at the discount level of [REDACTED] off catalog pricing. (Sullivan, Tr. 4004; [REDACTED])

Schein's Response:

The cited evidence demonstrates that during and *after* the alleged conspiracy, Mr. Sullivan was reluctant to offer a buying group large discounts without volume commitments. (Sullivan, Tr. 4004; SRF 1830). Mr. Sullivan's reluctance was justified. Dr. Marshall's analysis of Schein's contract with Smile Source in 2017, for instance, shows

that Schein lost [REDACTED] by supplying Smile Source. (Marshall, Tr. 3122-23 [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1850. On June 5, 2015, Stanley Bergman asked Sullivan whether Smile Source was a credible group. (CX2683 at 001). In response, Sullivan wrote: "We've met with them several times and have alignment on purpose and values, but they want [REDACTED] discount for members that we just can't do. We made a very aggressive and inclusive proposal to them that many of their execs liked, but without the discount they wouldn't move." (CX2683 at 001; Sullivan, Tr. 4007-4008; [REDACTED])

Schein's Response:

The cited evidence demonstrates that during and *after* the alleged conspiracy, Mr. Sullivan was reluctant to offer a buying group large discounts without volume commitments. (Sullivan, Tr. 4004; SRF 1830). Mr. Sullivan's reluctance was justified. Dr. Marshall's analysis of Schein's contract with Smile Source in 2017, for instance, shows that Schein lost [REDACTED] by supplying Smile Source. (Marshall, Tr. 3122-23 [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]. The cited

evidence also supports the fact that Schein made a “very aggressive” proposal to Smile Source in 2014.

Patterson’s Response:

No specific response.

Benco’s Response:

The proposed finding does not pertain to Benco, as it refers only to Schein’s business.

1851. Sullivan understood at the time that Smile Source wanted [REDACTED] off for their members. (Sullivan, Tr. 4007-4008; [REDACTED] Sullivan would not have made a false statement to his boss. (Sullivan, Tr. 4008).

Schein’s Response:

The cited evidence demonstrates that during and *after* the alleged conspiracy Mr. Sullivan was reluctant to offer a buying group large discounts without volume commitments. (Sullivan, Tr. 4004; SRF 1830). Mr. Sullivan’s reluctance was justified. Dr. Marshall’s analysis of Schein’s contract with Smile Source in 2017, for instance, shows that Schein lost [REDACTED] by supplying Smile Source. (Marshall, Tr. 3122-23 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]).

Complaint Counsel’s comment that an author of a document would not make a false statement is irrelevant. Schein has never suggested that Mr. Sullivan’s opinion about what Smile Source “wanted” was not accurate.

Patterson’s Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Schein's business.

1852. [REDACTED]

Schein's Response:

There is no evidence that Schein had any knowledge of Patterson being considered by Smile Source, or that Patterson had any knowledge of Schein being considered by Smile Source. Thus, there is no evidence that any Respondent believed that they were competing against each other for Smile Source's business in 2016. Rather, the evidence shows that, in 2016, Schein continued to negotiate with Smile Source to replace, or be included in the list of, Smile Source's other distributors, namely Burkhart, Atlanta Dental, Nashville Dental, and Darby. As Smile Source's President Trevor Maurer noted, [REDACTED]

[REDACTED] (RX 2091-001).

Patterson's Response:

No specific response.

Benco's Response:

The proposed finding does not pertain to Benco, as it refers only to Patterson's and Schein's business.

XXV. WITNESS BACKGROUND**A. Lay Witnesses Who Testified At Trial****1. Third Party Witnesses**

Dr. Joseph Baytosh of Corydon Palmer Dental Society (Dr. Baytosh, Tr. 1875-1923)

1853. Dr. Joseph Baytosh is the former President of Corydon Palmer Dental Society (“Corydon Palmer”). He acted as president of Corydon Palmer in 2014. (Baytosh, Tr. 1880).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1854. Prior to his presidency at Corydon Palmer, Dr. Baytosh served as secretary, vice president, and president-elect of Corydon Palmer. (Baytosh, Tr. 1880).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1855. Dr. Baytosh also served on the Corydon Palmer executive board from 2011-2013. (Baytosh, Tr. 1880).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1856. Before serving as an executive for Corydon Palmer, Dr. Baytosh also served on the Corydon Palmer Board of Trustees for three years, and as Corydon Palmer's Chairman of Continuing Education. (Baytosh, Tr. 1879).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1857. He joined Corydon Palmer as a member shortly after graduating dental school 30 years ago, and is a practicing dentist in Girard, Ohio. (Baytosh, Tr. 1878, 1876).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Dr. Andrew M. Goldsmith of Smile Source (Dr. Goldsmith, Tr. 1925-2190)

1858. Dr. Andrew M. Goldsmith served as Smile Source's Chief Dental Officer from 2013-2014. (Goldsmith, Tr. 1934, 2041-2042).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1859. [REDACTED]

Schein's Response:

No response.

Patterson's Response:

The correct citation for this finding is: [REDACTED]

Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1860. In 2011, Dr. Goldsmith took on the role of President of Smile Source. He held this role until 2013. (Goldsmith, Tr. 1934, 1938).

Schein's Response:

Dr. Goldsmith was demoted from President to Chief Dental Officer in November 2012. (Maurer, Tr. 4938, 4972-73).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1861. As President of Smile Source, and a part of Smile Source's management team, Dr. Goldsmith had responsibilities for recruiting and retaining members, building a website, developing a vendor program, evaluating the value proposition for members, building a brand, market research negotiating vendor discounts, reviewing invoices, meeting with manufacturers and distributors, promoting the business model, and setting educational standards. (Goldsmith, Tr. 1934, 1951-1952, 1955-1956).

Schein's Response:

No response.

Patterson's Response:

The correct citation for this finding is: (Goldsmith, Tr. 1934, 1951-1952, 1954-1956). Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1862. Dr. Goldsmith became a Smile Source member in about 2010. (Goldsmith, Tr. 1938).

Schein's Response:

Dr. Goldsmith was a Smile Source member for "roughly a year" before joining the management team in 2011. (Goldsmith, Tr. 1938).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1863. Dr. Goldsmith is a practicing independent dentist in Houston, Texas. He has practiced dentistry for 20 years. (Goldsmith, Tr. 1926).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Dr. Richard Johnson of Klear Impakt (R. Johnson, Tr. 5478-5525)

1864. Dr. Richard Johnson is a founding partner and part owner of Klear Impakt. (R. Johnson, Tr. 5478-5479, 5481).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1865. Dr. Richard Johnson and his partners started Klear Impakt sometime in 2014. (R. Johnson, Tr. 5511).

Schein's Response:

Dr. Johnson testified that Klear Impakt created its LLC in 2014, but “at that point we’d been talking for a couple years.” (R. Johnson, Tr. 5511).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1866. As part of his responsibilities from August 2015 to the present, Dr. Richard Johnson negotiates discounts and pricing with Henry Schein. (R. Johnson, Tr. 5481; 5511 (1st agreement with Schein signed in 2015)).

Schein's Response:

Dr. Johnson's negotiations with Schein regarding pricing and other terms of Klear Impact's partnership with Schein began in 2014. (R. Johnson, Tr. 5479, 5490).

Patterson's Response:

Patterson has no specific response but notes that August 2015 is after the alleged April 9, 2015 end of the alleged conspiracy. (Kahn, Tr. 19).

Benco's Response:

Benco has no specific response to the proposed finding.

Dr. John C. Kois, Sr. of Kois Buyers Group (Kois, Sr., Tr. 160-303)

1867. Dr. John C. Kois, Sr. founded the Kois Center in 1994, and he served as its Director since its inception. (Kois Sr., Tr. 163-164).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1868. In 2014, Dr. Kois, Sr. founded the Kois Buyers Group. (Kois Sr., Tr. 179-181).

Schein's Response:

The Kois Buyers Group was the idea of a Canadian-based consultant named Qadeer Ahmed at ProCare. (CX 8007 (Kois Sr., Dep. at 30-31 (“Where did you get the idea to set up a buyers group? A. From a company called ProCare. ... Q. Before you met ProCare and Qadeer Ahmed, had you done anything to start the process of trying to set up a buying group? A. No.”))). Dr. Kois worked with Mr. Ahmed to create the Kois Buyers Group. (SF 849-56).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1869. Dr. Kois, Sr. is a self-employed dentist practicing in the state of Washington. (Kois Sr., Tr. 161).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1870. Dr. Kois started practicing dentistry in 1977, and joined the U.S. Air Force in 1978. (Kois Sr., Tr. 161-162).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1871. Dr. Kois, Sr. is also an assistant professor at the University of Washington and continues to teach through the Kois Center. (Kois Sr., Tr. 163-164).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

John Constantine Kois, Jr. of Kois Buyers Group (Kois Jr., Tr. 304-390)

1872. John C. Kois, Jr. is the CEO of Kois Center, and has held that position since March 2015. (Kois Jr., Tr. 306).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1873. From 2015 to present, Kois, Jr. has also acted as the Manager of Kois Tribal Management. (Kois Jr., Tr. 307).

Schein's Response:

No response.

Patterson's Response:

The asserted date of "2015" is misleading and not discussed on the cited page. (Kois Jr., 307) (mentioning no dates). John Kois, Jr. has acted as Manager of Kois Tribal Management since *August or September 2015*. (CX8008 (Kois Jr., Dep. at 10, 102)). August or September 2015 is after the alleged April 9, 2015 end of the alleged conspiracy. (Kahn, Tr. 19).

Benco's Response:

Benco has no specific response to the proposed finding.

1874. Kois Tribal Managment runs the Kois Buyers Group. (Kois Jr., Tr. 307).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1875. Kois, Jr. also serves as the Manager of Kois Buyers Group. In that capacity, he manages and maintains vendor relationships, memberships, and the website. (Kois Jr., Tr. 306, 309).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Dr. Brenton Mason of New Mexico Dental Co-op (Mason, Tr. 2321-2409)

1876. In late 2012 or early 2013, Dr. Brenton Mason along with Dr. Jason Chapman, and Dr. Frank Montoya sought to establish the New Mexico Dental Co-op for independent dentists. (Mason, Tr. 2331, 2339 (began discussions in 2012-2013)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1877. As part of his duties in putting together the New Mexico Dental Co-op, Dr. Mason looked to negotiate supplies and equipment pricing with vendors, including dental supply distributors. (Mason, Tr. 2333-2334).

Schein's Response:

No response, other than to note that Dr. Mason did not approach Schein to negotiate supplies and equipment pricing. (Mason, Tr. 1394-97; RX 2400-001 (asking Schein for "ideas" and clarifying "we are not ... trying to set the price of the distributor"))).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1878. From 2002 through 2014, Dr. Mason owned his own dental practice in Albuquerque, New Mexico. (Mason, Tr. 2324). He owned three offices and had a contract with a fourth. (Dr. Mason, Tr. 2324).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1879. Currently, Dr. Mason is a practicing dentist at a general dentistry family practice called Valencia Family Dental. (Mason, Tr. 2322).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Trevor Maurer of Smile Source (Maurer, Tr. 4935-5018)

1880. Trevor Maurer is the President and CEO of Smile Source. (Maurer, Tr. 4935).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1881. In late 2012, Maurer joined Smile Source as the Vice President of Business Development. (Maurer, Tr. 4937). He was promoted to President in mid-2013 and CEO in late-2013. (Maurer, Tr. 4937-4938).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Justin Michael Puckett of MB2 Dental Solutions (Puckett, Tr. 2200-2319)

1882. Justin Michael Puckett is the President of MB2 Dental Solutions. (Puckett, Tr. 2201).

Schein's Response:

No response, other than to note that Mr. Puckett was also part owner of the Dental Gator buying group. (Puckett, Tr. 2222).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1883. He has held the position of President of MB2 Dental Solutions since December 2013. (Puckett, Tr. 2201).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1884. As President of MB2 Dental Solutions, Puckett deals with helping dental offices grow, as well as overseeing all corporate operations. (Puckett, Tr. 2204).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1885. Prior to becoming President of MB2 Dental Solutions, Puckett also served as its General Counsel. (Puckett, Tr. 2204).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1886. Puckett was Vice President of Finance and General Counsel for another DSO called Floss Dental before joining MB2 Dental Solutions. (Puckett, Tr. 2205).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Jeffrey Richard Reece of Burkhart Dental Supply (Reece, Tr. 4357-4496)

1887. Jeffrey Reece is Vice President of Sales and Marketing for Burkhart. (Reece, Tr. 4357-4358).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1888. Reece's responsibility for marketing at Burkhart started two years ago, but he has held the VP of Sales position since 2008. (Reece, Tr. 4359).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1889. His responsibilities as VP of sales include overseeing the growth, success, and strategic vision for the sales division. (Reece, Tr. 4359).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1890. As the VP of Marketing, he is responsible for the brand and the strategic vision of the marketing division. (Reece, Tr. 4359).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1891. Over the past 20 years with Burkhardt Dental Supply, Reece filled other positions such as Branch Manager, Continuing Education Division, and Director of Marketing. (Reece, Tr. 4358).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2. Respondents' Executives and Former Executives

a) Benco

Charles ("Chuck") Cohen (Cohen, Tr. 398-1001)

1892. Charles ("Chuck") Cohen is the Managing Director of Benco, a title he shares with his brother, Rick Cohen. (Cohen, Tr. 399-400). The Managing Director title is akin to being the Chief Executive Officer of the company. (Cohen, Tr. 400). Cohen both co-owns and co-manages Benco Dental with his brother. (Cohen, Tr. 399-400).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1893. Cohen took on a leadership role at Benco Dental in 1996, and became the Managing Director about twenty years ago. (Cohen, Tr. 401).

Schein's Response:

Mr. Cohen is "co-managing director along with [his] brother." (Cohen, Tr. 401).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1894. Cohen oversees the company's strategy for development and expansion, human resources, finance, sales, and marketing. (Cohen, Tr. 401).

Schein's Response:

Mr. Cohen shares responsibility for the company's strategy and direction with his brother and other members of the Benco management team. (Cohen, Tr. 401).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1895. From 1989 to 1994, Cohen worked as a Territory Representative for Benco Dental in New York. (Cohen, Tr. 402). He also took on roles in Benco's sales and marketing until around 1994. (Cohen, Tr. 402).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1896. Before leaving for college in 1994, Cohen served as Benco Dental's first Marketing Director. (Cohen, Tr. 402).

Schein's Response:

No response.

Patterson's Response:

Cohen served as Benco Dental's first Marketing Director from 1984 to 1985, after which he left to go to college. (Cohen, Tr. 402).

Benco's Response:

Benco has no specific response to the proposed finding.

Patrick Ryan (Ryan, Tr. 1009-1277)

1897. Patrick Ryan is the Equipment Research and Development Field Director of Strategic Markets for Benco Dental, a position he took on in June of 2018. (Ryan, Tr. 1015-1016). He also manages a book of DSO business. (Ryan, Tr. 1016).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Pat Ryan is a Benco employee, not a Benco executive. Pat Ryan is not a member of Benco's Senior Leadership Team. (CX8015 (Cohen, Dep. at 347); CX0304 (Ryan, IHT at 11)).

1898. Ryan held multiple positions within Benco Dental concurrently. (Ryan, Tr. 1012-1013 (Director of Sales and Director of Special Markets); 1013-1015 (Director of Special Markets and Director of Business Development)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco directs this Court to its response to ¶ 1897.

1899. Ryan took on the Director of Business Development position in 2011. (Ryan, Tr. 1014). In this position, Ryan managed the growth of Benco Dental into 30 new geographic markets. (Ryan, Tr. 1015).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco directs this Court to its response to ¶ 1897.

1900. Ryan became the Director of Special Markets (also known as “Strategic Markets”) Division in 2006. (Ryan, Tr. 1013-1014).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco directs this Court to its response to ¶ 1897.

1901. While in this position, Ryan reported directly to Chuck Cohen. (CX8037 (Ryan, Dep. at 23-24)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco directs this Court to its response to ¶ 1897.

1902. As Director of Special Markets, Ryan was responsible for large groups such as DSOs, community health centers, and federal government customers. (Ryan, Tr. 1014).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco directs this Court to its response to ¶ 1897.

1903. As Director, Ryan managed nine employees in the Strategic Markets Division. (Ryan, Tr. 1014).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco directs this Court to its response to ¶ 1897.

1904. In 2002, Ryan became the Director of Sales with responsibility for all regions including 48 states. (Ryan, Tr. 1011-1012). In this position, Ryan had approximately eight direct reports and 60-100 indirect reports including Territory Representatives and Equipment Specialists. (Ryan, Tr. 1012-1013).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco directs this Court to its response to ¶ 1897.

