PUBLIC

ORIGINAL

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**

RESPONDENT BENCO DENTAL SUPPLY CO.'S POST TRIAL BRIEF

Dated: April 11, 2019

TABLE OF CONTENTS

TABLE OF AUTHORTIES

Cases

Other Authorities

INTRODUCTION

The evidence presented at trial confirms the position that Benco has consistently taken throughout this litigation – that Benco did not participate in any agreement with Schein and/or Patterson to refrain from doing business with buying groups. Benco's story is straightforward. Benco had a longstanding policy, stretching back more than a decade before the alleged conspiracy, to not do business with "middlemen" who came between Benco and its customers. Benco's business model had been built on remaining in close touch with its customers, and Benco views a "customer" as the entity that (1) makes the purchasing decisions and (2) pays the bills. Benco's "no-middleman" policy was adopted unilaterally, and Benco's high-touch, customer-focused business model allowed Benco to grow successfully and expand from a regional distributor based in the Northeast to become the first family-owned national dental distributor. Benco's business model and its successful growth into a national distributor enhanced competition in the dental distribution business.

Benco views buying groups (also sometimes referred to as GPO's) – broadly defined as groups of individual dentists that lacked common ownership structure or common control of purchasing decisions – as middlemen. Thus, consistent with its longstanding policy, Benco refused to do business with buying groups as a single customer before, during and after the alleged conspiracy. Benco's policy was not a secret. When approached by a buying group, Benco would forthrightly explain that it did not do business with buying groups. *See, e.g.,* FF[1] 395 ("Your structure meets our definition of GPO, and Benco does not participate in group purchasing organizations." (CX1138)). Benco also explained its policy to many others in the dental industry.

[1] "FF" refers to Benco's Proposed Filings of Fact that have been filed herewith.

FF 453. Because Benco's policy was not a secret, it did not view disclosure of the policy as competitively sensitive information.

Despite Complaint Counsel's varying claims that the alleged conspiracy began sometime in 2011 or 2012, the evidence showed that the claims essentially rest upon two limited information exchanges in 2013, a February 8, 2013, email exchange between Chuck Cohen of Benco and Paul Guggenheim of Patterson; and a March 25, 2013, exchange between Chuck Cohen and Tim Sullivan of Schein. These information exchanges are too thin a reed to establish the alleged conspiracy. What is missing? There is no mention of any agreement in any of the communications identified. There is no evidence that Benco, Schein or Patterson ever reached any agreement that Respondents would or should adopt the same policy. There is no evidence that Benco asked Schein, Patterson, or any other entity to take any action, or to refrain from taking action, with regard to doing business with buying groups. There is no evidence that Benco ever communicated with Schein concerning any Patterson position on dealing with buying groups, or that Benco ever communicated with Patterson concerning any Schein position concerning buying groups. There is no evidence that Schein or Patterson ever communicated between themselves about buying groups. There is not a single document that refers to any agreement among Respondents, and every fact witness who testified denied the existence of, or knowledge of, the alleged conspiracy. What the evidence does show is that each Respondent dealt differently and independently with regard to doing business with buying groups, thus positively refuting the existence of any agreement among them.

Complaint Counsel seeks to rely on the opinions of an economist, Dr. Marshall, to fill the gaps in their evidence, but Dr. Marshall adds nothing useful to the record. His assessment of market structure fails to distinguish between lawful oligopoly and unlawful conspiracy; his

"structural breaks" are nothing more than his personal interpretation of selected factual evidence; his assertions regarding Respondents' unilateral self-interest were based on fundamentally flawed analysis and proved untenable at trial; and he performed no proper market-based analysis from which any proper conclusions can be drawn regarding presence or absence of harm to competition. Dr. Marshall's opinions should be disregarded.

BACKGROUND

The specific facts relevant to the resolution of the claims against Benco are generally set out in the argument, as applicable, below. This section is limited to setting out the genesis and rationale of Benco's no-middleman policy.

Since the mid-1990's, Benco has had a policy that it does not recognize or work with middlemen that come between it and its customers. FF 166, 167 & 450. 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. FF 169. 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. FF 170. 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. FF 168.

In formalizing the policy, Benco developed five rules set forth in Benco's "Group Practice Engagement Rules" to determine when a group will be recognized as a single customer:

(a) Where all offices are owned by a single entity;

(b) Where a single entity owns all of the hard assets of all offices and a dentist or multiple dentists own the practices;

(c) Where a single entity has majority ownership in all the offices but may have multiple minority partners;

(d) Where a management company with no ownership in any office, but that can compel purchasing from vendors it chooses, provides purchasing services for the group, and is the entity that is invoiced for the group, and is the entity that pays the bills for the group;

(e) Any group combinations of (a) through (d).

FF 172.

Rules 1-3 of the policy describe different forms of common ownership, which is important to Benco because it is a way of measuring common control. Rule 4 is of the policy reflects situations where, although there is not common ownership, there is a common entity that can control purchasing among the group's members. FF 173. Benco believes that there must be common ownership or control of separate dental practices in order for Benco to sell to a group as a single customer. FF 174. Only those groups that have common ownership or control can compel compliance in purchasing decisions. FF 173.

"Compliance" means that someone can make a commitment for purchasing and 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 in fact buy their products from Benco. FF 175. If only 30 of those 100 offices purchased from Benco, that would cause problems in two respects. First, Benco would have priced the products based upon a projected volume of sales to 100 offices, but would not realize the volume increase or cost savings that would justify the lower prices. Second, if the 30 offices take advantage of the lower prices are already Benco customers, then Benco would have offered a discount to existing customers without adding new clients – in effect cannibalizing its existing customers. FF 176. It is only where Benco can be assured that compliance will happen that Benco can lower its costs

to serve, and thereby lower pricing, without anyone coming between Benco and the customer. FF 177.

"Buying groups" as defined by Complaint Counsel may lack both common ownership and any common entity that controls purchasing. Thus, Benco does not consider such a buying group a "customer" under its policy. Accordingly, Benco does not offer discounts to such buying groups, although Benco will offer discounts directly to individual customers who may also be members of a buying group. FF 174, 188. In contrast, a corporate dental practice, also called a DSO, is broadly defined as a group of dental practices that have one common ownership structure that operates in multiple locations. Joint FF[2] 39-42. The dentists who work for these practices are employees, sometimes minority owners, but not the majority owners and not the decision makers. FF 197. Because, with a DSO, there is common ownership over all individual locations and common control over business decisions, DSO's fall within the definition of a single customer under Benco's policy and Benco does business with DSO's through Benco's "Strategic Markets" division. FF 203-207. Unlike buying groups, DSO's do lower Benco's costs of service, because they do not require traditional sales reps and can guarantee increased volume, and have other attributes, like guaranteed volum purchasing, and centralized ordering and shipping, which allows Benco to negotiate lower prices with manufacturers which are then passed on to the DSO. Joint FF 42-49. The main difference in developing its Strategic Markets division was that Benco decided to go after the DSO segment without its traditional sales reps and determined that it needed a separate sales team, with a separate compensation structure and separate go-to-market strategy to address the growing DSO segment of the market. FF 226.

[2] "Joint FF " refers to the proposed findings of fact set forth in Respondents' Joint Proposed Findings of Fact and Conclusions of Law.

ARGUMENT

I. Complaint Counsel's Evidence Fails to Show an Agreement Among Respondents to Not Do Business With Buying Groups.

A business entity "has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Anderson News, L.L.C. v. Am. Media, Inc.*, 899 F.3d 87, 103 (2d Cir. 2018). Under the antitrust laws, an agreement consists of a "unity of purpose or common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946); *see also United States v. Apple, Inc.*, 791 F.3d 290, 313, 315 (2d Cir. 2015) (defining an agreement as "a conscious commitment to a common scheme designed to achieve an unlawful objective."). The evidence in the trial record did not meet Complaint Counsel's burden of proving that Benco's consistent application of its no-middleman policy, which Benco followed before, during and after the alleged conspiracy, was the result of an agreement rather than Benco's independent, unilateral conduct.

A. There Is No Direct Evidence of the Alleged Agreement.

There is no direct evidence that Benco entered into any agreement with Schein or Patterson not to do business with buying groups. Direct evidence "is explicit and requires no inferences to establish the proposition or conclusion being asserted," *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999). Direct evidence consists of evidence such as "an admission by one of the defendants," *Anderson News*, 899 F.3d at 103, "a recorded phone call in which two competitors agreed to fix prices," *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013), or other "document or conversation explicitly manifesting the existence of the agreement in question." *In re Ins. Brokerage Antitrust Litig.*, 618

F.3d 300, 324 n.23 (3d Cir. 2010). *See also* Joint COL[3] 16-17. Following the trial, there is still no such direct evidence of the agreement alleged by Complaint Counsel.

First, every fact witness has denied any knowledge of the alleged conspiracy. Prior to trial, Complaint Counsel identified 40 individuals as having knowledge of the alleged conspiracy. Joint FF 82. Every individual identified by Complaint Counsel who testified at trial or in a deposition in this case denied any knowledge of the alleged conspiracy. Joint FF 83-118. Sworn denials of the existence of an agreement by those alleged to have personal knowledge of the agreement is direct evidence *that there was no agreement*. *In re McWane, Inc. & Star Pipe Prods., Ltd.*, 155 F.T.C. 903, at *267 (2013), *aff'd in part, rev'd in part*, FTC No. 9351, 2014 WL 556261 (Jan. 30, 2014), *aff'd sub nom. McWane, Inc. v. FTC*, 783 F.3d 814 (11th Cir. 2015) (finding that defendants' sworn testimony denying the illegal conduct is "*direct evidence contrary to the asserted [agreement]* and is entitled to weight" and that such testimony cannot be "dismissed as 'self-serving'" absent a finding that the witness lied under oath or is otherwise not credible) (emphasis added); *see also* Joint COL 23-24.