1905. Ryan started at Benco Dental as a Territory Representative in 1993, and received a promotion to Regional Manager in 2000. (Ryan, Tr. 1011).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

By way of response, Benco directs this Court to its response to ¶ 1897.

b) Schein

Joe Cavaretta (Cavaretta, Tr. 5525-5662)

1906. Joe Cavaretta worked for Henry Schein Dental for 18 years, starting in 2001. He began to work for another company, Dental Whale Services in February of 2019. (Cavaretta, Tr. 5527).

Schein's Response:

Mr. Cavaretta began working for Dental Whale in February of 2019 as President of Dental Whale Services. (Cavaretta, Tr. 5525-26).

Patterson's Response:

The correct citation for this finding is: (Cavaretta, Tr. 5526-5527). Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1907. Between 2011 and 2015, Cavaretta held the following positions at Schein: Western Zone Manager, Western Zone Director, Vice President of Sales for the West, and finally Vice President of Sales for the East. (Cavaretta, Tr. 5540).

Schein's Response:

Schein notes that Mr. Cavaretta testified he held these positions in the order stated above. However, he did not hold all of these positions from 2011-2015. Mr. Cavaretta became "Vice President of Sales for the East" in January 2018. (Cavaretta, Tr. 5540; CX 8033 (Cavaretta, Dep. at 16-17)).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1908. During the years 2011 through 2015, Cavaretta reported to Dave Steck. (Cavaretta, Tr. 5540-5541).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Keith Randall ("Randy") Foley (Foley, Tr. 4505-4741)

1909. From 2013 to December 2016, Randy Foley was the Vice President of Sales for Schein Special Markets. (Foley, Tr. 4508).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1910. While Vice President, Foley reported to Hal Muller. (Foley, Tr. 4516).

Schein's Response:

No response, other than to note that Mr. Foley was the Vice President of Sales for Schein Special Markets.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1911. Dave Steck was Foley's counterpart in Henry Schein Dental. (Foley, Tr. 4520).

Schein's Response:

Dave Steck was a Vice President and General Manager for HSD. (Steck, Tr. 3673-74). Mr. Foley was, at certain times, Vice President of Sales for Special Markets. (Foley, Tr. 4508).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1912. From 2009 to 2013, Foley was the Director of Sales for Schein Special Markets. (Foley, Tr. 4508).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1913. As Director and then Vice President of Henry Schein Special Markets, Foley's responsibilities included setting the strategy for Special Markets, managing a sales budget of almost \$500 million, and managing sales teams for DSOs, Federal Government, and Dental Schools. (Foley, Tr. 4514-4515).

Schein's Response:

Mr. Foley held the positions of Director of Sales and then Vice President of Sales for Special Markets. (Foley, Tr. 4508).

Complaint Counsel misrepresents the cited testimony. As Mr. Foley testified, he also “had primary responsibility ... for buying groups.” (Foley, Tr. 4514-15).

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1914. Foley also personally managed the top 50 DSOs known as “Elite DSOs.” (Foley, Tr. 4514).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

Jason (“Jake”) Meadows (Meadows, Tr. 2409-2658)

1915. As of September 2017, Jason (“Jake”) Michael Meadows has served as Henry Schein’s Vice President of Sales of Special Markets. (Meadows, Tr. 2411-2412). In this position, he is responsible for all sales in the United States. (Meadows, Tr. 2412).

Schein’s Response:

Mr. Meadows is only responsible for Schein Special Markets’ business across the United States, not all sales across the United States. (Meadows, Tr. 2412).

Patterson’s Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1916. Meadows held the position of Vice President of Sales, Eastern Area for Henry Schein Dental from 2015 to 2017. (Meadows, Tr. 2412). In this position, Meadows oversaw all sales east of the Mississippi. (Meadows, Tr. 2413).

Schein's Response:

Henry Schein Dental is "a different division" from Henry Schein Special Markets. (Meadows, Tr. 2412). As Vice President of Sales, Eastern Area for HSD, Mr. Meadows oversaw sales for the Henry Schein Dental division, not Special Markets. (Meadows, Tr. 2412-13).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1917. Prior to serving as the Vice President of Sales, Eastern Area, Meadows was the Director for Sales, Eastern Area for one year from 2014 to 2015. (Meadows, Tr. 2413).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1918. While serving as the Vice President of Sales, Eastern Area, Meadows reported to Dave Steck. (Meadows, Tr. 2416).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1919. From 2011 to 2015, Meadows was Henry Schein Dental's Northwest Zone General Manager and reported to Dave Steck and Joe Cavaretta. (Meadows, Tr. 2416-2417).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1920. The Northwest Zone territory under Meadows' management included Alaska, northern California, Idaho, Montana, portions of Nevada, Oregon, and Washington state. (Meadows, Tr. 2417).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

David ("Dave") Arthur Steck (Steck, Tr. 3671-3865)

1921. David ("Dave") Arthur Steck is Henry Schein Dental's Vice President and General Manager. (Steck, Tr. 3671-3673).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1922. Steck took on this position in 2005. (Steck, Tr. 3671-3673).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1923. As HSD's Vice President, Steck's responsibilities include oversight of field sales operations cross the United States, and he had anywhere from 6 to 16 direct reports, including field sales consultants, equipment specialists, and technology specialists. (Steck, Tr. 3672-3675).

Schein's Response:

As Vice President, Mr. Steck's direct reports were managers like Messrs. Cavaretta and Meadows, not field sales consultants. (Meadows, Tr. 2416-17; Cavaretta, Tr. 5540-41). Mr. Steck indirectly oversaw field sales consultants, equipment specialists, and technology specialists, but not directly. (Steck, Tr. 3672-75).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1924. Both Cavaretta and Meadows reported to Steck. (Steck, Tr. 3674-3675).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1925. As Henry Schein Dental's Vice President and General Manager, Steck reported to Tim Sullivan. (Steck, Tr. 3674-3675).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1926. Steck was Foley's counterpart within Henry Schein Dental. (Foley, Tr. 4520).

Schein's Response:

The asserted fact is essentially the same as CCFF 1911 and Schein hereby incorporates its answer here. (*See* SRF 1911). Mr. Steck was a Vice President and General Manager of HSD. (Steck, Tr. 3673). Mr. Foley was, at certain times, Vice President of Special Markets. (Foley, Tr. 4508).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Timothy ("Tim") Sullivan (Sullivan, Tr. 3866-4356)

1927. In the first quarter of 2019, Timothy ("Tim") Sullivan expected to take on the role of Executive Advisor for the Henry Schein's Global Dental Group. (Sullivan, Tr. 3867, 3872).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1928. From 1997 until the end of 2018, Sullivan held the position of President of Henry Schein Dental for North America. (Sullivan, Tr. 3867, 3871-3872 (explaining that he held the title of “President” of Henry Schein Dental for the majority of his 21 years with the company)).

Schein’s Response:

Mr. Sullivan held the position of President of Henry Schein Dental for North America for a majority of his 21 years with Schein.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1929. In his role as President of Henry Schein Dental for North America, Sullivan was responsible for the overall business strategy for a team of roughly 3,000 Henry Schein employees including between 1,100-1,200 sales representatives. (Sullivan, Tr. 3872-3874).

Schein’s Response:

Mr. Sullivan’s responsibilities included setting the overall go-to market strategy, tone, and culture for HSD, but not Special Markets. (Sullivan, Tr. 3871-72, 3899-900; CX 0311 (Sullivan, IHT at 18-21)).

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response to the proposed finding.

1930. When he was President of Henry Schein Dental North America, Sullivan reported to Jim Breslawski. (Foley, Tr. 4519).

Schein’s Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1931. Sullivan served as the President of Schein's U.S. dental business from 2004 through the end of 2018. (Sullivan, Tr. 3871).

Schein's Response:

Mr. Sullivan served as the President of HSD's U.S. dental business from 2004 through the end of 2018. His responsibilities did not cover Special Markets' U.S. dental business. (SRF 1929).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1932. As President of Henry Schein Dental North America, Sullivan's responsibilities included setting the market strategy and tone and culture for Schein's dental business. (Sullivan, Tr. 3871-3872).

Schein's Response:

As noted in response to CCFF 1929, Mr. Sullivan was only responsible for the HSD portion of Schein's dental business, not the Special Markets portion of Schein's dental business. (SRF 1929).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1933. Sullivan anticipated that his role would change in early 2019 to an executive advisor to Schein's Global Dental Group. (Sullivan, Tr. 3867, 3872).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Kathleen Titus (Titus, Tr. 5190-5341)

1934. Kathleen Titus is a business consultant for Henry Schein. (Titus, Tr. 5190-5191).

Schein's Response:

Since her retirement in December 2018, Ms. Titus has served as a business consultant for Schein. (Titus, Tr. 5190-91).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1935. In 2014, Titus took on the role as Director of Group Practices, Western Area for Henry Schein Dental's Mid-Market division, and held this position until January 2019. (Titus, Tr. 5191, 5287-5288). In this position, Titus reported to Joe Cavaretta. (Titus, Tr. 5288).

Schein's Response:

Ms. Titus served as Director of the Mid-Market division from March 2014 until her retirement in December 2018. (Titus, Tr. 5191, 5287-88). In that capacity, she reported to Mr. Cavaretta, Mr. Meadows, and Mr. Brady, but “never reported directly to Mr. Tim Sullivan.” (Titus, Tr. 5192, 5288).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1936. Titus was a Zone Manager for Schein's Special Markets for fifteen years until being transferred to Henry Schein Dental in 2014. (Titus, Tr. 5287-5288). As a Zone Manager, Titus reported to Randy Foley and Hal Muller. (Titus, Tr. 5192-5193).

Schein's Response:

No response.

Patterson's Response:

The cited transcript testimony does not support this proposed finding.

Benco's Response:

Benco has no specific response to the proposed finding.

c) Patterson

Paul Andrew Guggenheim (Guggenheim, Tr. 1524-1874)

1937. Paul Guggenheim was the president of Patterson Dental from May 2010 until April or May 2015. (Guggenheim, Tr. 1526-1527). At that time, he became the CEO of Patterson Dental and remained in that position until May 2016. (Guggenheim, Tr. 1527).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1938. When Guggenheim was President and CEO of Patterson Dental, the individuals who would evaluate GPOs for the company were Dave Misiak, Tim Rogan, Neal McFadden and Wesley Fields. (CX0314 (Guggenheim, IHT at 225)).

Schein's Response:

Mr. Guggenheim specified that responsibility for GPOs “changed in terms of who was ... evaluating [them] at times.” (CX 0314 (Guggenheim, IHT at 225)). Mr. Guggenheim did not specify who was responsible for buying groups at which times.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1939. From May 2016 to May 2017, Guggenheim was the Chief Innovation Officer for Patterson Dental. (Guggenheim, Tr. 1529-1530; CX8023 (Guggenheim, Dep. at 22)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1940. From May 2017 to the present, Guggenheim has been President of Patterson's Western Region, a similar role to position he had with Patterson Dental from 2000 to 2010. (Guggenheim, Tr. 1530; CX8023 (Guggenheim, Dep. at 20-22)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Matthew Neal ("Neal") McFadden (McFadden, Tr. 2659-2848)

1941. Neal McFadden was the President of Patterson's Special Markets division from July 2013 until he left the company in 2017. (McFadden, Tr. 2668). That division has also been called Strategic Accounts. (McFadden, Tr. 2670). From 2009 until July 2013, McFadden was the manager of Patterson's Southwest Region. (McFadden, Tr. 2668-2669; CX8004 (McFadden, Dep. at 28, 29)).

Schein's Response:

No response.

Patterson's Response:

This finding incorrectly identifies Neal McFadden's role at Patterson from 2009 until July 2013. McFadden was Patterson's Southeast Regional Manager from 2009 until July 2013. (McFadden, Tr. 2668-2669; CX8004 (McFadden, Dep at 28-29)). Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1942. As President of Special Markets, McFadden reported to Paul Guggenheim from 2013 to 2015. (McFadden, Tr. 2670-2671).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1943. In May 2015, McFadden began reporting to David Misiak. (McFadden, Tr. 2671; CX8004 (McFadden, Dep. at 54)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

David ("Dave") Misiak (Misiak, Tr. 1289-1517)

1944. David ("Dave") Misiak was Patterson Dental's Vice President of Sales from 2010 to 2016. (Misiak, Tr. 1297-1298).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1945. As VP of Sales for Patterson Dental, Misiak was in charge of Patterson Dental's entire United States sales operation. (Guggenheim, Tr. 1606).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1946. During the time that Misiak was the VP of Sales for Patterson Dental, he reported to Paul Guggenheim. (Misiak, Tr. 1299).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1947. During the time Misiak was the VP of Sales for Patterson Dental, he provided guidance to Patterson Dental's regions and branch office about working with customers. (Misiak, Tr. 1383).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1948. In late 2016, Misiak became the president of Patterson Dental. (CX0316 (Misiak IHT, at 11-12). He left Patterson Dental in approximately May 2018. (Misiak, Tr. 1297).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1949. Misiak is currently employed by Young Innovations (Misiak, Tr. 1291). Ninety-seven percent of Young Innovation's business is for consumable products, which it sells through Schein, Patterson, Benco and other dental products distributors. (Misiak, Tr. 1293-1294). Schein, Patterson and Benco are three of Young Innovations' larger customers. (Misiak, Tr. 1294).

Schein's Response:

No response except to note that Mr. Misiak did not say Young Innovations' consumable products business involved Respondents only, or even mostly. Mr. Misiak did not specify what percentage of Young Innovations' current business involves Respondents, and only referred to Respondents as "larger customers." (Misiak, Tr. 1294).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Timothy ("Tim") Rogan (Rogan, Tr. 3418-3669)

1950. In May 2017, Timothy ("Tim") Rogan become Patterson's Vice President and General Manager for North America. (Rogan, Tr. 3421, 3423).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1951. Rogan has worked for Patterson since 1993. (Rogan, Tr. 3420-3421). From 2009 to May 2017, Rogan was Patterson's Vice President of Marketing for Merchandise. (Rogan, Tr. 3423).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1952. During the time Rogan was Patterson's Vice President of Marketing for Merchandise, he was responsible for consumables (merchandise) relationships with vendors, global sourcing, customer loyalty program, and pricing. (Rogan, Tr. 3424, 3513; Guggenheim, Tr. 1606-1607).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1953. Rogan reported to Paul Guggenheim until approximately January 2016. (Rogan, Tr. 3424-3425).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

B. Expert Witnesses Who Testified at Trial

1. Complaint Counsel's Expert Witness (Marshall, Tr. 2855-3417)

a) Dr. Robert Clifford Marshall

(1) Background

1954. Dr. Marshall is a Distinguished Professor of Economics at Penn State University, where he is also co-director of the Center for the Study of Auctions, Procurements and Competition Policy. (Marshall, Tr. 2856).

Schein's Response:

No response, except to note that Dr. Marshall was not testifying in his capacity as a professor, but rather as a paid consultant employed by the firm Bates White, which has billed the United States Government over “2.5 million” dollars in this matter. (Marshall, Tr. 2858).

Patterson's Response:

Patterson joins Schein's response.

Benco's Response:

Benco has no specific response to the proposed finding.

1955. Dr. Marshall has a Ph.D. degree in economics from the University of California, San Diego (“UCSD”), a master's degree in economics from UCSD, and an undergraduate degree is from Princeton University. (Marshall, Tr. 2856). He specializes in the fields of industrial organization, auctions, procurements, as well as the economics of collusion. Dr. Marshall has published several articles on economics of collusion. (Marshall, Tr. 2856-2857). Among his publications on the topic of collusion is a book, *The Economics of Collusion: Cartels and Bidding Rings*, published by MIT Press, and a paper entitled, “Tacit Collusion in Oligopoly,” which is published in *The Handbook of International Antitrust*. (Marshall, Tr. 2857).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1956. Dr. Marshall has been a professor of economics for over 35 years. (Marshall, Tr. 2856). He spent the first twelve years of his career at Duke University and then left to go to Penn State in 1995, where he had been recruited to be the department head. (Marshall, Tr. 2856). Dr. Marshall is a partner of the economic consulting firm Bates White LLP. (Marshall, Tr. 2857).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

1957. To educate himself about the industry, Dr. Marshall talked with a number of individuals who are participants in the industry, reviewed the record in the case to understand the market participants, including manufacturers, full-service distributors, online distributors, and dentists. (Marshall, Tr. 2859).

Schein's Response:

Dr. Marshall reviewed cherry-picked portions of the record, and misstated numerous facts. The materials he claims to have reviewed are listed in his report. (CX 7100-229-434; *see also* Marshall, Tr. 2949 (noting he did not “review the entire record to determine whether Schein said no to buying groups prior to Unified Smiles in 2011”)).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding except to state that despite Dr. Marshall's firm charging the United States government \$2.5 million in this case alone (Marshall, Tr. 2858), Dr. Marshall makes mistakes at each step of his analysis that renders that render his analyses unreliable. (J. Johnson, Tr. 4873-4875). Dr. Marshall didn't apply his own geographic markets in his analysis; he improperly combined consumables and equipment in the same product market; he excluded other sources of competition, including

manufacturer direct sales and non-full-service distributors; he relied on a limited sample and erroneous assumptions in his SSNIP tests; he improperly assessed the market structure because he ignored key economic evidence about actual economic characteristics; his reliance on industry characteristics to determine likelihood of collusion is suspect; his analysis of unilateral economic self-interest is improper because he failed to conduct a counterfactual analysis and he made a series of unsupported assumptions; he relied on a flawed assessment of a “structural break” driven in part by his misunderstanding of the salient features of the Elite Dental Alliance partnership; and he made unsupported assertions that the alleged conduct resulted in anticompetitive harm. (J. Johnson, Tr. 4873-4875). As a result of Dr. Marshall’s errors, his analysis is not reliable as a matter of economics. (J. Johnson, Tr. 4873-4875).

2. Respondents’ Expert Witnesses

a) Dr. John Henry Johnson, IV (J. Johnson, Tr. 4772-4933)

(1) Background

1958. Dr. John H. Johnson, IV is a professional economist and the owner of the economic consulting firm, Edgeworth Economics. (J. Johnson, Tr. 4773).

Schein’s Response:

No response.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response.

1959. Dr. Johnson charged an hourly rate of \$975 for his work on this case. (RX2834 at 067 (Appendix B) (Johnson Expert Report)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

(2) Dr. Johnson Failed To Do Any Quantitative Analysis To Define The Relevant Market To Assess Respondents' Conspiracy

1960. Dr. Johnson admitted that he did not conduct a hypothetical monopolist or a SSNIP (small but significant and non-transitory increase in price) test to define a relevant product market in this FTC matter. (J. Johnson, Tr. 4929; RX2965 (J. Johnson, Dep. at 30, 184-187,)).

Schein's Response:

Dr. Johnson had no responsibility to conduct a Hypothetical Monopolist Test to define a relevant market. Respondents do not bear the burden of defining the relevant market, Complaint Counsel does.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading. Dr. Johnson did not have to conduct a hypothetical monopolist or a SSNIP test in this matter. As the party with the burden of proof, it is up to Complaint Counsel to prove market definition in this matter. Dr. Johnson confirmed what cross-examination of Dr. Marshall revealed – that Dr. Marshall's purported SSNIP tests, which underlie his opinion regarding the relevant

product market upon which Complaint Counsel relies, were deeply flawed. (J. Johnson, Tr. 4808-4811; *see also* RXD0105 at 14).

1961. Dr. Johnson admitted that he did not define a relevant product market in this FTC matter. (J. Johnson, Tr. 4929; RX2965 (J. Johnson, Dep. at 30, 185,187)).

Schein's Response:

Dr. Johnson had no responsibility to conduct a Hypothetical Monopolist Test to define a relevant market. Respondents do not bear the burden of defining the relevant market, Complaint Counsel does.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading. Dr. Johnson did not have to define a relevant product market in this matter. As the party with the burden of proof, it is up to Complaint Counsel to prove market definition in this matter. Dr. Johnson established that Dr. Marshall's opinion regarding the relevant product market, upon which Complaint Counsel rely, is deeply flawed. (J. Johnson, Tr. 4784-86, 4799-4816; RX2834 at 15-24, ¶¶ 23-34). Indeed, Dr. Johnson demonstrated that substantial persuasive evidence contradicts Dr. Marshall, and strongly implies that there are two distinct relevant product markets: one consisting of all distributors (including full-service distributors, non-full-service distributors, and direct-selling manufacturers) of consumable dental supplies, and the second consisting of all distributors (including full-service distributors, non-full-service distributors, and direct-selling manufacturers) of dental equipment. (J. Johnson, Tr. 4784-86, 4799-4816; RX2834 at 15-24, ¶¶ 23-34).

1962. Dr. Johnson did not define a relevant product market for *SourceOne Dental, Inc. v. Patterson Companies, Inc. et al* (“SourceOne Action”). (RX2965 (J. Johnson, Dep. at 51)).

Schein’s Response:

The asserted fact is irrelevant. Complaint Counsel offer no explanation as to why Dr. Johnson’s efforts in the *SourceOne* case affect the validity of Dr. Marshall’s analysis. Again, Respondents do not bear the burden of establishing the relevant market.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response.

1963. Dr. Johnson admitted that he did not define a relevant product market for *In Re: Dental Supplies Antitrust Litigation* (“Dental Supplies Class Action”). (RX2965 (J. Johnson, Dep. at 52)).

Schein’s Response:

The asserted fact is irrelevant. Complaint Counsel offers no explanation as to why Dr. Johnson’s efforts in the *In re Dental Supplies Antitrust Litigation* case affect the validity of Dr. Marshall’s analysis. Again, Respondents do not bear the burden of establishing the relevant market.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco has no specific response.

(3) Dr. Johnson Failed To Do Any Investigation Or Relevant Analysis To Support His Opinion That The Relevant Market Should Include Direct-Selling Manufacturers

1964. Dr. Johnson opines that the relevant product market should include direct selling manufacturers. (J. Johnson, Tr. 4784-4785; RX2834 at 015-023 (¶¶ 23-30) (Johnson Expert Report)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding misstates the evidence. Dr. Johnson opined that "Dr. Marshall has ignored" sets of products, and in particular that Dr. Marshall "fail[ed] to account for evidence that direct-selling manufacturers and what I would call partial line or non-full-line distributors compete in certain local markets." (J. Johnson, Tr. 4784-85). It is true, however, that the evidence ignored by Dr. Marshall strongly implies that "the relevant product market[s] should include direct selling manufacturers." (J. Johnson, Tr. 4799-4802; RX2834 at 18-23, ¶¶ 25-30).

1965. Dr. Johnson did not include any data or opine in his report in this matter on how dentists substitute between suppliers in response to a price change. (RX2965 (J. Johnson, Dep. at 60-61)).

Schein's Response:

To the contrary, Dr. Johnson opined that Dr. Marshall's analysis failed to adequately consider available alternatives like direct-selling manufacturers and online distributors. (RX 2834-015-23).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading. In the portions of his SourceOne report incorporated into his opinion in this matter, Dr. Johnson analyzed data regarding Benco's pricing tiers, automatic price overrides, and manual price overrides.

[REDACTED]. This data is relevant to the issue of dentist substitution between suppliers in response to a price change. In his report in the present matter, Dr. Johnson specifically noted that Benco "uses 'selective price overrides to make Benco's prices competitive with low-priced competitors like Darby & Safco.'" (RX2834 at 22, ¶ 30).

1966. Dr. Johnson acknowledged that he did not study the question of whether there are some products that are sold directly that are not sold through distributors. (RX2965 (J. Johnson, Dep. at 59)).

Schein's Response:

The asserted fact is irrelevant. The fact that some products may be sold directly but not through distributors has no bearing on market definition. There is no evidence that products sold directly to dentists do not compete with products sold through distributors, or vice versa.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading. Dr. Johnson testified that it is irrelevant to his conclusion that most direct sale manufacturers do not supply a broad range of products and many supply only niche products, because dentists regularly source across multiple suppliers and direct-selling manufacturers can constrain competition by

competing for only some of the products offered by full-service distributors. (J. Johnson, Tr. 4802-03).

1967. Dr. Johnson acknowledged he did not conduct any empirical analysis of whether dentists would switch to direct-selling manufacturers if distributors raised prices. (RX2965 (J. Johnson, Dep. at 59)).

Schein's Response:

Neither did Dr. Marshall, who, as Complaint Counsel's expert, bears the burden of reliably defining the relevant market. (RX 2965 (J. Johnson, Dep. at 59)). Dr. Johnson *did* study testimony from dentists indicating that they compare prices between full and non-full-service distributors. (RX 2965 (J. Johnson, Dep. at 59)).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading. Dr. Johnson did not have to define a relevant product market in this matter. As the party with the burden of proof, it is up to Complaint Counsel to prove market definition in this matter. Dr. Johnson established that Dr. Marshall's failure to include direct-selling manufacturers in the relevant product markets "does not make sense as a matter of economics." (J. Johnson, Tr. 4799-4801).

1968. Dr. Johnson did not interview any manufacturers, including direct selling manufacturers, to learn about the distribution chain in the dental supplies industry. (See [REDACTED]; [REDACTED]; see also RX2834 at 068-085 (Appendix C) (Johnson FTC Expert Report) (listing no interviews relied upon); see also [REDACTED]; [REDACTED])

Schein's Response:

The asserted fact is irrelevant. Complaint Counsel has not established that interviews have anything to do with the accuracy of Dr. Johnson's criticisms of Dr. Marshall. Dr. Marshall's failings do not depend on whether Dr. Johnson conducted interviews.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

(4) Dr. Johnson's Pricing And Entry Analysis From His SourceOne Report Is Irrelevant And Does Not Support His Opinion That the Relevant Market Is Broader Than Full-Service Distribution

1969. Dr. Johnson admitted that the allegations in the SourceOne Action are different from those in this FTC Case. (J. Johnson, Tr. 4904).

Schein's Response:

No response, other than to note that, while some issues may be different, others may be the same. Complaint Counsel has not established why market definition should be the same or different in this case than in the *SourceOne* action.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading. In connection with the SourceOne litigation, Dr. Johnson conducted an assessment of the dental distribution industry, including reading deposition testimony, reviewing documents, and analyzing data

relating to dental distribution. In order to assess the proposed market definition, he analyzed who the competitors were (including assessing the importance of direct-selling manufacturers) and Benco's pricing data. Dr. Johnson's work in the SourceOne litigation was directly relevant to the present matter. (J. Johnson, Tr. 4931-32).

1970. Dr. Johnson acknowledged that the allegations in the Dental Supplies Class Action were different than in this FTC case. (J. Johnson, Tr. 4904-4905).

Schein's Response:

Some of the allegations were the same, while others differed in certain respects. Regardless, a comparison of the allegations between the two cases serves no purpose. Complaint Counsel's opinion concerning the definitions of "same," "similar," and "different" are even less relevant.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading. In connection with the Dental Supplies Class Action, Dr. Johnson analyzed voluminous pricing data and Benco's pricing of its products from the same time period as that of the present matter. Dr. Johnson's work in the Dental Supplies Class Action was directly relevant to the present matter. (J. Johnson, Tr. 4931-32).

1971. Dr. Johnson acknowledged that the SourceOne Action does not involve a conspiracy not to discount to buying groups. (J. Johnson, Tr. 4904).

Schein's Response:

No response.

Patterson's Response:

No specific response, except that Complaint Counsel claimed the opposite before the Commission in opposition to Patterson's Motion for Summary Decision. (CC MSD Opp'n 1 n.4 ("Patterson's Motion is not its first attempt to evade judicial scrutiny on similar facts. It recently lost a motion for summary judgment where a court found sufficient evidence suggesting Patterson conspired with Respondents against the Texas and Arizona state dental association buying groups, creating a dispute of material fact. *Sourceone Dental, Inc. v. Patterson Cos., Inc.*, 310 F. Supp. 3d 346 (E.D.N.Y. 2018). The evidence from this related case is one small part of Complaint Counsel's extensive record. Patterson did not prevail in its Sourceone motion, nor should its recycled arguments prevail here.")).

Benco's Response:

Complaint Counsel's proposed finding is misleading. In connection with the SourceOne litigation, Dr. Johnson conducted an assessment of the dental distribution industry, including reading deposition testimony, reviewing documents, and analyzing data relating to dental distribution. In order to assess the proposed market definition, he analyzed who the competitors were (including assessing the importance of direct-selling manufacturers) and Benco's pricing data. Dr. Johnson's work in the SourceOne litigation was directly relevant to the present matter. (J. Johnson, Tr. 4931-32).

1972. Dr. Johnson acknowledged the Dental Supplies Class Action does not involve a conspiracy not to discount to buying groups. (J. Johnson, Tr. 4905).

Schein's Response:

Class plaintiffs were never clear about what smorgasbord of allegations their case was based on. Dr. Johnson's opinion, if any, about the scope of class counsel's case goes beyond the scope of permissible expert testimony and calls for a legal conclusion.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading. In connection with the Dental Supplies Class Action, Dr. Johnson analyzed voluminous pricing data and Benco's pricing of its products from the same time period as that of the present matter. Dr. Johnson's work in the Dental Supplies Class Action was directly relevant to the present matter. (J. Johnson, Tr. 4931-32).

1973. Dr. Johnson's assignment in the SourceOne Action was to assess the economic analysis provided by the plaintiff's expert Dr. Leitzinger. [REDACTED]
[REDACTED]; RX2965 (J. Johnson, Dep. at 14)).

Schein's Response:

The asserted fact is irrelevant.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading. In connection with the SourceOne litigation, Dr. Johnson conducted an assessment of the dental distribution industry, including reading deposition testimony, reviewing documents, and analyzing data relating to dental distribution. In order to assess the proposed market definition, he

analyzed who the competitors were (including assessing the importance of direct-selling manufacturers) and Benco's pricing data. Dr. Johnson's work in the SourceOne litigation was directly relevant to the present matter. (J. Johnson, Tr. 4931-32).

1974. Dr. Johnson's assignment in the Dental Supplies Class Action was limited to the assessment of the expert economic opinions offered by the plaintiffs' experts Dr. Solow and Dr. McClave, in that matter. (J. Johnson, Tr. 4776; [REDACTED] [REDACTED]).

Schein's Response:

The asserted fact is irrelevant.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading. In connection with the Dental Supplies Class Action, Dr. Johnson analyzed voluminous pricing data and Benco's pricing of its products from the same time period as that of the present matter. Dr. Johnson's work in the Dental Supplies Class Action litigation was directly relevant to the present matter. (J. Johnson, Tr. 4931-32).

1975. Dr. Johnson claimed that non-full-service distributors, such as Darby, act as a constraint on Benco's pricing and, thus, should be included in the relevant market. [REDACTED] [REDACTED]; J. Johnson, Tr. 4806).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1976. Dr. Johnson admitted that in his FTC Case report that he did not do pricing analysis in which he isolated what part of Benco's price changes were the result of competition in a market from Darby. (J. Johnson, Tr. 4914-4915; RX2965 (J. Johnson, Dep. at 263-264)).

Schein's Response:

Dr. Johnson clarified that he didn't conduct a "Darby specific analysis," but "to the extent that Darby ha[d] a presence in one of these particular relevant markets, there's some relevance." (J. Johnson, Tr. 4914-15). According to Dr. Johnson's analysis, Benco's price changes reflect competitive conditions, which include direct manufacturers, Darby, and other online-only distributors. (J. Johnson, Tr. 4915).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading. In the portions of his SourceOne report incorporated into his opinion in this matter, Dr. Johnson analyzed data regarding Benco's pricing tiers, automatic price overrides, and manual price overrides. [REDACTED]). In his report in the present matter, Dr. Johnson specifically noted that Benco "uses 'selective price overrides to make Benco's prices competitive with low-priced competitors like Darby & Safco.'" (RX2834 at 22, ¶ 30).

1977. In his SourceOne Expert Report, Dr. Johnson analyzed how Benco's pricing and margins changed as Benco entered new geographic areas. (RX2965 (J. Johnson, Dep. at 103, 260-264)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1978. The pricing analyses in Dr. Johnson's SourceOne Expert Report did not provide information about what specifically Benco was responding to with its price changes. (RX2965 (J. Johnson, Dep. at 263-264)).

Schein's Response:

As noted in response to CCFF 1976, Dr. Johnson's analysis reflected competitive conditions, which include direct-selling manufacturers and online/telesales distributors.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading. In the portions of his SourceOne report incorporated into his opinion in this matter, Dr. Johnson analyzed data regarding Benco's pricing tiers, automatic price overrides, and manual price overrides.

██ In his report in the present matter, Dr. Johnson specifically noted that Benco "uses 'selective price overrides to make Benco's prices competitive with low-priced competitors like Darby & Safco.'" (RX2834 at 22, ¶ 30).

1979. Dr. Johnson admitted that his analyses of Benco's pricing in his SourceOne expert report would capture changes in price due to competition from Schein and Patterson. (J. Johnson, Tr. 4915; RX2965 (J. Johnson, Dep. at 263-264)).

Schein's Response:

As noted in response to CCFF 1976, Dr. Johnson's analysis reflected competitive conditions, which include direct-selling manufacturers and online/telesales distributors.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

(5) Dr. Johnson's Exhibit 2 Is Misleading and Does Not Support Dr. Johnson's Opinion That The Relevant Market Is Broader Than Full-Service Distribution

1980. Dr. Johnson's Exhibit 2 purports to show that dentists regularly source dental products across multiple suppliers, and this relates to Dr. Johnson's opinion on the relevant product market in this matter. (J. Johnson, Tr. 4905-4906; RX2965 (J. Johnson, Dep. at 38-40); RX2834 at 019-021 (¶ 27) (Johnson Expert Report)).

Schein's Response:

Dr. Johnson's Exhibit 2 shows that dentists regularly source dental products from multiple suppliers. (RX 2834-019-21).