Second, the record is devoid of any document "explicitly manifesting" (or even alluding to) the alleged agreement. As discussed below, at most, the documentary evidence shows that Benco disclosed what it considered to be public knowledge – Benco's no-middleman policy – to Patterson, just as Benco disclosed it to potential buying groups who had approached Benco, FF 395 (Smile Source) and to others in the industry. FF 453. There is no reference in any document to any agreement between or among the Repondents to refrain from doing business with buying groups.

[3] "Joint COL" refers to the proposed conclusions of law set forth in Respondents' Joint Findings of Fact and Conclusions of Law.

B. **The Circumstantial Evidence Cannot Sustain a Finding of Any Agreement.**

The circumstantial evidence that Complaint Counsel has put into the record is insufficient to establish the alleged conspiracy. Circumstantial evidence, unlike direct evidence, requires further inferences to establish the proposition being asserted. Circumstantial evidence that may support an inference of conspiracy includes "a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications." *Mayor & City Council of Baltimore*, 709 F.3d at 136. Circumstantial evidence is "usually ... of two types – economic evidence suggesting that the defendants were not in fact competing, and noneconomic evidence suggesting that they were not competing because they had agreed not to compete." *In re McWane, Inc.*, 155 F.T.C., at *223 (quoting *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002)).

In antitrust cases, particularly those involving oligopolistic industries, the Supreme Court has limited "the range of permissible inferences from ambiguous evidence," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), because "mistaken inferences in [antitrust] cases ... are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Id.* at 594. For that reason, the "circumstantial evidence of a conspiracy, when considered as a whole, must tend to rule out the possibility of independent action." *In re McWane, Inc.*, FTC No. 9351, 2012 WL 5375161, at *6 (Aug. 9, 2012) (citing *Matsushita Elec. Indus. Co.*, 475 U.S. at 764). Ambiguous or circumstantial evidence that is equally consistent with permissible competition as with illegal conspiracy does not permit an inference of conspiracy. *Anderson News*, 899 F.3d at 98, 104-05. *See also* Joint COL 28. "Oligopolies pose a special problem under § 1 because rational, independent actions taken by oligopolists can be nearly indistinguishable from [concerted action]. This problem is the result of 'interdependence,'

which occurs because 'any rational decision [in an oligopoly] must take into account the anticipated reaction of other firms." *Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, 873 F.3d 185, 192 (3d Cir. 2017) (quoting *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 359 (3d Cir. 2004)). *See also* Joint COL 30. Because "competitors in concentrated markets watch each other like hawks[,]" internal discussions about what other competitors might be doing does not give rise to an inference of agreement. *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 875 (7th Cir. 2015).

Accordingly, to determine whether the circumstantial evidence suffices to prove an agreement, courts follow a three-step process. "First, the court must determine whether the plaintiff has established a pattern of parallel behavior. Second, it must decide whether the plaintiff has demonstrated the existence of one or more plus factors that 'tends to exclude the possibility that the alleged conspirators acted independently'…. Third, if the first two steps are satisfied, the defendants may rebut the inference of collusion by presenting evidence" that negates the inference "that they entered into a ... conspiracy." *Williamson Oil Co. v. Philip Morris USA*, 346 F. 3d 1287, 1301 (11th Cir. 2003); *see also* Joint COL 31.

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

1. The Evidence Does Not Show Parallel Conduct by Respondents, Which Precludes a Finding of An Agreement.

Comparing Respondents' behavior during the alleged conspiracy period, a finder of fact could not reasonably conclude that Benco, Schein and Patterson engaged in parallel behavior, which precludes a finding of agreement.

Complaint Counsel claims that Respondents acted in parallel in refusing to do business with buying groups during the alleged conspiracy period. Although, as explained below, the evidence shows that Benco did not act in parallel to Patterson or Schein, parallel conduct alone cannot support an inference of conspiracy unless it consists of "complex and historically unprecedented changes … made at the very same time by multiple competitors, and made for no other discernible reason." *Mayor & City Council of Baltimore,* 709 F.3d at 137 (internal quotation marks omitted); *see also Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 557 (2007) ("[W]hen allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action."). The evidence establishes that Respondents did not engage in parallel conduct, let alone parallel conduct that would meet this high threshold.

Before, during, and after the conspiracy period, each respondent assessed independently how to address whether it made sense to deal with buying groups, and each respondent pursued different strategies when facing the question of whether to deal with buying groups. The evidence shows that:

- Benco, following its longstanding policy, did not deal with buying groups before, during or after the alleged conspiracy;
- Schein dealt with selected buying groups before, during and after the alleged conspiracy; and
- Patterson was generally skeptical about dealing with buying groups before, during, and after the alleged conspiracy, but occasionally its salespeople worked with buying groups.

The evidence shows independent consideration and decision-making that is inconsistent with, and defeats any inference of, a conspiracy among Respondents.

As explained above, before, during and after[4] the alleged conspiracy period, Benco followed its longstanding non-middleman policy and simply did not do business with buying groups. FF 187, 189. Since the mid-1990's, Benco has consistently followed and implemented a policy that it will not recognize or work with buying groups or other middlemen that come between it and its customers. With one exception (the case of Elite Dental Alliance, explained below), Benco has followed this policy consistently for the past 23 years.

Throughout the relevant time period, Patterson was skeptical of buying groups for many of the same reasons as Benco. *See* Patterson FF[5] Section II.g. But Patterson operated as a decentralized company, and its branches and local sales personnel sometimes evaluated independently whether to work with buying groups. *See* Patterson FF Section II.h. Although in most cases, Patterson declined to work with buying groups, Patterson FF Section II.i, occasionally Patterson sales personnel did work with buying groups. Patterson FF Section II.j. Both the local evaluation and decision-making process and the occasional decision to work with buying groups differed from Benco's practice.

The record reflects that Schein, by contrast, did business with and/or bid for the business of multiple different buying groups before, during, and after the conspiracy period. *See generally* Schein FF Sections II & III.[6] Schein identified over 40 organizations of independent dentists with which it did business during the relevant time period. *See generally* Schein FF Section III. In addition, Schein bid for the business of, or negotiated to reach an agreement with, other buying groups during the relevant time period. *See generally* Schein FF Section III. Schein also

[4] 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.

[5] "Patterson FF" refers to Respondent Patterson's Proposed Findings of Fact.

[6] "Schein FF" refers to Respondent Henry Schein, Inc.'s Proposed Findings of Fact.

seriously evaluated the possibility of bidding or negotiating for the business of multiple buying groups during the relevant time period, even if it ultimately decided not to go forward. *See* Schein FF Section II.C. Complaint Counsel objects, claiming that not all of these entities meet its particular definition of buying groups. But even Complaint Counsel concedes that many do. Complaint Counsel tries to explain away individual instances, arguing for example that perhaps some of this business was continuation of business begun before the relevant time period, and perhaps certain other instances were examples of Schein cheating. But Complaint Counsel can't explain away Schein's record of continuous business with buying groups, multiple evaluations of potential new business with buying groups, and bids and negotiations for new business with buying groups throughout the relevant time period. This record is supported by the unanimous testimony of Schein witnesses, and confirmed by third party witnesses, that Schein seriously pursued buying group business during the relevant time period. *See generally* Schein FF Section II.B. Schein's record of dealing with buying groups stands in stark contrast to that of Benco and that of Patterson.

This marked absence of parallel conduct establishes the absence of any conspiracy. Indeed, even the decision-making process – a clear, pre-existing policy on the part of Benco, decentralized evaluation by Patterson, and centralized engagement by Schein – are inconsistent with the concept of a conspiracy.

In an effort to rebut this stark factual record, Complaint Counsel relied on Dr. Marshall to opine that Schein stopped dealing with buying groups between 2011 and 2015, and that therefore its conduct might be considered parallel to that of Benco and Patterson during these years. But this opinion is nothing more than Dr. Marshall's interpretation of factual evidence which is beyond his competence as a supposed economics expert. What entities were, or were perceived

to be, buying groups, and what actions Benco, Schein and Patterson took with respect to such groups, are purely factual questions as to which Dr. Marshall has nothing to contribute. The factual nature of the issue is evident in the errors underlying his views.

Dr. Carlton properly recognized that the definition of buying groups is for the factfinder to decide. Therefore, he examined data regarding Schein's business dealings with various categories of entity (to account for various possible findings by the factfinder) and confirmed that, for any realistic definition of buying group, Schein's business pursuant to agreements with buying groups increased between 2011 and 2015. FF 831-37.

[redacted]

Further evidence of non-parallel conduct is found in the bids that Schein placed between 2011 and 2015 in unsuccessful attempts to win buying group contracts. FF 829-30; [redacted]. Dr. Marshall had to concede that Schein submitted a bid for the business of Smile Source in 2014, in the midst of the alleged conspiracy period. FF 869. The record evidence confirms that Schein's bid for Smile Source's business in 2014 was serious and sincere. FF 871. Even Complaint Counsel admits that Schein's bid for Smile Source business in 2014 was serious. FF 872. But to avoid having to deal with this inconvenient fact, Dr. Marshall opined, without factual support and in conflict with Complaint Counsel's concession, that Schein's bid for Smile Source's business in 2014 was "nonserious." FF 870. [redacted]

[redacted]. Schein's bid to Smile Source in 2014 and [redacted] were not parallel to the conduct of Benco and Patterson at that time.

Dr. Marshall's efforts to dismiss this clear evidence of non-parallel conduct are circular and internally inconsistent: he assumes parallel conduct as evidence of conspiracy, and assumes conspiracy to explain away evidence of non-parallel conduct. FF 878. And even using the numbers conceded by the FTC, the sales data demonstrate that Schein was discounting to buying groups before the alleged conspiracy period, during the alleged conspiracy period, and after the alleged conspiracy period.[7] Dr. Marshall simply has no basis in the record for the spin he tries to put on the facts; the evidence clearly demonstrates that Respondents' conduct with respect to buying groups was not parallel.