Patterson's Response:

With regard to the statement that dentists regularly source dental products across multiple suppliers, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals,

speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response.

1981. Exhibit 2 lists the dental product purchases of only the seven named plaintiffs in the Dental Supplies Class Action. (J. Johnson, Tr. 4906; RX2965 (J. Johnson, Dep. at 39-40); RX2834 at 019-021 (§ 27) (Johnson Expert Report)).

Schein's Response:

Complaint Counsel offers no evidence to show these dentists are unrepresentative of dentists generally. To the contrary, Dr. Marshall agrees that dentists generally purchase supplies from numerous sources simultaneously. (See Marshall, Tr. 2921 [REDACTED]

[REDACTED].

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1982. The seven dentists listed in Exhibit 2 of Dr. Johnson's report in this matter are not a random sample. (RX2965 (J. Johnson, Dep. at 40); J. Johnson, Tr. 4906)).

Schein's Response:

Complaint Counsel offers no evidence to show these dentists are unrepresentative of dentists generally. To the contrary, Dr. Marshall agrees that dentists generally purchase supplies from numerous sources simultaneously. (See Marshall, Tr. 2921 [REDACTED] [REDACTED]).

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading. The seven dentists listed in Exhibit 2 of Dr. Johnson's report were put forward in that litigation as representative of the large class of dentists involved in that litigation. (J. Johnson, Tr. 4906; *see also* RX2834 at 19, ¶ 27).

1983. Dr. Johnson agreed that there were approximately 188,000 dentists in the United States. (J. Johnson, Tr. 4906; RX2965 (J. Johnson, Dep. at 40)).

Schein's Response:

No response, other than to note that it is not clear that the 188,000 figure is the number of active dentists at any particular point in time, rather than the number of dentists in the dataset he was working with, which is a combination of all current and past dentists over the time period reflected in the dataset.

Patterson's Response:

With regard to the statement that there were approximately 188,000 dentists in the United States, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that

should be established by fact witnesses or documents,” Order on Post-Trial Briefs, 3, as well as this Court’s admonition: “Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That’s what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I’m letting you know today so that you don’t think you’re going to question your experts about facts and rely on that,” (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco’s Response:

Benco has no specific response.

1984. Dr. Johnson agreed that Exhibit 2 of his report in this matter thus represents the purchases of only 0.00003723 percent of dentists in the United States. (J. Johnson, Tr. 4907-4908).

Schein’s Response:

Complaint Counsel offers no evidence to show these dentists are unrepresentative of dentists generally. To the contrary, Dr. Marshall agrees that dentists generally purchase supplies from numerous sources simultaneously. (See Marshall, Tr. 2921 [REDACTED]).

Patterson’s Response:

No specific response.

Benco’s Response:

Complaint Counsel’s proposed finding is misleading. As Dr. Johnson explained during his testimony, the seven dentists listed in Exhibit 2 of Dr. Johnson’s report are representative of dentists in general because they were select and put forward in that

litigation specifically because they were representative of the large class of dentists involved in that litigation. (J. Johnson, Tr. 4906; *see also* RX2834 at 19, ¶ 27).

1985. One of the seven named plaintiffs in the Dental Supplies Class Action and listed in Dr. Johnson's Exhibit 2 is Evolution Dental in New York. (RX2834 at 020-021 (Exhibit 2) (Johnson Expert Report)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1986. At trial, Dr. Johnson was not able to recall if Evolution Dental was a dentist's office or a dental laboratory. (J. Johnson, Tr. 4908-4909).

Schein's Response:

The asserted fact is irrelevant.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading. Trial testimony is not intended to be a memory test. (J. Johnson, Tr. 4908-09).

1987. Dr. Johnson admitted that five of the six dental offices listed in Exhibit 2 of his report in this matter are not buying group members. (J. Johnson, Tr. 4909).

Schein's Response:

The asserted fact is irrelevant. Complaint Counsel offers no evidence to show the dentists Dr. Johnson considered are unrepresentative of dentists generally. To the contrary, Dr. Marshall agrees that dentists generally purchase supplies from numerous sources simultaneously. (See Marshall, Tr. 2921 [REDACTED] [REDACTED]).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1988. Dr. Johnson admitted that Exhibit 2 does not identify which supplier is the primary supplier for each dentist listed in the exhibit. (J. Johnson, Tr. 4909-4911; RX2965 (J. Johnson, Dep. at 40)).

Schein's Response:

No response, except to note that it is undisputed that dentists generally purchase supplies from numerous sources simultaneously. (See Marshall, Tr. 2921 [REDACTED] [REDACTED]).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1989. Dr. Johnson admitted that Exhibit 2 of his report in this matter does not show what products each dentist listed in the exhibit bought from the suppliers listed in the exhibit. (J. Johnson, Tr. 4909; RX2965 (J. Johnson, Dep. at 41)).

Schein's Response:

No response, except to note that it is undisputed that dentists generally purchase supplies from numerous sources simultaneously. (See Marshall, Tr. 2921 [REDACTED]

[REDACTED].

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1990. Dr. Johnson admitted that Exhibit 2 of his report in this matter does not identify the quantity each dentist purchased from each of the suppliers listed in Exhibit 2. (J. Johnson, Tr. 4911; RX2965 (J. Johnson, Dep. at 41)).

Schein's Response:

No response, except to note that it is undisputed that dentists generally purchase supplies from numerous sources simultaneously. (See Marshall, Tr. 2921 [REDACTED]

[REDACTED]).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1991. Dr. Johnson admitted that Exhibit 2 of his report in this matter does not indicate if a dentist bought most of their dental supplies from a full-service distributor. (J. Johnson, Tr. 4912).

Schein's Response:

No response, except to note that it is undisputed that dentists generally purchase supplies from numerous sources simultaneously. (See Marshall, Tr. 2921 [REDACTED])

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1992. Dr. Johnson admitted that Exhibit 2 of his report in this matter does not indicate a supplier listed in the exhibit has products that are not available for purchase from a full-service distributor. (J. Johnson, Tr. 4912; RX2965 (J. Johnson, Dep. at 41-42)).

Schein's Response:

No response, except to note that it is undisputed that dentists generally purchase supplies from numerous sources simultaneously. (See Marshall, Tr. 2921 [REDACTED])

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1993. Dr. Johnson admitted that Exhibit 2 of his report in this matter does not show how many times the dentists purchased from each of the suppliers listed in the exhibit. (J. Johnson, Tr. 4912; RX2965 (J. Johnson, Dep. at 42)).

Schein's Response:

No response, except to note that it is undisputed that dentists generally purchase supplies from numerous sources simultaneously. (See Marshall, Tr. 2921 [REDACTED]).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

1994. Dr. Johnson admitted that if a dentist purchased only once from one of these suppliers listed in Exhibit 2 of his report, that supplier would still be listed in the exhibit. (J. Johnson, Tr. 4912; RX2965 (J. Johnson, Dep. at 43)).

Schein's Response:

Dr. Johnson noted it was possible that a one-time purchase could be listed, but Complaint Counsel offers no indication that this was the case. In any event, it is undisputed that dentists generally purchase supplies from numerous sources simultaneously. (See Marshall, Tr. 2921 [REDACTED]).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

(6) Dr. Johnson's Exhibits 8-12 Are Red Herrings That Do Not Actually Include Any Profitability Analysis Related to Buying Groups

1995. Dr. Johnson presented Exhibits 8-12 in his expert report to show that Benco experienced sales growth in five specific metropolitan areas ("MSAs") between 2010 and 2017, despite

Benco's refusal to do business with buying groups. [REDACTED]
[REDACTED]

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. Dr. Johnson presented Exhibits 8-12 in his expert report to show that Dr. Marshall erred in opining that Benco acted contrary to its unilateral economic self-interest by declining to bid for the business of the Kois Buyers Group and Smile Source, and in fact Benco acted consistently with its unilateral economic self-interest by using its resources to pursue its own business objectives and its independent opportunities rather than using them to serve buying groups. (J. Johnson, Tr. 4846-53; [REDACTED] RX2834 at 39-48, ¶¶ 62-76).

1996. [REDACTED]
[REDACTED] RX2965 (J. Johnson, Dep. at 232); RX2834 at 041 (¶65) (Johnson Expert Report) (describing Exhibits 8 through 12)).

Schein's Response:

To the contrary, Dr. Johnson noted [REDACTED]
[REDACTED]
[REDACTED] (J. Johnson, Tr. 4925).

Patterson's Response:

No specific response.

Benco's Response:

Benco agrees with Complaint Counsel that there is no basis to assume that sales to individual dentists are more profitable than sales pursuant to a buying group contract, and that distributors often offer similar prices or even lower prices to individual dentists (including members of buying groups) than the prices buying groups contract for with their preferred distributors. For example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Under these circumstances, it would not have been in Benco's unilateral economic self-interest to use some of its resources to support buying groups. (J. Johnson, Tr. 4846-53; [REDACTED]; [REDACTED]; RX2834 at 39-48, ¶¶ 62-76).

1997. Dr. Johnson did not offer an opinion on whether Schein acted in its unilateral self-interest with respect to buying groups. (J. Johnson, Tr. 4899; RX2965 (J. Johnson, Dep. at 23)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. Dr. Johnson's analysis of the flaws in Dr. Marshall's five studies and his conclusion that Dr. Marshall's opinion is unreliable as a matter of economics apply equally to Schein. (J. Johnson, Tr. 4827-29, 4835-44, 4855-56; RX2834 at 28-39, ¶¶ 43-61).

1998. Dr. Johnson did not offer an opinion on whether Patterson acted in its unilateral self-interest with respect to buying groups. (J. Johnson, Tr. 4899; RX2965 (J. Johnson, Dep. at 24)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Complaint Counsel's proposed finding is incomplete and misleading. Dr. Johnson's analysis of the flaws in Dr. Marshall's five studies and his conclusion that Dr. Marshall's opinion is unreliable as a matter of economics apply equally to Patterson. (J. Johnson, Tr. 4827-29, 4835-44, 4855-56; RX2834 at 28-39, ¶¶ 43-61).

1999. In Exhibit 9 of his report, Dr. Johnson purports to show Benco's annual sales to dentists for 2010 to 2017 in the Los Angeles-Long Beach-Anaheim, CA MSA. [REDACTED]; RX2834 at 043 (¶68) (Johnson Expert Report)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

2000. Dr. Johnson opines that Exhibit 9 shows Benco's sales growing in the Los Angeles-Long Beach-Anaheim, CA MSA over the time period from 2013 to 2016 from \$6.19 million to \$12.2 million, although Benco was not working with buying groups during this time. [REDACTED]; RX2834 at 043-044 (¶69) (Johnson Expert Report)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response.

2001. Dr. Johnson reports that for Dr. Marshall's data, during the same time period, 2013 to 2016, Kois Buyers Group members in the Los Angeles-Long Beach-Anaheim, [REDACTED]

Schein's Response:

No response.

Patterson's Response:

With regard to the statement that during 2013 to 2016, Kois Buyers Group members in the Los Angeles-Long Beach-Anaheim, [REDACTED]

[REDACTED] this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing]


to expert testimony to support factual propositions that should be established by fact witnesses or documents,” Order on Post-Trial Briefs, 3, as well as this Court’s admonition: “Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That’s what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I’m letting you know today so that you don’t think you’re going to question your experts about facts and rely on that,” (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco’s Response:

Benco has no specific response.

2002. 

Schein’s Response:

The asserted fact is misleading. Figure 58 looks at the Kois members who purchased at least one item from Burkhart through the Kois Buyers Group at any point between 2015 and 2016. It then reports the total purchases of dental supplies, either through the buying group or outside of the buying group, from those members. So, for example, if a customer bought a \$5 box of gloves from Burkhart, and \$60,000 of other supplies from Schein, the height of the bar in Figure 58 purports to report the \$60,000 figure. Since the number of members is identical for *each year* – that is, the chart tracks the total buying group and non-buying group purchases of the same selected  customers each year – the height of the bar chart is irrelevant, and simply reflects, among

other factors, statistical variation, inflation, growth of the underlying dental practices, other irrelevant changes in market conditions, or shifts from non-full-service distributors to, or away, from full-service distributors.

Patterson's Response:

With regard to the statement that, in the time period from 2013 to 2016, Kois Buyers Group members' purchases grew from under \$20 million to over \$20 million overall across MSAs, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response.

2003.



Schein's Response:

Dr. Marshall's Figure 58 does not support the asserted fact. Figure 58 does not purport to show purchases of all Kois Buyers Group members, but instead is limited to those members that chose to [REDACTED] [REDACTED] (CX 7100-153-54). Thus, it suffers from self-selection bias in that it focuses on dentists predisposed to choose to purchase from Burkhart. Nor does Figure 58 purport to show where Burkhart's additional sales came *from*, whether from direct-selling manufacturers, online distributors, mail-order distributors, regional full-service distributors, or national full-service distributors like Respondents.

Patterson's Response:

[REDACTED]
[REDACTED], this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response.

b) **Dr. Lawrence Wu** (Wu, Tr. 5019-5189)

(1) **Background**

2004. Dr. Lawrence Wu is the President of NERA, an economic consulting firm. (Wu, Tr. 5067).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Patterson.

2005. Dr. Wu charged an hourly rate of \$1,100 per hour for his work on this case. (Wu, Tr. 5066-67).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Patterson.

(2) **Dr. Wu's Revised Exhibits 5A, 5B, 5C, 13A, and 13B Are Flawed**

2006. Despite his revisions to exhibits in his report the night before his deposition, Dr. Wu's revisions to his expert report Exhibits 5A, 5B, 5C, 13A, and 13B ("Amended Exhibits") are still flawed. (CCFF ¶¶ 2007-2014; Wu, Tr. at 5102-5103, 5106-5107).

Schein's Response:

No response.

Patterson's Response:

Complaint Counsel's proposed finding is false. Complaint Counsel also offers no explanation as to why the exhibits are "flawed." Dr. Wu's Amended Exhibits 5A, 5B, 5C, 13A, and 13B—which respond to Dr. Marshall's analysis—are accurate depictions of the data. The Amended Exhibits graphically depict the simple point that that Patterson was charging prices that are in the same range (or lower) whether the dentist was a member of a buying group or not. (See RX2833 (Amended Exhibits 5A, 5B, 5C, 13A, and 13B) (*in camera*)). Indeed, Complaint Counsel has not identified in its proposed findings (or at trial) any inaccuracies or "flaws" in Dr. Wu's exhibits, and instead simply points to factors Dr. Wu theoretically *could* have analyzed (despite the fact that Dr. Marshall did not analyze any of the factors it points to).

Benco's Response:

Benco joins in the response of Patterson.

2007. All of Dr. Wu's Amended Exhibit analyses examined only the pricing for a single dental product (Septocaine) in a single state (Washington State). [REDACTED] [REDACTED]
[REDACTED]

Schein's Response:

No response.

Patterson's Response:

Complaint Counsels' proposed finding is misleading and irrelevant. Dr. Wu's amended exhibits were created solely to respond to Dr. Marshall's analysis, and thus Dr. Wu analyzed the pricing for the *same* product (Septocaine) that Dr. Marshall analyzed. It

is true, however, that Dr. Marshall analyzed the price of Septocaine for only a single MSA in his Figure 21 from his Expert Report. *See* CX7100 (Marshall Expert Report) at Figure 21 (*in camera*).

Benco's Response:

Benco joins in the response of Patterson.

2008. [REDACTED]

Schein's Response:

No response.

Patterson's Response:

Complaint Counsel's proposed finding is misleading and misstates the evidence and testimony. Analyzing whether dentists who joined a buying group may have obtained lower prices for Septocaine after joining the buying group was not the point of Dr. Wu's exhibits—which simply responded to Dr. Marshall's analysis—nor is it relevant to his opinion. As stated previously, for example, the point of Dr. Wu's Amended Exhibits 5B and 13B is to show that Patterson was charging prices that were in the same range (and often lower) as the prices paid to the Smile Source contracted distributor (Burkhart). Thus, Dr. Wu's conclusion was that dentists could have paid similar prices whether or not they joined a buying group.

Benco's Response:

Benco joins in the response of Patterson.

2009. [REDACTED]

Schein's Response:

No response.

Patterson's Response:

Complaint Counsel's proposed finding is false and misstates Dr. Wu's testimony.

Nowhere in Dr. Wu's testimony does he state, as Complaint Counsel alleges here, that

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Benco's Response:

Benco joins in the responses of Patterson.

2010. [REDACTED]

Schein's Response:

No response.

Patterson's Response:

Complaint Counsel's proposed finding is misleading. The Amended Exhibits 5B and 13B use prices at the transaction level (similar to Dr. Marshall's Figure 21 in his Initial Report, which does not control for volume). The point is to show that Patterson was

charging prices that were in the same range (and often lower) as the prices paid to the Smile Source contracted distributor (Burkhart). Thus, dentists could have paid similar prices whether or not they joined a buying group.

Benco's Response:

Benco joins in the responses of Patterson.

2011. [REDACTED]

Schein's Response:

No response.

Patterson's Response:

Complaint Counsel's proposed finding misstates the evidence and Dr. Wu's testimony. Graphing is one means of statistically analyzing data, and Dr. Wu's Amended Exhibits provide a number of graphs depicting the results of those analyses. It is true, albeit misleading, to state that Dr. Wu did not [REDACTED]

[REDACTED] but that was not the point of Dr. Wu's Amended Exhibits, which responded to Dr. Marshall's analysis and graphically depicted that Patterson was charging prices that were in the same range (and often lower) as the prices paid to the Smile Source contracted distributor (Burkhart). In doing so, Dr. Wu [REDACTED]

Benco's Response:

Benco joins in the responses of Patterson.

2012. Rather than present any statistical analysis of the data underlying his exhibits, Dr. Wu simply presented the exhibits themselves. [REDACTED]

Schein's Response:

No response.

Patterson's Response:

Complaint Counsel's proposed finding is misleading. Dr. Wu's Amended Exhibits respond to Dr. Marshall's analysis, and thus Amended Exhibits 5B and 13B show prices at the transaction level (similar to Dr. Marshall's Figure 21 in his Initial Report, which does not control for volume and for which no "statistical analysis" is presented for the data underlying his exhibit). The point is to show that Patterson was charging prices that were in the same range (and often lower) as the prices paid to the Smile Source contracted distributor (Burkhart). Thus, dentists could have paid similar prices whether or not they joined a buying group.

Benco's Response:

Benco joins in the responses of Patterson.

2013. None of the analyses Dr. Wu's Revised Exhibits examine the counterfactual "but-for" world absent Respondents' conspiracy. [REDACTED]

Schein's Response:

No response.

Patterson's Response:

Complaint Counsel's proposed finding is misleading. Dr. Wu's Amended Exhibits did not have to examine the counterfactual "but-for" world absent Respondents alleged conspiracy, as that was not the point of any of the exhibits, and Dr. Marshall did not examine a counterfactual "but-for" world in his report. (See CX7100 (Marshall Expert Report) (*in camera*); CX7101 (Marshall Expert Rebuttal Report) (*in camera*)).

Benco's Response:

Benco joins in the responses of Patterson.

2014. Specifically, in all of his Revised Exhibits, Dr. Wu failed to account for the fact that the prices that buying group members paid during the conspiracy period may have been inflated because of Respondents' conduct. [REDACTED]

Schein's Response:

No response, other than to note there is no evidence to suggest that "the prices buying group members paid during the [alleged] conspiracy period [were] inflated." As described elsewhere, Dr. Marshall's analysis does not establish that the alleged conduct inflated prices. His analysis of a subset of customers from just two atypical buying groups, Smile Source and Kois, does not establish that prices in the relevant market were inflated. In fact, because Dr. Marshall did not account for the fees that members pay to these buying groups (or deduct the middleman fees paid by distributors to the buying groups), his analysis does not even show that the select customers Dr. Marshall studied received better

pricing. Finally, it is undisputed that Dr. Marshall did not do a but-for analysis. (SF 1715-20).

Patterson's Response:

Complaint Counsel's proposed finding is inaccurate and misleading. The point of Dr. Wu's Amended Exhibits is to show that Patterson was charging prices that were in the same range (and often lower) as the prices paid to the buying group members' contracted distributors. Thus, dentists could have paid similar prices whether or not they joined a buying group. Moreover, Complaint Counsel bears the burden of proof, and Dr. Marshall does not show that prices charged to Kois and Smile Source members were higher than they would have been in the "but-for" world. (See CX7100 (Marshall Expert Report) (*in camera*); CX7101 (Marshall Expert Rebuttal Report) (*in camera*)).

Benco's Response:

Benco joins in the responses of Patterson.

(3) Dr. Wu Applied The Wrong Critical Loss Test In His Criticisms Of Dr. Marshall's Relevant Market Definition

2015. Dr. Wu did not define the relevant product market in this case, nor did he independently perform the hypothetical monopolist test to define the relevant market. [REDACTED] [REDACTED]
[REDACTED]

Schein's Response:

No response.

Patterson's Response:

Complaint Counsel's proposed finding is misleading. Defining the relevant product market was not part of Dr. Wu's assignment. (RX2833 at 1-3). It is Complaint Counsel's burden to prove market definition in this matter. Dr. Wu did, however, point

out potential problems with the way Dr. Marshall has attempted to define the relevant product market in this case, and pointed to evidence showing that online distributors and direct-selling manufacturers are included as part of the relevant market. (RX2833 at 44-55, ¶¶ 105-136).

Benco's Response:

Complaint Counsel's proposed finding is misleading. Dr. Wu did not have to conduct a hypothetical monopolist or a SSNIP test or define the relevant product market in this matter. As the party with the burden of proof, it is up to Complaint Counsel to prove market definition in this matter. Dr. Wu confirmed what cross-examination of Dr. Marshall revealed – that both Dr. Marshall's purported SSNIP tests and his opinion regarding the relevant product market, upon which Complaint Counsel relies, were deeply flawed. (RX2833 at 44-55, ¶¶ 105-136). Indeed, Dr. Wu demonstrated that substantial persuasive evidence contradicts Dr. Marshall, and strongly implies that online distributors and direct-selling manufacturers are included as part of the relevant market. (RX2833 at 44-55, ¶¶ 105-136).

2016. Dr. Wu criticized Dr. Marshall's hypothetical monopolist test ("HMT") analysis, but Dr. Wu applied the wrong critical loss test in his criticisms of Dr. Marshall's Benco Southern California HMT analysis. (CX7101 at 020-021 (¶¶ 44-47) (Marshall Expert Rebuttal Report)).

Schein's Response:

No response.

Patterson's Response:

Complaint Counsel's proposed finding is false. Dr. Wu applied the critical loss test as described by Dr. Marshall in his initial report (CX7100 (Marshall Report) at ¶ 205). In his initial report, Dr. Marshall explicitly compared the diversion in sales to the critical loss

(when comparing 6.3% to 12%), stating that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Dr. Marshall then changed the discussion of his critical loss test in his rebuttal to focus on recapture rates (CX7101 (Marshall Rebuttal Report) at ¶ 46). No empirical analysis of recapture rates was provided in Dr. Marshall's initial report. Moreover, Dr. Wu made it clear at his deposition that he does not agree that the HMT was correctly applied by Dr. Marshall (RX2967 (Wu Dep. at 224), despite Dr. Marshall's implications that they agree on this point (CX7101 (Marshall Rebuttal Report) at ¶ 46, fn. 67). For example, applying Dr. Marshall's HMT to Burkhardt would lead to the conclusion that Burkhardt is not in the same market as Benco, yet Dr. Marshall obscures this fact by combining all full-service dental distributions into a single "firm." Dr. Marshall's analysis is incorrect. Patterson also joins Benco's response to Complaint Counsel's proposed finding.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and misleading. Dr. Marshall's criticism of Dr. Wu's critical loss test is wrong. In his rebuttal report, Dr. Marshall erroneously asserted that the appropriate test is "whether the *recapture rate* exceeds the critical loss." (CX7101 at 20, ¶ 46) (*emphasis added*). The Horizontal Merger Guidelines state that, in conducting a SSNIP test, the proper way to analyze whether a particular product is in the relevant market is to compare 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*)). As explained below in more detail, comparison of the recapture rate to the critical loss leads to nonsensical results.

(See RRFF 2017). Dr. Marshall's analysis is inconsistent with the Horizontal Merger Guidelines and is incorrect. (RX1139 at 9, § 4.1.3; RX2967 (Wu, Dep. 229)). Dr. Wu's analysis is consistent with the Horizontal Merger Guidelines and is correct.

2017. In Dr. Marshall's Benco Southern California HMT analysis, the proper way to analyze whether Darby is in the relevant market is to determine whether the recapture rate is greater than the critical loss, as Dr. Marshall did in his original analysis. (CX7101 at 020 (¶ 44) (Marshall Expert Rebuttal Report)).

Schein's Response:

False. As explained in response to CCFF 1583, Dr. Marshall failed to appropriately conduct the Hypothetical Monopolist Test because he *assumed* that Darby poses less of a competitive constraint than regional full-service distributors. The evidence shows that each distributor offers a unique blend of products and services, which means that dental distribution is a differentiated services market, not that the market is limited to full-service distribution. Dentists purchase supplies and equipment from a host of sources that impose competitive constraints. As noted above in SRF 1525, the evidence establishes that online/mail-order distributors, such as Darby, compete successfully for the business of buying groups, their members, and other independent dentists.

Patterson's Response:

Complaint Counsel's proposed finding is false. Dr. Marshall did not compare recapture rates to the critical loss in his original analysis. (CX7100 (Marshall Expert Report)). Instead, Dr. Marshall simply compared the diversion in sales to the critical loss. (CX7100 (Marshall Expert Report) at ¶ 205). Dr. Marshall also did not calculate any recapture rates in his original report. The first calculation of a recapture rate appears in Dr. Marshall's rebuttal report. (CX7101 (Marshall Rebuttal Report) at ¶ 46). Dr. Marshall's

analysis is inconsistent with the Horizontal Merger Guidelines and is incorrect. Patterson also joins Benco's response to Complaint Counsel's proposed finding of fact.

Benco's Response:

Complaint Counsel's proposed finding is wrong. The Horizontal Merger Guidelines state that, in conducting a SSNIP test, the proper way to analyze whether a particular product is in the relevant market is to compare 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*)). Instead of using the *predicted loss*, Dr. Marshall erroneously compared the *recapture rate* to the critical loss. (CX7101 at 20, ¶ 46). Dr. Marshall's analysis is inconsistent with the Horizontal Merger Guidelines and is incorrect. (RX1139 at 9, § 4.1.3; RX2967 (Wu, Dep. 229)).

The magnitude of Dr. Marshall's error is evident from his own report. Using "a margin of 30% and a SSNIP of 5%," Dr. Marshall found that the critical loss threshold would be 14%. (CX7100 at 90, ¶ 225). Because he used the recapture rate rather than the predicted loss, Dr. Marshall concluded that "a SSNIP of 5% would have to divert 86% or more of the business to products *outside* the FTC's alleged market for it *not* to be a relevant product market." (CX7100 at 90, ¶ 225 (*emphasis in original*)). To illustrate the implications of Dr. Marshall's flawed methodology, take Dr. Marshall's purported SSNIP test based on Benco's entry into Southern California. In that test, Dr. Marshall applied a hypothetical SSNIP to Benco only, and considered diversion outside the candidate market only to Darby. (Marshall, Tr. 3354, 3356-57). (Applying the SSNIP to Benco only – which had only a tiny share of sales in Southern California – rather than to a hypothetical monopolist, and considering diversion to Darby only rather than to all alternate suppliers outside the candidate market, were separate flaws in his methodology. *See* BFF 747-765.)

Assume, in response to a hypothetical SSNIP, Benco lost customers, and of those lost customers, 85% went to Darby, and 5% went to each of Schein, Patterson, and Burkhardt. Dr. Marshall's formula would have us conclude that Schein, Patterson, and Burkhardt are in the relevant product market, but Darby is outside the relevant market – despite being by far the closest competitor and receiving 85% of diverted customers – because the hypothetical SSNIP did not “divert 86% or more of the business to products *outside* the FTC's alleged market.” (CX7100 at 90, ¶ 225). Clearly, this result is ludicrous. But this is the result of Dr. Marshall's erroneous comparison of the *recapture rate* to the critical loss, rather than properly comparing the predicted loss to the critical loss. (RX1139 at 9, § 4.1.3 (Horizontal Merger Guidelines)).

2018. Dr. Wu erroneously did not use the criterion of whether the recapture rate is greater than the critical loss and instead used an incorrect framework in which the hypothetical monopolist raises the prices for all full-service distributors, not just the prices charged by Benco. (CX7101 at 020 (¶ 44) (Marshall Expert Rebuttal Report)). As a result of this error, Dr. Wu used the wrong criterion when analyzing the Southern California data to determine whether Darby should be included in the relevant product market. (CX7101 at 020 (¶ 45) (Marshall Expert Rebuttal Report)).

Schein's Response:

No response.

Patterson's Response:

Complaint Counsel's proposed finding is incorrect. Dr. Wu did not use the wrong criterion when analyzing the Southern California data to determine whether Darby should be included in the relevant product market. Dr. Wu properly implemented the hypothetical monopolist test as laid out in the Horizontal Merger Guidelines. (RX1139 at 7, § 4.1.1). It should also be noted that Dr. Marshall also did not use the criterion of “whether the recapture rate is greater than the critical loss” in his original report (CX7100 (Marshall

Report) at ¶ 205), but then *changed* his test in his rebuttal report (CX7101 (Marshall Rebuttal Report) ¶ 46). If there was any error in applying the critical loss test, it is Dr. Marshall's. Patterson also joins Benco's response to Complaint Counsel's proposed finding.

Benco's Response:

Complaint Counsel's proposed finding contains at least three fundamental errors.

First, the criterion of "whether the *recapture rate* is greater than the critical loss" is the wrong standard. The Horizontal Merger Guidelines state that, in conducting a SSNIP test, the proper way to analyze whether a particular product is in the relevant market is to compare 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)). Complaint Counsel's proposed criterion is inconsistent with the Horizontal Merger Guidelines and is incorrect. (RX1139 at 9, § 4.1.3; RX2967 (Wu, Dep. 229)).

Second, the framework in which "the hypothetical monopolist raises the prices for all full-service distributors," not just the prices charged by Benco, is the correct framework. The Horizontal Merger Guidelines state that the hypothetical monopolist test "requires that a hypothetical profit-maximizing firm . . . that was the only present and future seller of those products" in the candidate relevant market, impose a SSNIP. (RX1139 at 7, § 4.1.1). Benco was not the "only present and future seller" of dental distribution services in Southern California – not by a long shot. Benco started with a share of 0% when it entered Southern California in 2011, and even in 2015 still had only a very small share. Hypothesizing a price increase by Benco only, with its tiny share of dental distribution in Southern California, does not come close to implementing the "hypothetical *monopolist*"

test using the hypothetical “only present and future” dental distributor in Southern California. (RX1139 at 7, § 4.1.1 (Horizontal Merger Guidelines)). Hypothesizing a price increase imposed by “all full-service distributors” is, in fact, the only way to implement the hypothetical monopolist test using the hypothetical “only present and future” dental distributor in the FTC’s candidate market in Southern California. (RX1139 at 7, § 4.1.1 (Horizontal Merger Guidelines)).

Third, Dr. Wu did not use the wrong criterion when analyzing the Southern California data to determine whether Darby should be included in the relevant product market. Rather, Dr. Wu properly implemented the hypothetical monopolist test by hypothesizing a price increase imposed by “all full-service distributors” to replicate a hypothetical “only present and future” dental distributor in the FTC’s candidate market in Southern California. (RX1139 at 7, § 4.1.1 (Horizontal Merger Guidelines)).

2019. In Benco’s Southern California HMT analysis, Dr. Marshall applied the correct analysis and concluded that the HMT supported the relevant product market of full-service dental distribution after calculating that the critical loss was substantially less than the recapture rate of a hypothetical monopolist. (CX7100 at 088-090 (¶¶ 220-226) (Marshall Expert Report)).

Schein’s Response:

False. As noted in SRF 1525 and 2017, the evidence establishes that online/mail-order distributors, such as Darby, compete successfully for the business of buying groups, their members, and other independent dentists.

Patterson’s Response:

Patterson joins Benco’s response to Complaint Counsel’s proposed finding. Patterson also notes that the section of Dr. Marshall’s Expert Report referenced here

(CX7100 at 088-090 (¶¶ 220-226) does not present any analysis, and instead, simply recites a general but inaccurate description of the HMT.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate, incomplete and misleading. Dr. Marshall's purported HMT analysis contained multiple flaws that rendered Dr. Marshall's conclusions inherently unreliable.

First, Dr. Marshall excluded Los Angeles and Orange counties from his test with respect to Benco's entry into Southern California. (Marshall, Tr. 3346; J. Johnson, Tr. 4808-4810; RX2833 at 51-52, ¶ 127.) Within Kern, Riverside and San Diego counties, Dr. Marshall considered only a subset of Benco's customers. (Marshall, Tr. 3348.) As a result, Dr. Marshall's study included only 257 dentists out of the thousands of dentists in Southern California. (CX7100 at 79, fn. 380). Dr. Marshall's results were "strongly influenced" by his decision to eliminate much of the distributor sales from Southern California. (RX2833 at 53, ¶ 131).