2. Complaint Counsel Could Not Establish the Start of the Alleged Agreement.

Complaint Counsel has alleged a general conspiracy among respondents "that none of them would do business with buying groups or discount to buying groups." (Opening Tr. 17). Complaint Counsel advanced various theories, but no actual evidence, as to how, when, by whom, or with respect to exactly what entities, the alleged conspiracy was formed. Indeed, Complaint Counsel was inconsistent in claiming when the alleged 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). But there is no record of communications between Benco and Schein regarding buying groups at any time before, on, or around July 2012,

[7] [redacted]

from which a finder of fact could find the existence of a conspiracy. Nor is there any record evidence of any specific *conduct* by Benco (or Schein) prior to July 2012 that could support an inference that the alleged conspiracy began "no later than July 2012." As for Benco, it continued to enforce its policy of not letting anyone, including a buying group, get in between Benco and its customers consistently from 1996 through July 2012 (and thereafter).

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). At trial, however, Complaint Counsel failed to produce any evidence of communications between Benco and Schein concerning buying groups or the alleged conspiracy in 2011. Moreover, the evidence at trial contradicted Complaint Counsel's theory. On September 26, 2011, Benco was approached by Dr. Andrew Goldsmith, President of a buying group called Smile Source. Dr. Goldsmith wrote that Smile Source operated in 8 states and had 40 practices, and "currently used Henry Schein for its services," FF 392. Although Benco was, thus, aware that Schein was working with buying groups as early as September 26, 2011, there is no evidence of any communication between Benco and Schein concerning Smile Source or buying groups in general at that time. FF 398.

Complaint Counsel identified various communications between Benco and Schein at the end of 2011 and the beginning of 2012, but there was no evidence presented that those communications concerned buying groups. On the contrary, the evidence showed that there were legitimate non-conspiratorial reasons for Benco and Schein to be communicating at that time (and throughout the alleged conspiracy period). The record showed that in late October, 2011,

Benco recruited four or five Schein employees (the "Rotert Group"), from the Fresno, California area. Benco's hiring of the "Rotert Group" from Schein resulted in several discussions over the following months, and resulted in Benco and Schein renegotiating the terms of a "Competitive Hiring Agreement" they had previously entered into. FF 577-81.

Complaint Counsel posits that a January 13, 2012 telephone call between Chuck Cohen of Benco and Tim Sullivan of Schein, concerned a buying group named Unified Smiles, and is evidence of Benco "enforcing" the alleged conspiracy (that supposedly started at some earlier time). But the evidence cannot support Complaint Counsel's assertion. Mr. Cohen and Mr. Sullivan testified that, based upon their review of surrounding documents (including employment records and records of other communications around that time), the January 13, 2012, call concerned employment issues and did not concern Unified Smiles. FF 586-94. The communications records show that Mr. Cohen called his attorney who handled employment matters just before and after Mr. Cohen's call with Mr. Sullivan. FF 590-91. And based upon his review of text messages around the time of the call, Mr. Sullivan believes they discussed Kent Hayes (a Fresno recruit) and employment related issues. FF 593. Mr. Sullivan testified that he was certain that Unified Smiles was not discussed on the call. FF 592.

Complaint Counsel has offered no evidence to overcome the testimony and documentary evidence showing that the call was about employment issues and did not concern Unified Smiles or buying groups. Complaint Counsel's assertion that the January 13, 2012 call concerned buying groups is sheer speculation. *See, e.g.*, *In re McWane, Inc.*, 155 F.T.C. at *253 (where witnesses "denied having any recollection of the telephone calls and/or denied any recollection of what was discussed[,]" it "would be pure speculation … to simply assume" that unlawful agreements were reached); *see also* Joint COL 76-77.

3. Complaint Counsel Assumes, Without Supporting Evidence, The End of the Alleged Conspiracy.

At trial, Complaint Counsel claimed that the conspiracy ended "in April 2015 [when] Benco entered into a settlement agreement with the Texas Attorney General" which made the conspiracy "difficult, if not impossible, to maintain," and "respondents started dealing with buying groups after that point." (Opening Tr. 19; *see also* Opening Tr. 54 ("for all intents and purposes, the conspiracy was impossible to maintain much long past that point" after April 2015)). With regard to Benco, the only evidence Complaint Counsel points to is Complaint Counsel's own assertion that Benco changed course after the supposed end of the alleged conspiracy by partnering with a financial services firm, Cain Watters, to form a joint venture, Elite Dental Alliance ("EDA"). Although EDA does have some of the characteristics of a buying group, a closer look at the structure of EDA, and Benco's level of control over EDA, shows that EDA differs markedly from a buying group and why it made sense for Benco to participate in EDA. In fact, Benco's actions in participating in EDA are fully consistent with its no-middleman policy and does not suggest that Benco changed its conduct after the supposed end of the alleged conspiracy.

Cain Watters is the largest financial services group dealing with independent dentists and dental practices, and had been a "success partner" of Benco's since the mid-2000's. FF 234-35. In June 8, 2015, Benco first learned of Cain Watters' potential interest in finding a dental supplier to provide volume discounts to Cain Watters clients. Because Benco was interested in exploring ways to build and deepen its relationships with Cain Waters, Benco had regular discussions with Cain Watters after that time negotiating what would became EDA. FF 237-41. The parties worked out an agreement whereby the companies would work together to grow

EDA, and if there were profits, those profits would be split 50/50 between Benco and Cain Watters. FF 236.

EDA is structurally different than any buying group Benco had ever seen, more like a DSO, but without common ownership. FF 261. EDA's unique characteristics include: (1) members: these are limited to Cain Watters clients who have an in-person meeting with Cain Watters at least once a year to discuss financial health and business planning and the Cain Watters' account planner has significant control over directing the financial decisions of the dental practice, or dentists with over $2 million in revenue; (2) purchase commitments: members of EDA make a firm purchase commitment to Benco in order to qualify for discounts; (3) profit sharing: Benco receives 50% of any profits from EDA; and (4) control: Benco has control absolute control over the selection of members and other vendor partners of EDA. FF 246.

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 enter into a trial partnership with Cain Watters on EDA. FF 247-49. Benco determined that it made sense to enter into a trial agreement to move forward with Cain Watters to see if EDA could solve the core structural problem that plagued all other buying groups and made them unattractive to Benco's unilateral economic interests. FF 243. Reflecting the months of considering and negotiating the structure of EDA with Cain Watters, Benco announced its partnership with Cain Watters and EDA at its sales meeting at the beginning of 2016. FF 251.

Benco's no-middleman 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. FF 263. Complaint Counsel's simplistic claim that Benco's participation in EDA constituted a change in its policy of not dealing with buying groups, thereby reflecting

an end of the alleged conspiracy, ignores the numerous substantive differences between EDA and other buying groups that had approached Benco, which differences made EDA uniquely attractive to Benco.

4. Dr. Marshall's Assertion of "Structural Breaks" is Based on Willful Ignorance of the Record and Should Be Disregarded.

Complaint Counsel seek support from Dr. Marshall, who claims to have identified "structural breaks" that show that Benco, Schein and Patterson changed their behavior, which he interprets as evidence of conspiracy. Dr. Marshall's assertions are simply wrong. They reflect nothing more than Dr. Marshall's view of selected facts (of which he has no independent knowledge and no particular ability to interpret) to try to bolster his flawed analyses. Even a cursory examination of the evidence reveals that Dr. Marshall is wrong – Respondents' conduct was consistent over time.

In his identification of supposed "structural breaks," Dr. Marshall applied no recognized method of economic analysis – he simply offered his interpretation of factual evidence.[8] FF 1243-50. The absence of any principled economic analysis is demonstrated by the simple fact that, if his "methodology" were applied consistently, it would define Benco's agreement with Atlantic Dental in 2013 as a "structural break" that would disprove the existence of any conspiracy.[9] FF 1251-60. Dr. Marshall didn't like this outcome, of course, so he interpreted those events differently.

[8] As Dr. Johnson pointed out, Dr. Marshall tried to dress up his interpretation of factual evidence in economic jargon. However, the term "structural break" has a very specific meaning in econometrics, based in an objective measure of empirical testing of data of an economic model. FF 1243-44. Dr. Marshall did not apply econometrics, did not examine data, and did not apply an objective measure. FF 1245. He borrowed the term just to try to hide the fact that he is simply offering his own personal view of factual evidence in the record.

[9] Dr. Marshall's "methodology" was to identify as a buying group any entity that at least one Respondent believed to be a buying group and as to which at least one Respondent declined to bid for an agreement. FF 1254. Had he applied his "methodology" consistently, Dr. Marshall should have found Atlantic Dental to be a buying group, as Patterson believed it to be a buying group and did not bid for its business. FF 1255-57.

Once Dr. Marshall's exercise is revealed to be simple interpretation of factual evidence, its weaknesses are clear – Dr. Marshall did not know the factual record. Rather than assessing all of the relevant evidence, he cherry-picked isolated facts and based his pronouncements on them. So long as one Respondent believed that an entity was a buying group and the entity was not named Atlantic Dental, Dr. Marshall seized on a decision to bid or not to bid for its business as determinative without regard for any other surrounding evidence.

Dr. Marshall asserted that Schein's decision not to bid for the business of Unified Smiles in 2011 constituted a "structural break." He ignored not only all of the surrounding circumstances and the reasons why Schein decided not to bid for that business, FF 1263-65, but also the fact that on the very next day, [redacted] FF 1266. Similarly, he asserted that Schein constructively terminated its relationship with Smile Source in early 2012, and this also constituted a "structural break." FF 1278. Dr. Marshall willfully ignored testimony, documentary evidence and data establishing that, far from being any break at all, Schein sought to continue its relationship with Smile Source. FF 1280-84. Dr. Carlton undertook a proper economic analysis – based on interpretation of the contemporaneous sales data – and concluded that there was no "structural break" – Schein's conduct was consistent during the time period in question. FF 1282-83.

Dr. Marshall also opined that Schein's bid for an agreement with Smile Source in 2016-2017 constituted a "structural break." Again, Dr. Marshall ignored all of the testimonial and documentary evidence establishing that Schein submitted a competitive bid for Smile Source's business in 2014 and remained in touch during 2015 and 2016 in order to try to win the bid at the next opportunity. FF 1337-43. Schein's bid in 2016 simply was not a change in conduct. FF 1344.

Dr. Marshall also claimed that Benco's agreement to partner with Cain Watters to form Elite Dental Alliance in 2016 constituted a "structural break." Dr. Marshall ignored all of the unique features of the Elite Dental Alliance arrangement that addressed most of Benco's concerns with dealing with buying groups. *See, supra*.

As explained above, the evidence is clear that 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. FF 1324. These unique factors – which set Elite Dental Alliance apart as a different type of organization – addressed many of Benco's concerns with typical buying groups. FF 246, 1322. It was precisely because Elite Dental Alliance was *different* from other buying groups, and that Benco had a measure of control over Elite Dental Alliance, that Benco was willing to enter into the arrangement. FF 247-250. Yet Dr. Marshall ignored all of the relevant factual evidence and instead simply assumed that Elite Dental Alliance was just like all other buying groups and that Benco's decision to enter into the arrangement involving Elite Dental Alliance therefore must have been a change in policy. FF 1334. Dr. Marshall's personal view of selective facts is not only not helpful to the factfinder – in light of his ignorance of the factual record, his views are counterproductive and should be disregarded.

5. Complaint Counsel Can't Rely on Dr. Marshall's Claims Regarding Market Structure to Infer the Existence of Collusion.

To support its claim that Your Honor should infer collusion among Respondents, Complaint Counsel rely on Dr. Marshall's opinion that the structure of the market for the distribution of dental products and services was "conducive to effective collusion." FF 785. Complaint Counsel's position is incorrect for multiple reasons. FF 787-821.

First, a conspiracy cannot be inferred from industry characteristics. FF 787-90. Even if there had been parallel behavior among Respondents with respect to buying groups (which there was not), that would be explained by oligopolistic interdependence, which has nothing to do with conspiracy. FF 789. Dr. Marshall failed to distinguish between oligopolistic interdependence and conspiracy. FF 790.

Second, even if Dr. Marshall's exercise could, in theory, be meaningful, his actual analysis tells us nothing. The same set of characteristics that he cites as conducive to collusion are would, in fact, undermine the ability of a cartel to form at all. FF 791. Furthermore, Dr. Marshall failed to perform his analysis in properly defined relevant markets: he failed to measure shares properly or to consider important competitive constraints in the dental distribution industry. FF 792-99. He also incorrectly assumed manufacturers lack bargaining power vis-à-vis distributors, and thus would be unable to discipline any collusion; in fact, the evidence of record refutes Dr. Marshall's assumption. FF 800-806. Dr. Marshall also incorrectly claimed that the industry is characterized by high barriers to entry. This assertion is contradicted by Benco's successful entry into a series of territories, including entry into the west coast and into the Pacific Northwest during the time period in question.[10] FF 809-13. As a result, Dr. Marshall simply cannot tell us whether or not the market structure actually would be conducive to collusion.

Furthermore, Dr. Marshall ignored multiple characteristics of the dental distribution industry that would make the alleged conspiracy less likely to succeed. Such characteristics include (1) the lack of pricing transparency due to variations in the basket of products purchased by individual dentists, (2) the difficulty in detecting cheating, (2) a distributor's potential use of

[10] Dr. Marshall responded by citing Benco's growth in *national* share over the past 25 years, since the early 1990s. FF 813. By citing to national shares, Dr. Marshall deliberately obscures the point. Looking at *individual regions*, Benco was able to enter a series of regions and, within each region, increase its share from zero to a significant presence in just a short period of time. FF 809-12.

services to get around any agreement, and (4) a distributor's potential offer of discounts directly to buying group members, which would undercut the purpose of the alleged agreement. FF 814-20. In sum, the various factors cited by Dr. Marshall simply don't support his conclusion that the structure of the dental products distribution business is conducive to collusion. FF 821.

C. The Limited Communications Concerning Buying Groups do not Support an Inference of Conspiracy.

Although Complaint Counsel has identified a number of communications between Benco and the other Respondents, when examined at trial, it became clear that there were only a small number that even concerned buying groups, while the remainder concerned legitimate business purposes, such as (1) issues that arose between Benco and Schein over their Competitive Hiring Agreement, (2) potential acquisitions of Benco by Schein or Patterson; (3) and social communications, jokes, etc. FF 163, 506, 546-560 & 606. The limited communications concerning buying groups are insufficient to find an agreement among Respondents.[11]

The only communications that Chuck Cohen has ever even had with anyone at Schein about buying groups is limited to one exchange with Tim Sullivan regarding Atlantic Dental

[11] As a threshold matter, Complaint Counsel's economic expert, Dr. Marshall, purported to offer his interpretation of "economic content" of the communications in question as evidence of the alleged conspiracy. FF 634. Dr. Marshall relied in part on his interpretation of emails and communications to opine that Respondents' conduct was consistent with coordinated action. FF 632. Dr. Marshall testified that, aside from his five case studies, "these communications" led him "to the conclusion that we have coordinated action." FF 632. (Marshall Tr. 2885-2886).

As Your Honor correctly observed at trial, an economist has nothing to offer a factfinder with respect to the interpretation of communications. (Marshall, Tr. 2878-2881). Drs. Johnson, Carlton and Wu were unanimous in testifying that inferring an agreement from emails and communications is outside of any training, accepted methodology, or competence of an economist. FF 633. "[A]n economist is not qualified to form a legal conclusion about whether companies have formed an agreement." FF 633 (RX2832 at 63, ¶ 9); *see also* Johnson, Tr. 4817-4818; J. Johnson, Tr. 4863-4864). Dr. Carlton stated that "an economist is not qualified to form a legal conclusion about whether companies have formed an agreement." FF 633 (RX2832 at 63, ¶ 94). Dr. Wu testified, "As an economist, I cannot possibly presume to divine what someone may have meant or intended in an e-mail." FF 633 (Wu, Tr. 5035). This position is widely shared among economists. *See* G. Stigler, "What Does An Economist Know?," *Journal of Legal Education* 33, No. 2 (1983) at 311-313. Apart from vague allusions to some unidentified "economic content" of communications, Dr. Marshall failed to offer any persuasive explanation of how his interpretation of emails and communications would assist the trier of fact in this matter.

Care. FF 420. The only communications that Chuck Cohen has ever even had with anyone at Patterson about buying groups is limited to two brief e-mail exchanges with Paul Guggenheim, neither of which come close to forming any type of agreement. FF 419.

1. The Email Exchange Regarding New Mexico Dental Coop is Not Evidence of an Agreement

On February 4, 2013, Dr. Brenton Mason sent an email blast entitled, "New Mexico Dental Cooperative Purchasing," to dental manufacturers setting a meeting for March 13, 2013 at Patterson's Albuquerque branch office which stated "We have partnered with Patterson." FF 426-27. That email caused "quite a stir" among manufacturers and distributors. FF 429 (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.")). Dr. Mason's email was then forwarded multiple times, originally by one of the recipients, until it reached Don Taylor, a former Benco Regional Manager responsible for the New Mexico market. FF 434-37. Taylor forwarded the email 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. FF 438.

Mr. Cohen understood Mr. Taylor Taylor's forwarding of the email 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 New Mexico Dental Coop. FF 440. At that time, Mr. Cohen was not aware that Patterson had any Special Markets Division or any business operations focused on DSOs, and had not seen any evidence in the marketplace of Patterson selling to DSOs or any kind of group. If Patterson had been entering the DSO or group market, this would have been a significant shift in Patterson's business strategy as Mr. Cohen understood

it and would have surprised Mr. Cohen, he was therefore "skeptical" of the truth of this information. FF 431-33.

On February 8, 2013, Mr. Cohen forwarded the email chain to Paul Guggenheim of Patterson. FF 421. Mr. Cohen wanted to let Mr. Guggenheim know about industry noise concerning one of Patterson's branches that Guggenheim might not have heard about and might want to know. Mr. Cohen thought that if the shoe had been on the other foot, he hoped that Mr. Guggenheim would have let him know of information about Benco that Mr. Cohen might not have known. FF 443-44.

At the end of his email, Mr. Cohen informed Mr. Guggenheim of Benco's policy of not dealing with middlemen such as buying groups. Benco's policy was not confidential and it was not an industry secret, and Mr. Cohen believed that it was already widely known in the dental industry. FF 449-52. Benco's policy had been in place for over 16 years, and Benco had shared it with many others in the dental industry over the years. FF 450, 453. Mr. Cohen did not recall why he included an FYI about Benco's policy in this email, but testified that "It seemed to be germane to the topic, but no special reason." FF 449.

Mr. Cohen testified that he did not write the February 8, 2013 e-mail for the purpose of forming any agreement with Paul Guggenheim or with Patterson about dealing with buying groups or anything else. FF 445. The email did not ask Guggenheim or Patterson to do anything or take any action, and Mr. Cohen did not expect Mr. Guggenheim to do anything in response to the email. FF 446-47. Furthermore, Mr. Cohen never followed up with Mr. Guggenheim after sending the email. FF 448. There is no evidence that Mr. Cohen's email had any impact on Patterson, or Patterson's decision on whether or not to do business with the New Mexico Dental Coop. And, as to the overall alleged conspiracy, Dr. Mason and the New Mexico branch

ultimately did business with Schein through the Utah Dental Cooperative in 2013 and 2014. FF 456.