Second, Dr. Marshall failed to test for a SSNIP imposed by a hypothetical monopolist as set forth in the Horizontal Merger Guidelines. The Horizontal Merger Guidelines state that the hypothetical monopolist test "requires that a hypothetical profit-maximizing firm . . . that was the only present and future seller of those products" in the candidate relevant market, impose a SSNIP. (RX1139 at 7, § 4.1.1; *see also* RXD0102). Instead, Dr. Marshall hypothesized a price increase by Benco only. (Marshall, Tr. 3346; *see also* RXD0103). Hypothesizing a price increase by Benco only, with only a tiny share of dental distribution in Southern California, did not come close to implementing the "hypothetical *monopolist*" test using a hypothetical "only present and future" dental distributor in Southern California. (RX1139 at 7, § 4.1.1 (Horizontal Merger Guidelines)).

Third, Dr. Marshall claimed to implement a SSNIP test involving just one product in a candidate relevant market. Dr. Marshall admitted that he did not base this on the Horizontal Merger Guidelines, but rather on a paper by Farrell & Shapiro. (Marshall, Tr. 3362; CX7100 at 89, fn. 390). Such a test (known as an asymmetric SSNIP test) is appropriate, if at all, only when “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). But because Dr. Marshall didn’t understand the difference between a symmetric and an asymmetric SSNIP, he failed to determine whether the factual preconditions were satisfied before applying an asymmetric SSNIP test. (Marshall, Tr. 3367; Marshall, Tr. 3369 (“Q. Okay. And the first sentence of footnote 17 [of Farrell & Shapiro] does not apply with respect to the SSNIP test you applied with respect to Benco’s entry in Southern California, correct? A. That’s correct.”); J. Johnson, Tr. 4804-4812).

Fourth, Dr. Marshall never tested diversion to all other suppliers in response to a SSNIP. In his Southern California SSNIP test, Dr. Marshall looked only at diversion to a single alternate supplier – Darby. (CX7100 at 78, ¶ 198; CX7100 at 86, ¶ 215; Marshall, Tr. 3356-3357; RXD0103; RX2833 at 51, ¶ 125).

Fifth, Dr. Marshall erroneously compared the *recapture rate*, rather than the *predicted loss*, to the critical loss. The Horizontal Merger Guidelines state that, in conducting a SSNIP test, the proper way to analyze whether a particular product is in the relevant market is to compare 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*)). Instead of using the predicted loss, Dr. Marshall

erroneously compared the *recapture rate* to the critical loss. (CX7101 at 20, ¶ 46). Dr. Marshall's analysis is inconsistent with the Horizontal Merger Guidelines and is incorrect. (RX1139 at 9, § 4.1.3; RX2967 (Wu, Dep. 229)).

Sixth, Dr. Marshall improperly combined elements of a symmetric SSNIP test and elements of an asymmetric test. Dr. Marshall started by (improperly) hypothesizing an asymmetric SSNIP – a SSNIP applied to just one product in a candidate relevant market. (Marshall, Tr. 3354; J. Farrell & C. Shapiro, “Improving Critical Loss Analysis,” *The Antitrust Source* 1 (February 2008) at p. 5, fn. 17; Marshall, Tr. 3366-67; *see also* RXD0104 at 5 (marking in pink the passages relevant to asymmetric SSNIP test)). Dr. Marshall then applied a formula for critical loss that applies only “in the symmetric case.” (CX7100 at 89, ¶ 222; J. Farrell & C. Shapiro, “Improving Critical Loss Analysis,” *The Antitrust Source* 1 (February 2008) at p. 5; Marshall, Tr. 3364-65; *see also* RXD0104 at 5 (marking in yellow the formula for critical loss and related passages in the symmetric case)). The formula for critical loss in a symmetric case does not apply to an asymmetric SSNIP, as “[a] different condition diagnoses whether a hypothetical monopolist would find a SSNIP imposed on just one product” to be profitable. (J. Farrell & C. Shapiro, “Improving Critical Loss Analysis,” *The Antitrust Source* 1 (February 2008) at p. 5 fn. 17.) By improperly applying a symmetric formula for critical loss to the results of an asymmetric SSNIP test, Dr. Marshall generated a nonsensical result. (CX7101 at 19, ¶ 40 (incorrectly analyzing a symmetric case using an asymmetric SSNIP test or vice versa “will likely result in an incorrect conclusion.”)).

Dr. Marshall's SSNIP test relating to Benco's entry into Southern California is internally inconsistent and fatally flawed, and the results of that test are inherently

unreliable. (J. Johnson, Tr. 4808-4812). Substantial reliable evidence contradicts Dr. Marshall's flawed conclusion that the relevant product market consisted of of full-service dental distribution. (J. Johnson, Tr. 4808-4812; RX2833 at 50, ¶ 124; RX2833 at 52, ¶ 128-129; RX2833 at 53, ¶ 131; RX2834 at 22-23, ¶ 30).

2020. Dr. Wu also criticized Dr. Marshall's Benco Southern California HMT analysis based on the data Dr. Marshall used to represent the southern California market. (RX2967 (Wu, Dep. at 227-225)).

Schein's Response:

No response.

Patterson's Response:

Correct. Dr. Marshall improperly uses a subset of the data available for Southern California.

Benco's Response:

Benco joins in the response of Patterson.

2021. Dr. Wu's Benco Southern California analysis is based on faulty sample of data. (CX7101 at 020-021 (¶¶ 46-47) (Marshall Expert Rebuttal Report)).

Schein's Response:

No response.

Patterson's Response:

Complaint Counsel's proposed finding is inaccurate. If anything, Dr. Marshall's subset of data is a faulty sample. (See Wu Report ¶ 127). For example, as part of its expansion into Southern California, Benco acquired Ezparanza Dental in Los Angeles County and Dental Equipment Specialists, Inc. in Kern County, among other companies.

This means that when Dr. Marshall “runs time in reverse,” much of Benco’s share is going to distributors that are not in Dr. Marshall’s data. Dr. Marshall eliminates Los Angeles County from his data (perhaps for this reason), but not Kern County. In a press release regarding Benco’s acquisition of Dental Equipment Specialists, Dental Equipment Specialists are described as specializing in equipment and repair (i.e., not full-service). This means at least some of Benco’s share came from non-full-service distributors and would go back to them if time was “taken in reverse.” These are movements Dr. Marshall does not capture because he does not use data for anything other than a subset of full-service dental distributors, and one online distributor (Darby). (CX7101 at 020-021 (¶¶ 46-47) (Marshall Expert Rebuttal Report)).

Benco’s Response:

Benco joins in the response of Patterson.

2022. Dr. Wu put forward data consisting of all the dentists in the entirety of Southern California, including many that did not consider Benco’s prices relevant to their purchasing decisions. (CX7101 at 020-021 (¶¶ 46-47) (Marshall Expert Rebuttal Report)).

Schein’s Response:

No response.

Patterson’s Response:

With regard to the statement that many dentists in the entirety of Southern California did not consider Benco’s prices relevant to their purchasing decisions, this Proposed Finding of Fact disregards this Court’s Order dated Feb. 21, 2019, which prohibits “cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents,” Order on Post-Trial Briefs, 3, as well as this Court’s admonition: “Do not use experts to elicit facts that should be elicited through a fact

witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading. Complaint Counsel highlight the problem with Dr. Marshall's analysis. In order to test a possible market, the Horizontal Merger Guidelines contemplates use of a hypothetical SSNIP imposed by a "hypothetical monopolist" that represents "the only present and future seller of [the] products" in the candidate relevant market. (RX1139 at 7, § 4.1.1; *see also* RXD0102). This ensures that it would test the *entire* candidate market – that *all* products in the candidate relevant market would be subject to the hypothetical SSNIP, and the anticipated responses of *all* customers in the candidate market would be evaluated. Instead, Dr. Marshall hypothesized a price increase by Benco only, with only a tiny share of dental distribution in Southern California. (Marshall, Tr. 3346; *see also* RXD0103). In addition to all the other problems associated with his test (*see* RRFF 2019), Dr. Marshall insists that the entire candidate market be tested based solely on the responses to a limited SSNIP of his 257 hand-picked Benco customers. (Marshall, Tr. 3349; CX7100 at 79, fn. 380). Dr. Marshall's analysis was flawed; Dr. Wu properly tested the response to a proposed SSNIP as contemplated by the Horizontal Guidelines.

2023. Dr. Wu failed to ensure that these dentists in his Benco Southern California analysis are in fact the ones that faced the price increase by the hypothetical monopolist. (CX7101 at 020-021 (¶¶ 46-47) (Marshall Expert Rebuttal Report)). Looking back in time, dentists who were buying something from Benco had to decide from whom to purchase once Benco exited. (CX7101 at 020-021 (¶¶ 46-47) (Marshall Expert Rebuttal Report)). It is the decisions of these dentists that is central to the analysis for product market definition. (CX7101 at 020-021 (¶¶ 46-47) (Marshall Expert Rebuttal Report)).

Schein's Response:

No response.

Patterson's Response:

Complaint Counsel's proposed finding is misleading. Defining the relevant product market was not part of Dr. Wu's assignment. (RX2833 at 1-3). Dr. Wu's analysis on this point uses the relevant market as proposed by Dr. Marshall (dentists who purchase from national full-service dental distributors). Moreover, with regard to the statement that dentists who were buying something from Benco had to decide from whom to purchase once Benco exited, this Proposed Finding of Fact disregards this Court's Order dated Feb. 21, 2019, which prohibits "cit[ing] to expert testimony to support factual propositions that should be established by fact witnesses or documents," Order on Post-Trial Briefs, 3, as well as this Court's admonition: "Do not use experts to elicit facts that should be elicited through a fact witness. Experts are here merely to give opinions, guesses, hypotheticals, speculation. That's what experts do. *Do not cite to an expert for any fact, any factual finding in your post-trial briefs.* If someone does, I expect the reply to point that out. I'm letting you know today so that you don't think you're going to question your experts about facts and rely on that," (JUDGE CHAPPELL, Pre-Trial Tr. 25–26) (emphasis added). Thus, it is entitled to no weight. Otherwise, Patterson has no specific response.

Benco's Response:

Complaint Counsel's proposed finding is misleading. Complaint Counsel highlight the problem with Dr. Marshall's analysis. In order to test a possible market, the Horizontal Merger Guidelines contemplates use of a hypothetical SSNIP imposed by a "hypothetical monopolist" that represents "the only present and future seller of [the] products" in the candidate relevant market. (RX1139 at 7, § 4.1.1; *see also* RXD0102). This ensures that it would test the *entire* candidate market – that *all* products in the candidate relevant market would be subject to the hypothetical SSNIP, and the anticipated responses of *all* customers in the candidate market would be evaluated. Instead, Dr. Marshall hypothesized a price increase by Benco only, with only a tiny share of dental distribution in Southern California. (Marshall, Tr. 3346; *see also* RXD0103). In addition to all the other problems associated with his test (*see* RRFF 2019), Dr. Marshall insists that the entire candidate market be tested based solely on the responses to a limited SSNIP of his 257 hand-picked Benco customers. (Marshall, Tr. 3349; CX7100 at 79, fn. 380). Dr. Marshall's analysis was flawed; Dr. Wu properly tested the response to a proposed SSNIP as contemplated by the Horizontal Guidelines.

2024. Even using Dr. Wu's own preferred set of data to represent the Southern California market, Dr. Marshall showed in his Expert Rebuttal Report that the HMT for a candidate market of full-service dental distribution would still be satisfied. (CX7101 at 020-021 (¶¶ 46-47) (Marshall Expert Rebuttal Report)).

Schein's Response:

Dr. Marshall did not establish that the relevant product market consists of only full-service distributors. As noted in SRF 1525 and 2017, the evidence establishes that online/mail-order distributors, such as Darby, compete successfully for the business of

buying groups, their members, and other independent dentists. Each distributor offers a unique blend of products and services, which means that dental distribution is a differentiated services market, not that the market is limited to full-service distribution. (SRF 1525, 2017).

Patterson's Response:

Patterson joins Benco's response to Complaint Counsel's proposed finding.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and misleading. In his rebuttal report, Dr. Marshall repeated his earlier mistake by testing "whether the *recapture rate* exceeds the critical loss." (CX7101 at 20, ¶ 46) (emphasis added). The Horizontal Merger Guidelines state that, in conducting a SSNIP test, the proper way to analyze whether a particular product is in the relevant market is to compare 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*)). As explained above in more detail, comparison of the recapture rate to the critical loss leads to nonsensical results. (See RRFF 2017). Dr. Marshall's analysis is inconsistent with the Horizontal Merger Guidelines and is incorrect. (RX1139 at 9, § 4.1.3; RX2967 (Wu, Dep. 229)). Dr. Wu's analysis is consistent with the Horizontal Merger Guidelines and is correct.

2025. In other words, using Dr. Wu's choice of data and the right natural experiment framework actually confirms Dr. Marshall's conclusion that Darby and other non-full-service distributors are not in the relevant product market. (CX7101 at 020-021 (¶¶ 46-47) (Marshall Expert Rebuttal Report)).

Schein's Response:

False. Dr. Marshall's analysis assumes the conclusion because he assumed that Darby and other online distributors exert less of a competitive constraint than the regional distributors Dr. Marshall chose to include. As such, Dr. Marshall did not establish that the relevant product market consists of only full-service distributors. As noted in SRF 1525 and 2017, the evidence establishes that online/mail-order distributors, such as Darby, compete successfully for the business of buying groups, their members, and other independent dentists. Each distributor offers a unique blend of products and services, which means that dental distribution is a differentiated services market, not that the market is limited to full-service distribution. (SRF 1525, 2017).

Patterson's Response:

Complaint Counsel's proposed finding is inaccurate. Dr. Marshall did not apply the HMT correctly and his analysis is inconsistent with the Horizontal Merger Guidelines. (see RX2967 (Wu Dep.) at 224-229). Patterson also joins Benco's response to Complaint Counsel's proposed finding.

Benco's Response:

Complaint Counsel's proposed finding is inaccurate and misleading. In his rebuttal report, Dr. Marshall repeated his earlier mistake by testing "whether the *recapture rate* exceeds the critical loss." (CX7101 at 20, ¶ 46) (emphasis added). The Horizontal Merger Guidelines state that, in conducting a SSNIP test, the proper way to analyze whether a particular product is in the relevant market is to compare 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)). As explained above in more detail, comparison of the recapture rate to the critical loss leads to nonsensical results.

(See RRFF 2017). Dr. Marshall's analysis is inconsistent with the Horizontal Merger Guidelines and is incorrect. (RX1139 at 9, § 4.1.3; RX2967 (Wu, Dep. 229)). Dr. Wu's analysis is consistent with the Horizontal Merger Guidelines and is correct.

(4) Dr. Wu Did Not Do Any Analysis Of The Products And Services That Darby Offered During The Relevant Period

2026. Dr. Wu admitted that he did not do any analysis of the products and services Darby actually offered during the relevant time period. (RX2967 (Wu, Dep. at 238)).

Schein's Response:

No response.

Patterson's Response:

Complaint Counsel's proposed finding is misleading. As Dr. Wu stated in his report, he was aware that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] In Complaint Counsel's cited deposition testimony, Dr. Wu testified that he did not specifically do an analysis of what products and services Darby offered during the 2011-2015 time period as part of his report, which is accurate.

Benco's Response:

Benco joins in the response of Patterson.

c) **Dr. Dennis Williams Carlton** (Carlton, Tr. 5349-5471)

(1) **Background**

2027. Dr. Dennis Carlton is a senior managing director of Compass Lexecon, an economic consulting firm. (RX2832 at 071 (Carlton Expert Report)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Schein.

2028. Dr. Carlton charged an hourly rate of \$1,600 per hour for his work on this case. (Carlton, Tr. 5419).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Schein.

(2) **Dr. Carlton Ignored A Substantial Amount Of Evidence In Forming His Opinions**

2029. Dr. Carlton admitted that he only reviewed around one-third of the deposition testimony in this matter. (Carlton, Tr. at 5425-5426).

Schein's Response:

Irrelevant. Complaint Counsel does not point to any testimony Dr. Carlton should have reviewed and that would bear on the opinions he rendered. Dr. Carlton's report lists 17 deposition transcripts and seven Investigational Hearing transcripts among the materials he reviewed. (RX 2832-101-02). Dr. Carlton also conducted eight interviews with Schein witnesses relevant to this matter. (RX 2832-102-03, -006).

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Schein.

2030. Dr. Carlton did not provide a response in his expert report to the Schein documents with examples of Schein executives and Schein sales representatives at all levels of the company referring to a no buying group policy. (See RX2832 (Carlton Expert Report)).

Schein's Response:

The asserted fact is vague, irrelevant, misleading, and contradicted by the evidence. Dr. Carlton's report cites 122 Bates-stamped documents, and Dr. Carlton considered 93 more, in addition to the discovery responses, filings, expert reports, and other documents on which he relied. (RX 2832-087-93). Complaint Counsel does not identify the documents to which Dr. Carlton allegedly should have responded and does not allege that Dr. Carlton relied on incorrect information. Indeed, there are no Schein documents that refer to a "no buying group policy," because there never was such a policy. (E.g., SF 159-88 (describing Schein's case-by-case approach to buying groups), 1358-85 (no instruction or policy at Schein not to do business with buying groups)).