The February 8, 2013 email from Mr. Cohen is not probative evidence of the alleged conspiracy. Monitoring competitors' activities is common and to be expected in competitive markets. *See, e.g.*, *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 879 (7th Cir. 2015) ("We can, . . . without suspecting illegal collusion, expect competing firms to keep close track of each other's pricing and other market behavior and often to find it in their self-interest to imitate that behavior rather than try to undermine it . . . ."); *Baby Food*, 166 F.3d at 126 (explaining that "[g]athering competitors' price information can be consistent with independent competitive behavior.") Similarly, competing firms may exchange information that is of common interest, and such information exchanges do not violate the antitrust laws where the parties then make independent business decision on the basis of that information. *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1048 (2d Cir. 1976) ("[I]t is not a violation of [Sherman Act §] 1 to exchange such information, provided that any action taken in reliance upon it is the result of each firm's independent judgment, and not of agreement."); *see also Interborough News Co. v. Curtis Publ'g Co.*, 225 F.2d 289, 293 (2d Cir. 1955) (explaining that customers' "past preference for maintaining an exclusive relationship with a single wholesaler provides a legitimate reason for defendants' lobbying efforts to persuade each other … to consider dealing with an alternative wholesaler"). *Ross v. Citigroup, Inc.*, 630 Fed. Appx. 79, 82 (2d Cir. 2018) (affirming grant of summary judgment in favor of defendants where, despite a high level of inter-firm communications, "the district court found that the 'final decision to adopt class-action-barring clauses was something the Issuing Banks hashed out individually and internally.'").

2. Communications Regarding Atlantic Dental Care ("ADC") are not Evidence of an Agreement.

Before trial, Complaint Counsel asserted that Respondents' conduct relating to the buying group Atlantic Dental Care ("ADC") demonstrates the existence of an agreement among Respondents to boycott buying groups. (CC Pretrial Br. 27-32.) The Complaint alleges that, "[i]n late February 2013, pursuant to the agreement, each of the Respondents refused to submit a bid for a customer called Atlantic Dental Care ..., as each of the Distributors believed it to be a Buying Group." (Complaint, ¶ 42). The evidence at trial was wholly inconsistent with Complaint Counsel's assertion.

There was no evidence presented that Schein or Benco refused to submit a bid for ADC in late February 2013, nor did Complaint Counsel present any communications among respondents in late February 2013 concerning ADC. FF 468. Furthermore, Schein did not receive ADC's RFP until March 22, 2013, and Schein timely submitted a proposal by the RFP's April 8, 2013 deadline. FF 469. Benco also timely submitted a proposal to the RFP, and was ultimately awarded the contract. FF 470. Although Patterson received a draft of the RFP in late February 2013, and unilaterally decided not to bid for the business, there was no evidence introduced that Patterson communicated with Benco or Schein about its decision not to submit a bid for ADC. FF 471. Complaint Counsel's summary exhibit and communications log also does not reflect any phone call or text message during this period. FF 472.

The only evidence of communications among any of the Respondents concerning bidding for ADC is an exchange between Mr. Cohen of and Mr. Sullivan, in which Mr. Cohen was seeking information about ADC's ownership structure to help Benco determine how to apply Benco's no-middleman policy to ADC.

When a group like ADC approaches Benco, Benco must gather information about the group so that it can apply its policy. FF 478. 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. FF 479. It is often a challenge for Benco to determine the ownership structure and control structure of a group. FF 482. Benco's evaluation of ADC was the most difficult and longest evaluation of a group that Benco had ever conducted, because Benco had never come across an ownership structure like ADC's. FF 487-89. Pat Ryan and Benco's Special Markets team spent months assessing ADC. FF 490. That assessment included asking ADC itself for documentation, consulting with Benco's local sales team, conducting independent research, and ultimately consulting with others in the dental industry. FF 491. Mr. Cohen eventually reached out to Mr. 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. FF 492. Mr. Cohen's intent in reaching out to Mr. Sullivan regarding ADC was to gather facts that might help Benco make its own independent evaluation of ADC. FF 493.

On March 25, 2015, Mr. Cohen received an internal email from Mr. Ryan, attaching an article about ADC's recent securities offering, and noting that he could not "figure out if [ADC] is a buying group or not." FF 494 (CX0020). Mr. Cohen sent a text message to Mr. Sullivan at 3:13 pm on March 25, 2013, asking if Mr. Sullivan is "[a]vailable to talk." FF 495 (CX6027-027). In his text message, Mr. Cohen did not indicate the subject matter he wished to talk about, and Mr. Sullivan testified that he did not know what Mr. Cohen wanted to talk about. FF 496. Mr. Sullivan responded to Mr. Cohen's text message that he was available at 5:00 pm eastern, and he called Mr. Cohen at that time. FF 497 (CX6027-027).

The purpose of the call was to find out if Mr. Sullivan had any information about ADC, since Benco could not determine whether it was a buying group. FF 500. Mr. Sullivan testified that Mr. Cohen asked about ADC on the call, and that Mr. Sullivan did not know anything about ADC at the time of the call. FF 502-03. Mr. Cohen and Mr. Sullivan did not reach any agreement about ADC on the call, FF 501, 504, and there was no discussion of Benco's policy or of Schein's policies, plans or practices concerning ADC or buying groups on the call. FF 501, 502, 504.

Immediately following the call, at 5:09 pm on March 25, 2013, Mr. Sullivan sent Mr. Cohen a text stating, "Yes, I am good with the terms we discussed and I look forward to joining Team Benco! Ps. Want to confirm that the Benco tooth logo will include a picture of me. :)" FF 505 (CX6027-027). 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. FF 506.[12] Later that evening, Mr. Cohen forwarded a link to an article reporting on ADC's financing. FF 510. In response, Mr. Sullivan simply wrote, "unusual," Mr. Sullivan did not provide any information about ADC or reveal Schein's plans about ADC.

Two days later, on March 27, 2017, Mr. Cohen sent Mr. Sullivan another text, saying that he "[d]id some additional research on the Atlantic Care deal, seems like they have actually merged ownership of all practices. So it's not a buying group, it's a big group. We're going to

[12] A few days before this conversation, 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. FF F07. The ongoing merger discussions between Schein and Benco impacted Mr. Sullivan's interactions with Mr. Cohen, in that he wanted to be cordial and treat Mr. Cohen with respect because they might working for one another if a merger went through. FF 508. Mr. Sullivan's and Mr. Cohen's joke about who would work for whom is consistent with a discussion on the March 25, 2013 call about this upcoming meeting, as are follow-up texts between Mr. Cohen and Mr. Sullivan that continued to joke. FF 509.

bid. Thanks." FF 513. 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. FF 514. Mr. Cohen's statement that Benco is going to bid for ADC's business did reveal Benco's plans. However, it does not evidence 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.

The evidence of these communications does not support an inference of any agreement between Mr. Sullivan and Mr. Cohen regarding buying groups. Mr. Cohen never inquired about, and Mr. Sullivan did not reveal, any information about Schein's policies, practices, or plans relating to ADC or buying groups generally. At most, they show Benco trying to gain basic factual information regarding a potential client before submitting a bid, one for whom Benco ultimately bid for and won the business.

There is no evidence of any communication between Benco and Patterson concerning ADC before Benco bid for, and won the business.

After Benco won, the business of ADC, on June 6, 2013, Paul Guggenheim of Patterson sent an email to Mr. Cohen concerning ADC. Mr. Guggenheim wrote his e-mail on top of the February 8, 2013 e-mail from Cohen. FF 533 (CX0062). 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." FF 534. Guggenheim testified that he had sent the e-mail 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. FF 535. Guggenheim wanted to see what he "could learn in terms of field intelligence about what we might be missing here" and to gain information that would better allow Nease to compete for this business. FF 535 ((CX0314 (Guggenheim, IHT at 287) ("I wanted to see what intelligence I could find out to help Devon get back in there and compete.")). Because Benco had already won the ADC contract, Mr. Cohen saw no harm in sharing Benco's thinking regarding the ownership structure of ADC. Mr. Cohen responded that ADC was a large group practice, and not a buying group. FF 537-38. Both Mr. Guggenheim and Mr. Cohen deny that this email constituted enforcement of an agreement not to work with buying groups. FF 540.

To sum up, the only communications that Chuck Cohen has ever even had with anyone at Schein about buying groups is limited to the one exchange with Tim Sullivan regarding Atlantic Dental Care described above. The only communications that Chuck Cohen has ever even had with anyone at Patterson about buying groups is limited to the two brief e-mail exchanges with Paul Guggenheim, described above. None of these communications come close to forming any type of agreement among Respondents to refrain from doing business with buying groups.

D. **There Was No Conduct Contrary To Respondents' Individual Economic Interests.**

As explained above, there was no parallel conduct among Respondents with regard to buying groups, but even if there had been parallel conduct, the Respondents acted in accordance with their individual self-interest, which independently defeats an inference of conspiracy. *See, e.g., Orson Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1369-70 (3d Cir. 1996) (finding no conspiracy because conduct was in defendants' independent self-interest); *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991) (it is "well settled in this circuit

that evidence of conscious parallelism does not permit an inference of conspiracy unless the plaintiff establishes that . . . each defendant engaging in the parallel action acted contrary to its economic self-interest."); *Merck-Medco Managed Care v. Rite Aid Corp*., 201 F.3d 436 (4th Cir. 1999) (unpublished) (showing of legitimate business reasons for conduct rebutted inference of conspiracy based on motive and opportunity to conspire).

Evidence that a Respondent acted independently includes (i) the sworn testimony of its employees attesting to that fact; (ii) evidence that that it made business decisions based on legitimate factors, such as the likely effect of a course of action on its prices, profits, or sales volume, on its competitors' behavior, and on the structure of the market; and (iii) evidence that it took steps inconsistent with the alleged conspiracy. *In re Citric Acid Litig*., 191 F.3d 1090, 1105-06 (9th Cir. 1999) (holding evidence "considered as a whole," could not support an inference that Cargill joined the conspiracy where the evidence included sworn testimony of independent action, consideration of the costs and benefits of a course of action, and actions inconsistent with the alleged conspiracy); *Valspar Corp.,* 873 F.3d at 200 (evidence of "internal deliberation" over a course of action "may negate an inference of conspiracy"); *Wilcox Dev. Co. v. First Interstate Bank of Or., N.A.*, 605 F. Supp. 592, 594 (D. Or. 1985) ("evidence of lawful business reasons for parallel conduct will dispel any inference of a conspiracy"), *aff'd,* 815 F.2d 522 (9th Cir. 1987); *see also* Joint COL 94-95.

Benco decided unilaterally – long before any allegation of conspiracy – not to deal with buying groups because Benco viewed groups lacking common ownership or common control over purchasing, unable to sufficiently increase the volume of sales to members of the group or reduce costs of servicing group members. FF 1285; *see also, supra.* Benco itself unilaterally adopted, and for over 20 years has maintained and consistently implemented, its policy of not

doing business with buying groups for compelling, procompetitive business reasons. FF 166-89; *see also, supra*. Benco's policy was consistent with its unilateral economic self-interest. FF 189, 414, 532, 879-886, 903-915. The evidence demonstrates that Patterson and Schein likewise acted in each of their own unilateral economic self-interests. *See generally* Patterson FF Section VIII; Schein FF at Section V.

Complaint Counsel relies on Dr. Marshall's opinion that Benco (and Schein and Patterson) must have acted pursuant to a conspiracy because each acted contrary to its own individual economic self-interest. But Dr. Marshall's analysis is deeply flawed and provides no reliable basis for his opinion. Indeed, when properly analyzed, Dr. Marshall's data actually show that Benco, Schein and Patterson did act in their own individual economic self-interest.

[redacted] Despite that major concession, he failed to consider that Benco has little incentive to deal with buying groups if they cannot guarantee volume. FF 913-15. Marshall overlooked the fact that buying groups do nothing to reduce Benco's costs to serve. Without product or volume commitments, Benco could not negotiate lower prices from manufacturers. FF 919. [redacted]

[redacted] Dr. Marshall simply dismissed Benco's

carefully planned business strategy of expanding systematically into the regions of the United States where it was not yet present, and the fact that Benco succeeded in doing so, profitably and on schedule, despite not following the business path that Dr. Marshall thinks it should have followed. FF 53, 59, 1186-1242. *See, e.g., In re Citric Acid Litig.*, 191 F.3d at 1101 ("Courts have recognized that firms must have broad discretion to make decisions based on their judgments of what is best for them and that business judgments should not be second-guessed even where the evidence concerning the rationality of the challenged activities might be subject to reasonable dispute.").

Dr. Marshall's initial opinion was internally inconsistent, contrary to the factual record, and nonsensical, and he was forced to abandon it at trial. Initially, Dr. Marshall pronounced, broadly, without reservation, and without any limitation to specific buying groups or time period, that it was contrary to each Respondent's unilateral economic self-interest not to bid for the business of buying groups. FF 930 (CX7100 at 11, ¶ 13 ("[i]t was in each Respondent's unilateral economic self-interest to discount to buying groups"); CX7100 at 151, ¶ 352 ("Schein, Patterson, and Benco's conduct of not bidding for buying group business was inconsistent with acting in their own unilateral economic self-interest.")). But Dr. Marshall could not support his assertions at trial. FF 932.

Dr. Marshall's opinion was grossly overbroad and useless as a means of identifying allegedly collusive conduct. It captured – and implicitly labelled as collusive – years-worth of routine conduct acknowledged by Complaint Counsel as non-collusive. Dr. Marshall's theory implied that Benco repeatedly and consistently acted contrary to its unilateral economic self-interest for 15 years, from 1996 to 2011, by not bidding for the business of buying groups. FF 937. Likewise, Dr. Marshall's initial opinion implied that Patterson repeatedly acted contrary to

its unilateral economic self-interest for years before the alleged conspiracy (FF 942),[13] and Schein acted contrary to its unilateral economic self-interest on multiple occasions before 2011. FF 952. Similarly, Dr. Marshall's theory implied that Respondents acted contrary to their own unilateral economic self-interest by declining to bid for the business of buying groups on multiple occasions after 2015. FF 944.

Dr. Marshall admitted that his analysis showed the exact same action by Respondents during and outside the alleged conspiracy period,[14] (FF 944, but offered no explanation for why Benco, Patterson or Schein would act contrary to their independent economic self-interest before 2011 or after 2015. Conversely, if Benco, Patterson and Schein acted consistently with their unilateral economic self-interest in the years before 2011 and the years after 2015, Dr. Marshall had no explanation for why the identical conduct – declining to do business with various buying groups – was in each company's unilateral economic self-interest in the years before 2011, contrary to their unilateral economic self-interest from 2011 to 2015, and then in their unilateral economic self-interest again after 2015. FF 929-55.

Furthermore, Dr. Marshall admitted that, of the 38 buying groups he listed in his expert report, he know nothing about 36 of them. FF 958. He knew nothing about the groups themselves, the circumstances of their formation, their membership, how they held themselves out to the public, or the circumstances in which they approached one or more of Respondents. FF 958-89. Dr. Marshall admitted that he did not know whether the buying groups had made coherent proposals to one or more of Respondents. FF 975, 977, 979, 981, 985. And he conceded

[13] Indeed, Dr. Marshall asserted that he believed that each of Patterson (and Benco and Schein) acted contrary to its unilateral economic self-interest in 2012 and therefore must have participated in a conspiracy at that time, even though Complaint Counsel allege that Patterson joined the alleged conspiracy in 2013. FF 943.

[14] Dr. Marshall conceded that he did not observe any change in Benco's behavior in 2011 or 2012. FF 939. He observed that Benco continued to decline to offer discounts to buying groups from 2011 to 2015, as it had from 1996 to 2011. FF 939.

that he didn't know whether it was in a Respondent's unilateral economic self-interest to decline to do business with his listed buying groups. FF 987, 989, 998.

Ultimately, Dr. Marshall confirmed that he had conducted an analysis with respect to two buying groups only – Kois and Smile Source – and that he was not offering an opinion as to whether Benco acted contrary to its own unilateral economic self-interest by declining to bid for the business of any of the other 36 buying groups listed in his report. FF 990-99. Thus, Dr. Marshall admitted that his opinion is really that Respondents acted contrary to their unilateral economic self-interest by declining to bid for the business of two buying groups only: Kois and Smile Source (or, in the case of Schein, failing to win the bid for the business of Smile Source). FF 9989-99. But this analysis of Dr. Marshall was so flawed as to be meaningless. FF 1000-02.

Dr. Marshall's profitability studies followed no accepted economic methodology. FF 624, 1023. He did not cite to a single academic, peer-reviewed study endorsing the type of analysis he performed. FF 1024-25. As Dr. Carlton explained, Dr. Marshall's theoretical construct was flawed because it conflates conspiratorial behavior with non-conspiratorial oligopolistic behavior. FF 1001. These flaws in Dr. Marshall's analysis render it lacking in any theoretically valid foundation for reaching any conclusions about whether a distributor's behavior can be explained by a conspiracy. FF 1001.

Dr. Marshall failed to consider any disadvantages of dealing with buying groups other than cannibalization (the possibility of lower prices to customers who would have bought from the distributor absent any agreement with the buying group). FF 1011. From an economic perspective, however, there are many reasons beyond cannibalization that a distributor might not want to deal with buying groups. FF 1005. These include the possibility:

- of inducing other customers to join the buying group;

- of customers outside the buying group demanding similar discounts;
- of reducing the commissions that a distributor's sales consultants earn;
- that buying groups would charge a distributor administrative fees; and
- that selling to buying groups might not align with the strategic objectives of the distributor.

FF 1006-09. Dr. Marshall's flawed theoretical construct renders his analysis unreliable. FF 1019.

Even if his construct made sense, Dr. Marshall's implementation contained multiple flaws. Dr. Marshall failed to perform a counter-factual analysis of any respondent's actual customer gains, costs, cannibalization, or expected profit or loss of dealing with buying groups. FF 1149-67. Rather than considering the actual benefits to *Benco* of dealing with a particular buying group, and weighing those against the specific costs that *Benco* would have incurred, Dr. Marshall performed a simplistic analysis of certain of the benefits and costs that *Burkhart*, *Atlanta Dental* and (in two cases, *Schein*) supposedly realized in their dealings with Kois and Smile Source. FF 1063-79.

Dr. Marshall's simplistic analysis relied on a series of unsupported assumptions. Most fundamentally, he assumed that *Burkhart*, *Atlanta Dental* and *Schein* are representative of *Benco*. This assumption is simply false. FF 1065. [redacted]

In addition, in reaching his conclusions, Dr. Marshall relied on a series of other unsupported assumptions, including that:

- had Benco, Patterson or Schein won bids for the business of Kois or Smile Source, no more, and no fewer, dentists would have become buying group members (FF 1128-29);
- had Benco, Patterson or Schein won bids for the business of Kois or Smile Source, Kois and Smile Source members' purchases, would have remained unchanged (FF 1130);
- the entirety of any changes observed in sales shares were due to partnering with a buying group (FF 1131);
- no other economic factors would have caused sale shares to change during the five-year time period of his studies (FF 1134);
- the treatment-period margin for a limited number of Kois and Smile Source dentists considered was representative of the profitability trade-offs that Benco would have faced had it bid for the business of the buying groups generally (FF 1137).