As an economist, Dr. Carlton evaluated the data, which shows that Schein worked with buying groups before, during, and after the alleged conspiracy. (*See* RX 2832-022; *see also* CX 7101-140-41). This evidence directly contradicts Complaint Counsel's allegations Schein had a policy not to do business with buying groups. (*See* RX 2832-022; CX 7101-140-41). This evidence and analysis is a response to Complaint Counsel's unspecified documents, and shows any alleged no-buying-group policy at Schein is but a figment of Complaint Counsel's imagination.

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Schein.

(3) Dr. Carlton's Application Of A Broader Definition Of
"Buying Groups" In Table 1 And Appendix D Of His Report
Leads To Misleading Results

2031. In his expert report, Dr. Carlton employed a broader definition of "buying group" than the definition alleged in this matter. (RX2832 at 008 (¶8, n.6) (Carlton Expert Report) ("I interpret the FTC's definition of 'Buying Groups' to include only buying groups of independent dentists and small group practices, as defined in the footnote above, in which the buying group does not have any ownership stake in any of its members. For the purpose of my report, I refer to the FTC's definition of buying group as 'buying groups of independent dentists,' while using the general term 'buying groups' to represent any entity, other than a DSO, that seeks to negotiate prices on behalf of its members.")).

Schein's Response:

The asserted fact is misleading. Dr. Carlton analyzed buying groups that fit Complaint Counsel's definition. He also included, in certain aspects of his report, a discussion of buying groups that include, but go beyond, Complaint Counsel's definition.

Dr. Carlton's *trial* testimony was limited to the portions of his report that dealt with buying groups as Complaint Counsel defined them.

There is no claim that Dr. Carlton incorrectly identified group members, incorrectly described the characteristics of particular groups, or relied on flawed data. Neither Dr. Carlton nor Dr. Marshall were offered as an expert in the dental industry or buying groups. Whatever definition either expert used is not relevant to whether any particular group is or is not a buying group. And whatever definition Complaint Counsel *alleges* does not determine whether any particular group actually is or is not a buying group. Those are questions of fact. As Dr. Carlton testified, it is "up to the fact-finder to determine who's right and who's wrong about definitions." (Carlton, Tr. 5438-39).

Dr. Carlton's report was prepared during discovery and he expressly provided alternative calculations for different types of entities. (RX 2832-018-23, 118-45; *see also* RX 2966 (Carlton, Dep. at 119-23)). He *separately* calculated sales to other types of buying groups, such as medical GPOs and buying groups of Community Health Centers. As such, Dr. Carlton's analysis is not "misleading." Complaint Counsel does not deny Schein worked with buying groups. Every witness asked at trial testified that Schein did business with buying groups, and both Dr. Carlton and Dr. Marshall found that Schein did business with buying groups. (*See* RX 2832-022; CX 7101-140-41; SF 120-58).

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Schein.

2032. Dr. Carlton used his broader definition of a buying group extensively in his expert report. (RX2966 (Carlton, Dep. at 100-101) (explaining that the definition of buying group alleged in this matter pertains to individuals in Category 1 & Category 2 of the Carlton Report Appendix D and Table 1 while “everything else” are “other buying groups” that do not fall under the definition as alleged in this matter), 102-103 (explaining that the quoted term “buying group” in his expert report is broader than the definition alleged and encompasses all entities besides DSOs “that negotiate[] prices on behalf of its individuals members.”)).

Schein’s Response:

False. As stated in response to CCFF 2031, the asserted is misleading. Dr. Carlton’s report analyzed buying groups that fit Complaint Counsel’s definition. He also included, in certain aspects of his report, a discussion of buying groups that include, but go beyond, the FTC’s definition. Dr. Carlton’s *trial* testimony was limited to the portions of his report that dealt with buying groups as Complaint Counsel defined them.

Patterson’s Response:

No specific response.

Benco’s Response:

Benco joins in the response of Schein.

2033. Dr. Carlton admitted that the “buying groups” in his Appendix D include groups that are not comprised of independent dentists. (Carlton, Tr. at 5438-5439).

Schein’s Response:

False. As stated in response to CCFF 2031, the asserted is misleading. Dr. Carlton’s report analyzed buying groups that fit Complaint Counsel’s definition. He also included, in certain aspects of his report, a discussion of buying groups that include, but go beyond, the FTC’s definition. Dr. Carlton’s *trial* testimony was limited to the portions of his report that dealt with buying groups as Complaint Counsel defined them.

Patterson's Response:

No specific response.

Benco's Response:

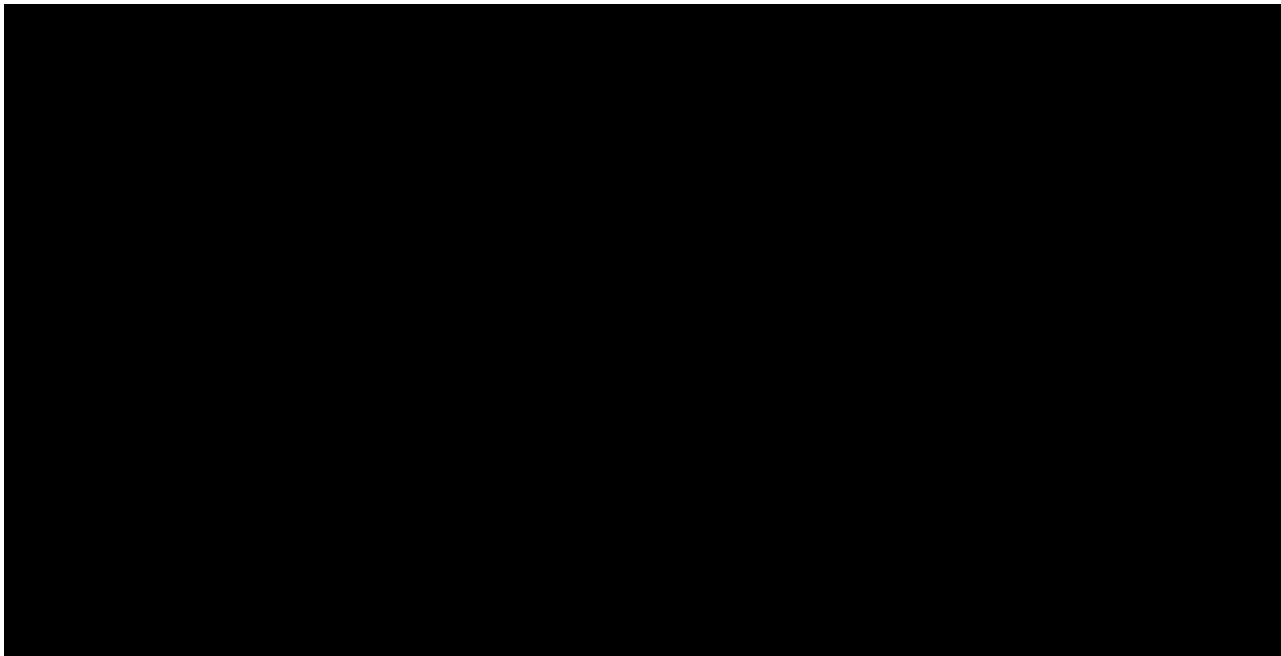
Benco joins in the response of Schein.

2034. Dr. Carlton identified 14 groups in his expert report as buying groups of independent dentists. [REDACTED]

Schein's Response:

The asserted fact is misleading. Complaint Counsel's own definition kept changing throughout the course of the investigation and discovery, necessitating that Dr. Carlton analyze different categorizations of buying groups. Dr. Carlton's *trial* testimony was limited to the portions of his report that dealt with buying groups as Complaint Counsel defined them. In any event, Dr. Marshall and Dr. Carlton each analyzed the sales for each entity that fit Complaint's Counsel's definition of a buying group. (CX 7101-140-41). The data from Dr. Marshall's analysis follows:

[REDACTED]



(CX 7101-140-41).

As explained in Schein's proposed findings of fact, even this chart is conservative because of limitations in Schein's data systems, which track dentists, not buying groups. (SF 1618).

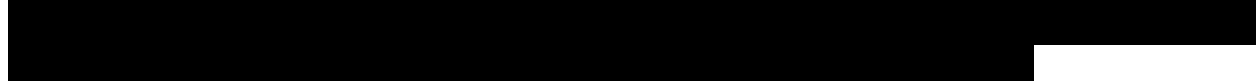
Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Schein.

2035. In his expert report, Dr. Carlton identified 30 of Schein's groups as entities that do not fit the definition of a buying groups of independent dentists, and Dr. Carlton identified these as something other than buying groups of independent dentists. [REDACTED]



Schein's Response:

Schein incorporates its response to CCFF 2034.

Patterson's Response:

No specific response.

Benco's Response:

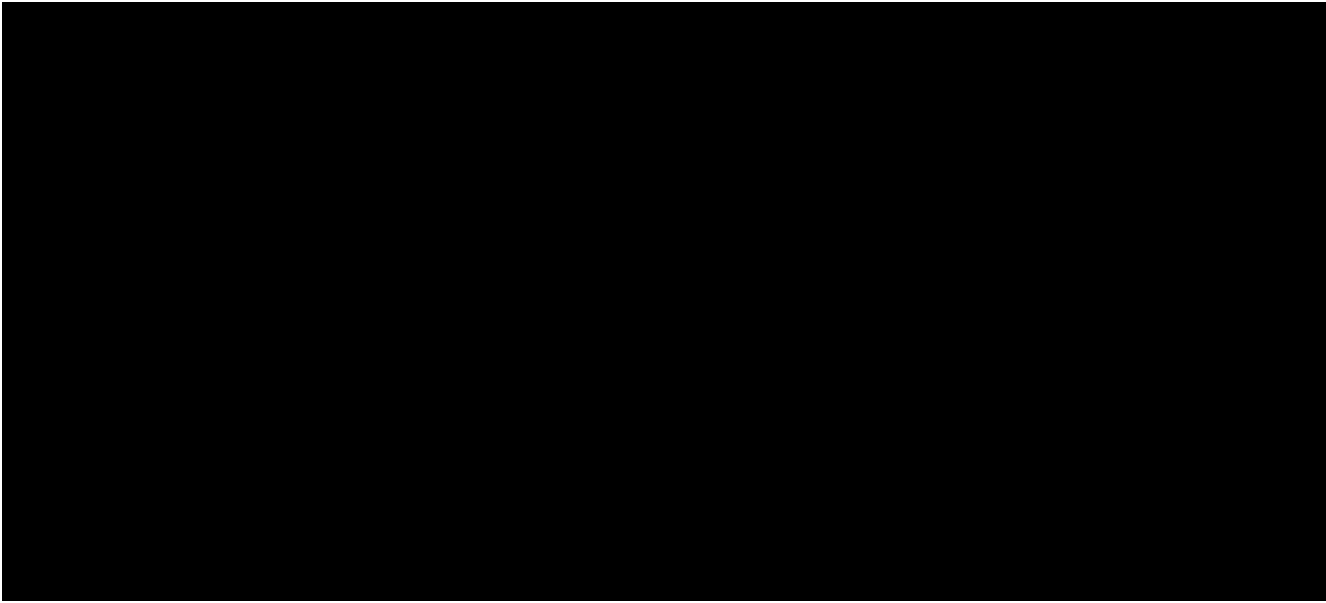
Benco joins in the response of Schein.

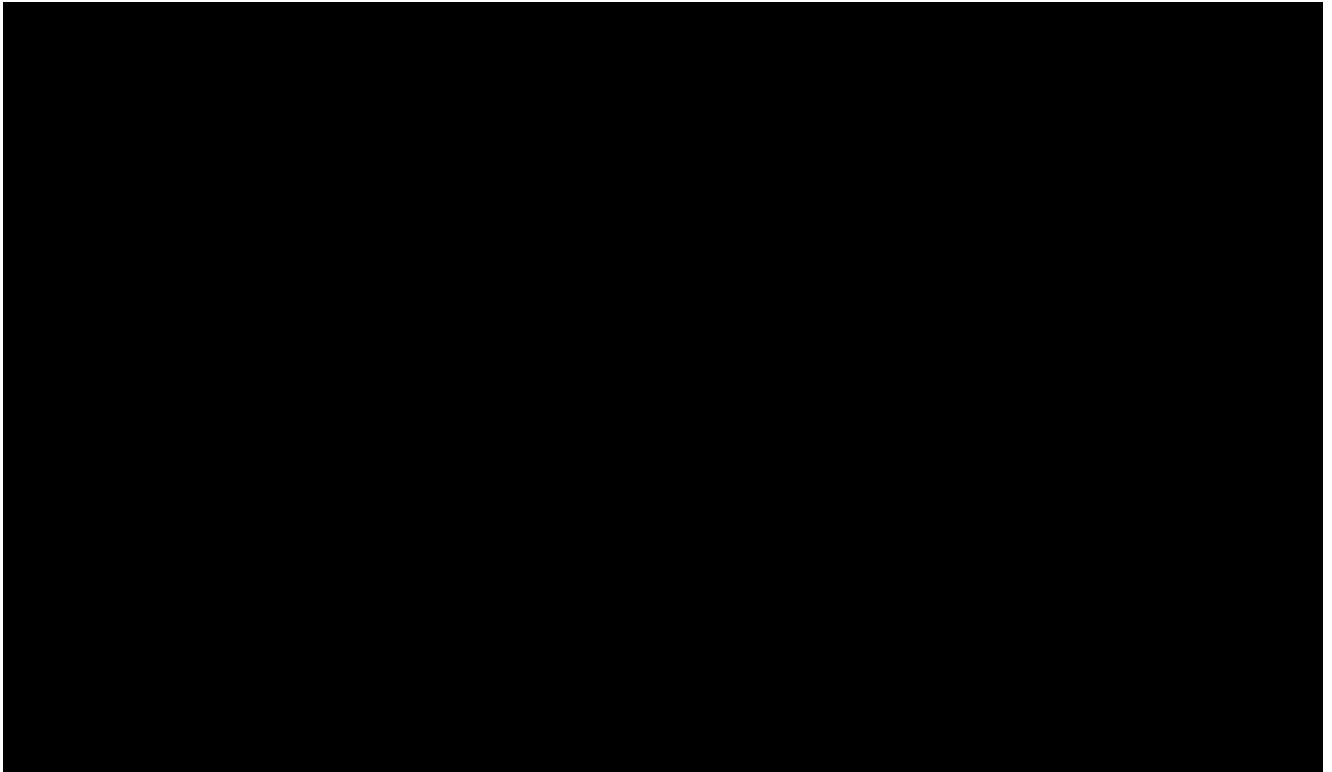
2036. Dr. Marshall explained that if sales for admitted non-buying groups and contested groups are removed from Table 1 in Dr. Carlton's Expert Report (RX2832 at 018-019 (¶29) (Carlton Expert Report)), the total sales reported in that table would be reduced by more than 95 percent. (CX7101 at 032-034 (¶¶80-82) (Marshall Expert Rebuttal Report)).

Schein's Response:

False. Complaint Counsel's attempt to use Dr. Marshall (or Dr. Carlton) to define what entities fit Complaint Counsel's definition of a buying group constitutes improper use of expert testimony.

Experts are qualified to review the sales data and compile the results, not make determinations about which groups were allegedly subject to the (imagined) conspiracy. The following chart shows Schein's sales to buying groups, according to both Dr. Marshall and Dr. Carlton. That chart shows annual purchases of approximately [REDACTED] during the alleged conspiracy period.





Dr. Marshall's testimony about a hypothetical grouping of buying groups has no relevance to the case. Dr. Carlton does not list "admitted non-buying groups," Dr. Marshall adopted the term on rebuttal, though it has no basis in the record. (CX 7101-033). Complaint Counsel does not dispute, for example, that United Dental Alliance is a buying group. (See RX 3087-004). Yet Dr. Marshall calls it an "admitted non-buying group."

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Schein.

2037. Dr. Marshall determined that, once sales for admitted non-buying groups and contested groups are removed from Dr. Carlton's Table 1, the data show that Schein's sales to dentists in buying groups decreased considerably from 2013 to 2015, followed by a significant increase from 2016 to 2017. (CX7101 at 034 (¶82) (Marshall Expert Rebuttal Report)).

Schein's Response:

False. Aside from the fact that Dr. Marshall's decision to exclude buying groups Schein did business with falls outside the scope of permissible expert testimony, Dr. Marshall's grouping of buying groups does **not** show that "Schein's sales to dentists in [Dr. Marshall's cherry-picked selection of] buying groups decreased considerably from 2013 to 2015." (CX 7101-034). In fact, it shows that Schein's sales **increased** at that start of the alleged conspiracy, and that it only decreased because Steadfast and the Dental Co-Op of Utah declined Schein's offer to become their exclusive distributor. (CX 7101-035 (showing that Schein's sales increased year-over-year from 2010 to 2011, and increased again from 2011 to 2012, and increased again from 2012-2013)).