Because he relied on those unsupported assumptions, Dr. Marshall failed to control for multiple factors relevant to the outcome. FF 1128-47.

In addition to having a flawed theoretical construct, analyzing distributors that are not representative of Benco, and relying on a host of unsupported assumptions, Dr. Marshall also incorporated multiple additional errors in his analysis. Among the specific problems with his studies are the following:

- Dr. Marshall's profitability studies considered only a tiny fraction of dentists in the United States (FF 1026-36);
- Dr. Marshall's profitability studies focused on only two buying groups, neither of which was representative of buying groups in general (FF 1037-47);
- Dr. Marshall conducted an "after-the-fact" review that failed to account for risk and uncertainty at the time distributors made their decisions whether or not to bid (FF 1080-97);
- Dr. Marshall limited his analysis to only those dentists who made purchases from the contracting distributor (FF 1098-1100);
- Dr. Marshall improperly mixed data from different years (FF 1101-1118); and

- Dr. Marshall failed to consider the cost to distributors of paying administrative fees and rebates (FF 1119-27).

Correcting only some of these mistakes would be sufficient to reverse Dr. Marshall's conclusions. For example, [redacted] FF 1188. Similarly, if [redacted] FF 1125.

Critically, Dr. Marshall did not do a counterfactual analysis of what a distributor's profits would be if they had made an offer to a buying group compared to what they would have been if they didn't make an offer to the buying group. FF 1153.

Dr. Marshall did not calculate:

- what discounts Benco (or Patterson, or Schein) would have had to offer to win the Kois or Smile Source contracts;
- how those discounts compared to the discounts that Benco (or Patterson, or Schein) was already offering to individual members of Kois or Smile Source;
- how much additional business Benco (or Patterson, or Schein) could reasonably have expected to gain if it had won the Kois or the Smile Source contract;
- how many existing Benco (or Patterson, or Schein) customers would be affected by cannibalization, and to what degree;
- how many additional dentists might be expected to join Kois or Smile Source if Benco (or Patterson, or Schein) had won the contract; and
- the expected marginal increase or reduction in Benco's (or Patterson's, or Schein's) profits if it had won the contract.

FF 1149-1167. Drs. Carlton and Johnson agree that Dr. Marshall's failure to perform the proper calculation was fatal to his analysis; because he did not perform a counter-factual analysis, Dr. Marshall "has no basis to draw the conclusions he has." FF 1167.

Most critically, Dr. Marshall failed to perform a counter-factual analysis that considered Benco's alternatives to dealing with buying groups. FF 1168-85. Apart from being vaguely aware of Benco's entry into Southern California, Dr. Marshall did not analyze Benco's strategy objectives between 2011 and 2015. FF 1180. Thus, Dr. Marshall did not undertake any analysis of how much profit Benco could have earned by deploying its resources elsewhere compared to what it would have earned serving Kois or Smile Source. FF 1182. Nor did Dr. Marshall conduct any study to determine what impact it would have had on Benco's strategy of nationwide expansion if Benco had diverted its resources to support buying groups. FF 1183. [redacted]

In contrast to Dr. Marshall, Dr. Johnson did consider Benco's strategic plan and its alternatives. He found that Benco successfully achieved its long-term goal of expanding profitably into the remaining parts of the country – the west coast and the Pacific Northwest – by focusing on its own business plan rather than pursuing Dr. Marshall's favored strategy. FF 1186-93.

More specifically, to determine whether Benco acted in its own unilateral economic self-interest, Dr. Johnson examined the most relevant information – Benco's own sales. For each of Dr. Marshall's five studies, Dr. Johnson examined the data regarding *Benco's* sales, rather than sales of Burkhart, Atlanta Dental, or Schein. In each case, he found that, by pursuing its own business strategy, Benco was able to increase its sales and number of customers in the largest

MSAs, often significantly, even as revenues from the Kois or Smile Source members in those MSAs either declined or stagnated. FF 1190-93. Dr. Johnson demonstrated, using Dr. Marshall's own data, that for each of Dr. Marshall's five studies, it was in Benco's unilateral economic self-interest to use its resources to pursue its own profitable business strategy, and not to divert its resources to serve buying groups.

II. Complaint Counsel Failed to Prove That the Alleged Agreement Harmed Competition.

Not only did Complaint Counsel fail to prove that the Respondents had formed an agreement not to do business with buying groups, Complaint Counsel also failed to prove that the alleged agreement restricted competition.

Importantly, the Commission's complaint does not even allege that the asserted agreement caused demonstrable harm to competition in the manner established pursuant to the traditional rule of reason. Instead, the complaint alleges only that asserted agreement is a *per se* violation (First Violation Alleged), is an "inherently suspect" violation (Second Violation Alleged), or is unlawful pursuant to a "truncated rule of reason analysis" (Third Violation Alleged).[15] Every one of these allegations relies on a *presumption* rather than actual evidence of harm to competition. Thus, the Commission's complaint required Complaint Counsel to establish the predicate requirements for application of one or more of these presumptions. Complaint Counsel has failed to do so. Complaint Counsel has not established any basis for Your Honor to find that the conduct alleged here would always or almost always result in harm to competition.

For over a century, Supreme Court has firmly established that the antitrust laws prohibit only agreements that unreasonably restrict competition. *Standard Oil Co. v. United States*,

[15] The Fourth Violation Alleged does not address any alleged agreement among Benco, Patterson and Schein, but rather a unilateral action – an alleged invitation supposedly extended by Benco.

221 U.S. 1, 60-68 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106, 178-181 (1911); *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289 (1985) ("Whether [an agreement] violates § 1 of the Sherman Act depends on whether it is adjudged an unreasonable restraint."). Complaint Counsel bears the burden of establishing that the alleged agreement in fact caused harm to competition.

Complaint Counsel argues it can avoid its traditional burden of proving that the alleged conduct actually caused anticompetitive harm in one or more antitrust markets by asserting instead that Your Honor should presume that the alleged agreement has caused harm to competition. (*See* Complaint Counsel's Pre-Trial Brief at 53 *et seq.*; Tr. 62-64. Complaint Counsel characterizes the alleged agreement as unlawful *per se* or, in the alternative, as presumptively unlawful ("inherently suspect" or subject to a "truncated" analysis, both of which would shift the burden of persuasion to Respondents). (Complaint Counsel's Pre-Trial Brief at 53-58; Tr. 62-64.) But the actual evidence presented by Complaint Counsel at trial failed to provide the requisite basis for treating the alleged agreement as either unlawful *per se* or as subject to any presumption of harm to competition (whether labeled "inherently suspect" or considered in a "truncated" analysis).

Thus far, Complaint Counsel has not cited to legal precedent applying the *per se* rule to the type of agreement alleged in this case. And Complaint Counsel failed to provide any empirically-based evidence to establish that an agreement of the type alleged always or almost always causes harm to competition, such that it should be considered inherently suspect or subject to a truncated rule of reason. Absent a solid legal or economic basis for applying a presumption of harm to competition, Your Honor should refrain from extending the law in this manner.

A. **The Alleged Agreement Is Not Per Se Unlawful.**

Complaint Counsel argues that Your Honor should dispense with the typical requirement of proving actual harm to competition because, it asserts, the alleged agreement is *per se* unlawful. (*See* Complaint Counsel's Pre-Trial Brief at 53 *et seq*.; Tr. 62-64.) But Complaint Counsel failed to prove that the alleged agreement is of a type that courts typically consider to be unlawful *per se*.

The Supreme Court has emphasized that the "prevailing" standard of evaluation of a restraint on competition is the rule of reason, which involves an examination of the "demonstrable economic effect" to a defined antitrust market caused by the restraint in question. *See, e.g., Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49, 59 (1977); *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006) ("[T]his Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful."); *Business Electronics Corp. v. Sharp Electronics Corp*., 485 U.S. 717, 723 (1988) ("Ordinarily, whether particular concerted action violates § 1 of the Sherman Act is determined through case-by-case application of the so-called rule of reason."); *id*. at 726 ("[T]here is a presumption in favor of a rule-of-reason standard.").

As a limited exception to rule of reason analysis, a small set of specific restraints are considered to be so likely to result in net harm to competition that they are treated as unlawful *per se*. *See, e.g., Texaco Inc. v. Dagher*, 547 U.S. at 5 ("*[p]er se* liability is reserved for only those agreements that are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'") (*quoting National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958) (certain practices are so likely to have a "pernicious effect on competition" they

can be conclusively presumed to be unreasonable). As the Court has described, the *per se* rule is appropriate only if "surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 103-104 (1984). *Per se* rules are appropriate "only for 'conduct that is manifestly anticompetitive.'" *Business Electronics Corp. v. Sharp Electronics Corp*., 485 U.S. at 723.

Importantly, application of the *per se* rule is an empirical exercise based on substantial real-world marketplace experience. Because the per se rule requires courts to make "broad generalizations" about particular commercial practices, *GTE Sylvania Inc*., 433 U.S. at 50 n.16, *per se* liability applies only if courts have "considerable experience with the type of challenged restraint," and based on that experience, can confidently conclude that a particular practice would "always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc*., 441 U.S. 1, 19-20, 20 n.33 (1979) ("*BMI*"). The Court has emphasized that application of the *per se* rule must be justified on the basis of a record of marketplace effects, not abstract labels. In the words of the Court, any "departure from the rule of reason standard must be based upon *demonstrable economic effect* rather than . . . upon formalistic line drawing." *GTE Sylvania Inc*., 433 U.S. at 58-59 (emphasis added).

Application of the *per se* rule is not intended to condemn agreements that do not harm competition. Indeed, courts have stressed, "whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same" – whether there is an impact on competition. *National Collegiate Athletic Ass'n*, 468 U.S. 85 at 104. Nor should the outcome depend on whether a court applies the *per se* rule or a rule of reason analysis. If there is any doubt as to whether a particular practice in fact causes anticompetitive harm, a court should

err on the side of applying the rule of reason. As the Court recently stated, "'we have expressed reluctance to adopt *per se* rules . . . 'where the economic impact of certain practices is not immediately obvious.'" *Texaco Inc. v. Dagher*, 547 U.S. at 5 (internal citations omitted).