Patterson's Response:

No specific response.

Benco's Response:

Benco joins in the response of Schein.

C. Witnesses Who Testified by Deposition and/or Investigational Hearing Only.

1. Respondents' Employees and Former Employees

a) Benco

Michael ("Mike") McElaney (CX0303)

2038. Mike McElaney was the Acting Director of Sales, Northeast, and Regional Manager of New England for Benco Dental starting in December 2016. (CX0303 (McElaney, IHT at 10-11)).

Schein's Response:

No response.

Patterson's Response:

The cited testimony does not reference New England. Otherwise, no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2039. Prior to his Acting Director position, McElaney held the position of Vice President of Sales at Benco for two and a half years, from 2013 to 2016. (CX0303 (McElaney, IHT at 11)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2040. From 2011 through 2013, McElaney was Director of Northeast at Benco. (CX0303 (McElaney, IHT at 11-12); CX0070 at 001-002)).

Schein's Response:

No response.

Patterson's Response:

The cited authorities do not support the time period from 2011 through 2013. Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Paul Jackson (CX0302)

2041. Paul Jackson was Vice President of Marketing for Benco Dental from 1996 until at least March 2017. (CX0302 (Jackson, IHT at 12)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

b) Schein

Brian Brady (CX8020)

2042. Brian Brady was Henry Schein Dental's Regional Manager for a territory that included San Diego and Hawaii from December 2008 until December 2012. (CX8020 (Brady, Dep. at 20)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2043. Brady was Henry Schein Dental's Regional Manager for the San Francisco Bay Area from December 2012 until January of 2015. (CX8020 (Brady, Dep. at 16-17)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2044. Brady was the National Director of Group Practice for Mid Market at Henry Schein Dental from approximately January 2015 through early September 2017. (CX8020 (Brady, Dep. at 10, 12)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

James Breslawski (CX8012)

2045. James Breslawski was the president of Henry Schein North America Dental, which oversaw both Henry Schein Dental and Henry Schein Special Markets from 2005 to present. (Foley, Tr. 4516, 4519; CX8012 (Breslawski, Dep. at 39))

Schein's Response:

Mr. Breslawski was the President of Henry Schein, Inc. during the relevant period.

Mr. Breslawski was also the CEO of the Global Dental Distribution business.

Patterson's Response:

The cited testimony does not reference the year 2005. Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2046. In 2018, James Breslawski became the Vice Chairman at Henry Schein Inc. (CX8012 (Breslawski, Dep. at 39)).

Schein's Response:

No response, other than to note that Mr. Breslawski was previously the President of Henry Schein, Inc.

Patterson's Response:

The cited testimony does not reference the year 2018. Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Deborah ("Debbie") Foster (CX8001)

2047. In 2015, Debbie Foster (or Debbie Torgensen-Foster) became the Regional Account Manager for Henry Schein Dental's Mid-Markets Division. She has held this position since early 2015. (CX8001 (Foster, Dep. at 7, 14-15); *see also* CX8001 (Foster, Dep. at 7) (explaining name change in 2011)).

Schein's Response:

Ms. Foster began transitioning into her position as Regional Account Manager for Mid-Market at the end of 2014. (CX 8001 (Foster, Dep. at 14-15)).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2048. Before joining Henry Schein Dental, Foster was the Director of Sales for Special Markets from 2005 to 2015. (CX8001 (Foster, Dep. at 13, 15)). While in the Director of Sales position, Torgersen-Foster reported to Randy Foley. (CX8001 (Foster, Dep. at 17)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Andrea Hight (CX8022)

2049. In July 2018, Andrea Hight became the Western Area Sales Manager for Henry Schein Practice Solutions. (CX8022 (Hight, Dep. at 8)). Just prior to this, Ms. Hight held the National Director of Community Health for Henry Schein Special Markets for one year. (CX8022 (Hight, Dep. at 9-10)).

Schein's Response:

No response.

Patterson's Response:

The correct citation for the first sentence of this finding is: (CX8022 (Hight, Dep. at 8-9)). Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2050. From 2014 to 2017, Ms. Hight was Henry Schein Mid-Market Division's Area Director for Managed Group Practice and Community Health. (CX8022 (Hight, Dep. at 10, 21)).

Schein's Response:

No response.

Patterson's Response:

The cited testimony does not fully support Ms. Hight's alleged job title. Otherwise, no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2051. In 2008 or 2009, Ms. Hight became a Regional Account Manager for Henry Schein Special Markets. (CX8022 (Hight, Dep. at 14-15)). Randy Foley was her direct supervisor from about 2009 to 2014. (CX8022 (Hight, Dep. at 19)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Dean Kyle (CX0307)

2052. Dean Kyle was a Zone General Manager for Henry Schein from 1998 until January 2015. (CX0307 (Kyle, IHT at 15)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2053. Kyle became a national recruiter for Henry Schein in January 2015. (CX0307 (Kyle, IHT at 14, 15)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Hal Muller (CX8005; CX0309)

2054. Hal Muller was the President of Henry Schein Special Markets from 2008 through 2018. (CX8005 (Muller, Dep. at 9); CX0309 (Muller, IHT at 8))

Schein's Response:

Mr. Muller held the title of President since 2008, but testified, "I've basically been doing that since 1995." (CX 0309 (Muller, IHT at 9-10)).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2055. Hal Muller, as president of Henry Schein Special Markets, reported to Jim Breslawski. (CX8005 (Muller, Dep. at 67); Foley, Tr. 4516).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Michael Porro (CX8000)

2056. Michael Porro started his current position as Henry Schein Dental's Director of Technology for Sales, East in January of 2018. (CX8000 (Porro, Dep. at 9)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2057. From 2014 through 2018, Porro was a Zone Manager for Henry Schein Dental's Atlantic states. (CX8000 (Porro, Dep. at 10-11) (Zone Manager for Atlantic South for 2016-2017 and Zone Manager for Atlantic Coast for 2014-2016)).

Schein's Response:

No response.

Patterson's Response:

The cited testimony does not support the dates in which Porro is asserted to have held the asserted positions. Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2058. Porro was the Corporate Director of Sales for HSD from 2012-2013. (CX8000 (Porro, Dep. at 11)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2059. From about 2010-2011, Porro was Director of CAD/CAM for HSD. (CX8000 (Porro, Dep. at 11-12)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2060. Porro started at HSD in 2005 as the Regional Manager for Schein in south Texas. He held this position until 2010. (CX8000 (Porro, Dep. at 11-12)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

c) Patterson

Scott Anderson (CX8027)

2061. In July of 2017, Scott Anderson became a Special Advisor to Patterson. Anderson's position as Special Advisor is supposed to extend through the end of June 2019. (CX8027 (Anderson, Dep. at 14)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2062. From May 2010 to June 30, 2017, Anderson served as the Chief Executive Officer and President of Patterson Companies, Inc. (CX8027 (Anderson, Dep. at 15-16)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Wesley Fields (CX0312)

2063. As of April 2017, Wesley Fields was Director of Business Development for Patterson. He started this position in November 2015. (CX0312 (Fields, IHT at 8)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2064. From 2013 to 2015, Fields held the position of Branch Manager for Patterson's Louisville, Kentucky branch. (CX0312 (Fields, IHT at 8-9)).

Schein's Response:

No response.

Patterson's Response:

This finding incorrectly states Wes Fields' title. From 2013 to 2015, Fields was the General Manager for Patterson's Louisville, Kentucky branch. (CX0312 (Fields, IHT at 8-9)).

Benco's Response:

Benco has no specific response to the proposed finding.

2065. Fields was a Territory Sales Rep for Patterson from 2008 to 2013. (CX0312 (Fields, IHT at 13)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Anthony Fruehauf (CX8013)

2066. Anthony Fruehauf was Branch Manager of Patterson's Raleigh/Durham branch from around 2005 to 2012. (CX8013 (Fruehauf, Dep. at 12-13)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2067. Fruehauf was Region Manager of Patterson's Mid-Atlantic Region for approximately one and a half years, from 2012 through part of 2013. Sometime in 2013, Patterson consolidated its Mid-Atlantic and Southeast Regions. After that consolidation, Fruehauf became the Southeast Region Manager for Patterson. (CX8013 (Fruehauf, Dep. at 16 -17)). He remained in that position until at least July 2018. (CX8013 (Fruehauf, Dep. at 16-17)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2068. During Fruehauf's tenure as Southeast Region Manager for Patterson, Patterson changed the name of his position from Southeast Region Manager to Southeast Region President. (CX8013 (Fruehauf, Dep. at 18-19)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2069. Fruehauf has also used the name "Louis Fruehauf" in emails at Patterson. (CX8013, Dep. at 93).

Schein's Response:

No response.

Patterson's Response:

The cited testimony shows that Fruehauf's email handle at one point began "louis.fruehauf." (CX8013, Dep. at 93). Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Joseph Lepley (CX8028)

2070. Joseph Lepley started working for Patterson Dental in November 2015 as its Director for Strategic Pricing. (CX8028 (Lepley, Dep. at 12)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2071. In Lepley's position as Director for Strategic Pricing at Patterson, he was responsible for managing merchandise pricing for all customer segments. (CX8028 (Lepley, Dep. at 12).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Devon Nease (CX8002)

2072. Devon Nease was Branch Manager for Patterson's Chesapeake branch from August 2011 to August 2014. (CX8002 (Nease, Dep. at 17, 19-20); Guggenheim, Tr. 1622).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Michael Smurr (CX0318)

2073. Michael Smurr was Branch Manager of the Wisconsin Milwaukee Sales Office for Patterson Dental from August 1, 2000 to December 1, 2008. (CX0318 (Smurr, IHT at 10-11)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2074. Smurr was Director of Marketing for Merchandise, from approximately December 2008 until at least April 2017. (CX0318 (Smurr, IHT at 10-11)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2. Third Party Witnesses

Frank Capaldo of Georgia Dental Association (CX8011)

2075. Frank Calpaldo is the Executive Director and Chief Executive Officer of the Georgia Dental Association ("GDA"). (CX8011 (Capaldo, Dep. at 11)).

Schein's Response:

Mr. Capaldo joined the GDA on March 3, 2014. (CX 8011 (Capaldo, Dep. at 11)).

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2076. When GDA formed the GDA Supplies Plus buying group in July 2015, Capaldo became the Chief Executive Officer of the Integrity Dental Buying Group, the GDA subsidiary that houses GDA Supplies Plus. (CX8011 (Capaldo, Dep. at 11-12)).

Schein's Response:

No response, except to note the GDA formed this group after the end of the alleged conspiracy.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Tracy Moody (CX8019)

2077. Tracy Moody joined Vision Source as the Vice President for Growth and Development in 2000. (CX8019 (Moody, Dep. at 16-17)). He became Chief Operating Officer of Vision Source in 2005. (CX8019 (Moody, Dep. at 20)).

Schein's Response:

No response.

Patterson's Response:

The correct citation for the first sentence of this finding is: (CX8019 (Moody, Dep. at 15-17)). Otherwise, Patterson has no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

2078. Moody was part of the team that founded Smile Source. (CX8019 (Moody, Dep. at 20-21)).

Schein's Response:

No response.

Patterson's Response:

No specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Donovan Osio of Texas Dental Association (CX9024)

2079. Donovan Osio is the General Manager of Texas Dental Association Financial Services, Inc., a wholly-owned subsidiary of the Texas Dental Association ("TDA"). (CX9024 (Osio, SourceOne Dep. at 12)).

Schein's Response:

No response.

Patterson's Response:

This finding does not completely describe TDA Financial Services, Inc.'s relationship to the TDA. TDA Financial Services, Inc. is a wholly-owned, for-profit subsidiary of the TDA, which is a non-profit state dental association. (CX9024 (Osio, SourceOne Dep. at 12)). Otherwise, no specific response.

Benco's Response:

Benco has no specific response to the proposed finding.

Respectfully submitted,

/s/ Colin R. Kass

Colin R. Kass
ckass@proskauer.com
PROSKAUER ROSE LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004
Telephone: (202) 416-6800

David A. Munkittrick
dmunkittrick@proskauer.com
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036-8299
Telephone: (212) 969-3226

John P. McDonald
jpmcdonald@lockelord.com
LOCKE LORD LLP
2200 Ross Avenue
Dallas, TX 75201
Telephone: (214) 740-8000

Lauren M. Fincher
lfincher@lockelord.com
LOCKE LORD LLP
600 Congress Avenue
Austin, Texas 78701
Telephone: (512) 305-4700

Tim Muris
tmuris@sidley.com
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000

*ATTORNEYS FOR
RESPONDENT
HENRY SCHEIN, INC.*

/s/ Joseph A. Ostoyich

Joseph A. Ostoyich
William C. Lavery
Andrew T. George
Caroline L. Jones
Jana I. Seidl
Kristen E. Lloyd
BAKER BOTTS LLP
The Warner
1299 Pennsylvania Avenue N W
Washington, DC 20004
Telephone: (202) 639-7905
joseph.ostoyich@bakerbotts.com
william.lavery@bakerbotts.com

James J. Long
BRIGGS AND MORGAN P.A.
80 South Eighth Street, Suite 2200
Minneapolis, MN 55402
Telephone: (612) 977-8582
jlong@briggs.com

*ATTORNEYS FOR
RESPONDENT PATTERSON
COMPANIES, INC.*

/s/ Kenneth Racowski

Howard D. Scher
howard.scher@bipc.com
Kenneth Racowski
kenneth.racowski@bipc.com
Thomas P. Manning
thomas.manning@bipc.com
BUCHANAN INGERSOLL &
ROONEY PC
50 S. 16th St., Suite 3200
Philadelphia, PA 19102
Phone: 215-665-8700
Fax: 215-665-8760

Geoffrey Oliver
gdoliver@jonesday.com
JONES DAY
51 Louisiana Ave., NW
Washington, D.C. 20001
Phone: 202-879-3939

*ATTORNEYS FOR
RESPONDENT BENCO DENTAL
SUPPLY COMPANY*

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2019, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W., Room H-110
Washington, D.C. 20580

April Tabor
Office of the Secretary
Federal Trade Commission
Constitution Center
400 Seventh Street, S.W.
Fifth Floor
Suite CC-5610 (Annex B)
Washington, D.C. 20024

I also hereby certify that on June 11, 2019, I delivered via electronic mail a copy of the foregoing public document to:

Lin Kahn (Attorney)
lkahn@ftc.gov
Ronnie Solomon (Attorney)
rsolomon@ftc.gov
Matthew D. Gold (Attorney)
mgoid@ftc.gov
John Wiegand (Attorney)
jwiegand@ftc.gov
Erika Wodinsky (Attorney)
ewodinsky@ftc.gov
Boris Yankilovich (Attorney)
byankilovich@ftc.gov
Jeanine K. Balbach (Attorney)
ibalbach@ftc.gov
Thomas H. Brock (Attorney)
tbrock@fte.gov
Jasmine Rosner (Attorney)
jrosner@ftc.gov
Federal Trade Commission
901 Market St., Ste. 570
San Francisco, CA 94103
Phone Number: 415-848-5115

Complaint Counsel

Howard Scher, Esq.
howard.scher@bipc.com
Kenneth Racowski, Esq.
kenneth.racowski@bipc.com
Carrie Amezcua, Esq.
carrie.amezcua@bipc.com
Buchanan Ingersoll & Rooney PC
50 S. 16th Street, Ste. 3200
Philadelphia, PA 19102

Craig A. Waldman, Esq.
cwaldman@jonesday.com
Benjamin M. Craven, Esq.
bcraven@jonesday.com
Ausra O. Deluard, Esq.
adeluard@jonesday.com
Jones Day
555 California Street, 26th Floor
San Francisco, CA 94104
T: 415-626-3939
F: 415-875-5700

Geoffrey D. Oliver, Esq.
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
T: 202-879-3939
F: 202-626-1700
gdoliver@jonesday.com

Counsel for Respondent Benco Dental Supply Co.

Timothy J. Muris, Esq.
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
T: 202-736-8000
F: 202 736-8711
tmuris@sidley.com

Colin Kass, Esq.
ckass@proskauer.com
Proskauer Rose LLP
1001 Pennsylvania Ave., NW, Ste. 600 South
Washington, D.C. 20004-2533
T: 202-416-6800
F: 202-416-6899

John P. McDonald, Esq.
jpmcdonald@lockelord.com
Lauren Fincher, Esq.
lfinchergockelord.com
Locke Lord LLP
2200 Ross Avenue, Ste. 2800
Dallas, TX 75201
T: 214-740-8000
F: 214-740-8800

Counsel for Respondent Henry Schein, Inc.

Dated: June 11, 2019

By: /s/ Andrew T. George
Attorney

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Dated: June 11, 2019

By: /s/ Andrew T. George
Attorney