Complaint Counsel has yet to articulate in any detail how the allegations in this matter satisfy the standards that the Supreme Court has established for application of the *per se* rule. Complaint Counsel don't even attempt to establish that the courts have "considerable experience with the type of challenged restraint, " *BMI*, 441 U.S. at 20 n.33, such that they can make "broad generalizations" based on "demonstrable economic effect," *GTE Sylvania*, 433 U.S. at 58-59, and reach a confident conclusion that the economic impact of the agreements alleged here are "immediately obvious," *Texaco Inc. v. Dagher*, 547 U.S. at 5, and "always or almost always tend to restrict competition and decrease output." *BMI*, 441 U.S. 19-20. Instead of presenting this type of broad experience with respect to agreements involving buying groups, Complaint Counsel has sought to pigeonhole the alleged agreement in various ill-fitting categories, and then tried to analogize to various cases applying the *per se* rule in factual situations markedly different from those present in this case.

Complaint Counsel's simplistic approach is both inaccurate and wrong. It is inaccurate because it falsely characterizes the alleged conduct as "price fixing" or a "boycott" when it is neither. As the Supreme Court said when condemning the rush to decide complex cases with simple *per se* rules, "easy labels do not always supply ready answers." *Id.* at 8. And Complaint Counsel's approach is wrong because the alleged conduct is not a practice with which the courts or the Commission have "considerable experience," *id*. at 20 n. 33, or can confidently conclude that it always or almost always causes anticompetitive harm.

Indeed, the flaws in this approach are evident in Complaint Counsel's struggle to describe the agreement it has alleged. Complaint Counsel asserts that the alleged agreement is equivalent to "an agreement to maintain prices." (Complaint Counsel's Pre-Trial Brief at 53, Tr. 62-63.) But it is not. There is absolutely no allegation that Respondents discussed anything having to do with prices. (*See* Complaint ¶¶ 31-74.) There is no allegation, let alone proof, that Respondents have discussed prices, price levels, components of pricing, discounts, or maintaining prices. *Id*. It is simply not true that Respondents are alleged, let alone proven, to have agreed to anything equivalent to "an agreement to maintain prices."

Furthermore, there is no allegation that Respondents entered into any agreement setting prices, discounts, or any other dealings with respect to the individual dentists who actually purchase products, whether members of buying groups or not. (Complaint ¶¶ 31-74.) Complaint Counsel did not introduce any evidence that Respondents discussed, let alone agreed upon, anything having to do with competition for, prices offered to, discounts offered to, or any other terms of dealing with, individual dentists. Rather, the evidence is uncontroverted that Benco, Patterson and Schein competed aggressively for the business of dentists, including members of buying groups. FF 30, 52-54, 146, 2008-28, 232-33, 383-86, 465. Benco, Patterson and Schein offered substantial discounts to dentists, including members of buying groups, to attract or keep their business. FF 67, 146-151, 842. Complaint Counsel's own expert conceded that Benco, Patterson and Schein competed aggressively for the business of individual dentists, including members of buying groups. FF 1353-82. [redacted] FF 1363-1374. Absent any evidence that Respondents

even discussed prices, price levels, or discount levels, or that they discussed or agreed to anything involving the dentists to whom the prices are actually charged, it is impossible to conclude that the agreement alleged in this matter is equivalent to "an agreement to maintain prices."

Recognizing that the alleged agreement is in fact not equivalent to an agreement to maintain prices, Complaint Counsel also state that the alleged conspiracy could be viewed as "an agreement to boycott a type of customer," which it claims is *per se* unlawful. Complaint (Counsel's Pre-Trial Brief at 55.) Again, Complaint Counsel's assertion is wrong. Even if buying groups were customers (which they are not), the agreement alleged would not fit the requirements for a *per se* unlawful boycott. As the Supreme Court has previously instructed the Federal Trade Commission, *per se* treatment applies to only a particular type of boycott—directed at denying a competitor's access to suppliers or customers—and is inapplicable here. *See FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986). In that case, the Commission challenged an agreement among members of the Indiana Federation of Dentists to withhold dental x-rays from insurers processing dental insurance claims. The Commission found that the agreement was unlawful *per se* and, in the alternative, unlawful pursuant to a rule of reason analysis. *Id*. at 451-452. On appeal, the Court of Appeals for the Seventh Circuit reversed. *Id*. at 453. The Supreme Court subsequently reinstated the Commission's order – but only on the basis of an abbreviated rule of reason analysis. The Court stressed that the Commission had erred by attempting to resolve this case "by forcing the Federation's policy into the 'boycott' pigeonhole and invoking the *per se* rule. . . . [T]he *per se* approach has generally been limited to cases in which firms with market power boycott *suppliers or customers* in order to discourage them from doing business with a competitor – a situation obviously not present here."). *Id*. at 458 (emphasis

added) (*citing Northwest Wholesale Stationers, Inc. Stationery & Printing Co.*, 472 U.S. 284 (1985)). Therefore, the Court continued, "we evaluate the restraint at issue in this case under the Rule of Reason rather than a rule of *per se* illegality." *Id.*

Such condemned foreclosure of a competitor's access to suppliers or customers, which the Court found lacking in *Indiana Federation of Dentists*, is conspicuously absent here as well. Complaint Counsel never asserted that Respondents restricted access of any other distributor of dental products from access to suppliers or customers. Indeed, if Complaint Counsel is to be believed, rather than foreclosing competitors' access, Respondents actually created opportunities for competitors such as Burkhart and Atlanta Dental.

Complaint Counsel's evidence failed to establish any of the hallmarks of a *per se* unlawful boycott. Complaint Counsel presented no evidence that Respondents conspired to pressure any other party to do, or refrain from doing, anything. There is no evidence that Respondents conspired to compel manufacturers to refuse to deal with anyone – whether with rival distributors, buying groups, or directly with dentists. Rather, the record demonstrates that Respondents competed vigorously for access to manufacturers on the best terms possible (FF 802-08), and Schein and Patterson unilaterally took advantage of opportunities to obtain exclusive supply from certain manufacturers at the expense of everyone else, including Benco. FF 802. Complaint Counsel did not claim that Respondents conspired to force dentists not to deal with anyone – whether rival distributors, buying groups, or directly with manufacturers. Indeed, the evidence shows that Benco, Patterson and Schein competed aggressively for the business of all individual dentists, whether members of a buying group or not. FF 202, 221, 383-84, 1365-68. And without evidence that Respondents conspired to foreclose a competing distributor's access to suppliers or customers, the alleged agreement fails to satisfy the criteria for a *per se*

unlawful boycott to which the Supreme Court held the Federal Trade Commission in *Indiana Federation of Dentists*.

Quite simply, Complaint Counsel has failed to establish that the agreement alleged in this matter is *per se* unlawful. Rather, the alleged agreement differs in critical ways from those that courts have held to be unlawful *per se*, and there is no basis to conclude that an agreement of the type alleged would always or almost always result in harm to competition.

B. The Alleged Agreement Is Not of a Type That Courts Presume to be Unlawful or Subject to a Truncated Analysis.

Recognizing that its allegations do not satisfy the requirements of a *per se* violation, Complaint Counsel has offered an alternative theory – that the alleged agreement should be presumed to be inherently suspect or subject to a truncated rule of reason. (Complaint Counsel's Pre-Trial Brief at 57.) However, Complaint Counsel have failed to establish any basis for Your Honor to deviate from the rule of reason and to presume harm to competition.

The Supreme Court has provided the Federal Trade Commission with clear instruction regarding application of a truncated analysis. In *California Dental Association v. Federal Trade Commission*, the Commission challenged restraints on advertising implemented by the dental association. The Commission found the dental association's advertising restraints to be *per se* unlawful violations of the Sherman and FTC Acts or, in the alternative, violations of the Sherman and FTC Acts under an abbreviated rule-of-reason analysis. *California Dental Ass'n v. FTC*, 526 U.S. 756, 763 (1999). The court of appeals overturned the finding that the restraints were *per se* unlawful, but upheld the finding pursuant to the abbreviated rule of reason analysis. *Id*. at 763. The Supreme Court overturned the latter finding as well.

The Court emphasized that the purpose of the analysis is "to see whether the experience of the market has been so clear . . . that a confident conclusion about the principal tendency" of

the restriction in question will follow from a quick look. *Id*. at 781. A truncated analysis is appropriate only if "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets" and "the great likelihood of anticompetitive effects can easily be ascertained." *Id*. at 770. Because it appeared plausible that the restraints in question could have "possibly no effect at all on competition," *id*. at 771, the Court held that the Commission's application of an abbreviated analysis was inappropriate. As the Court explained, "the plausibility of competing claims about the effects of the professional advertising restrictions rules out the indulgently abbreviated review to which the Commission's order was treated." *Id*. at 778.

As in *California Dental*, Complaint Counsel in the present case argue that they can rely on presumptions to avoid the difficult and tedious task of proving specific marketplace effects. Complaint Counsel seek to rely on "easy labels," *BMI*, 441 U.S. at 8, to argue that the burden should be shifted to Respondents to prove absence of harm to competition. But Complaint Counsel here repeat the Commission's fundamental error in *California Dental*. In *California Dental*, the Supreme Court was particularly critical of the appellate court's (and implicitly, the Commission's) "aversion to empirical evidence" and "leniency of its enquiry into evidence of the restrictions' anticompetitive effects" before shifting to Respondent the burden of establishing absence of harm to competition. *California Dental*, 526 U.S. at 776. The Court acknowledged that full rule of reason analysis is not always required. *Id*. at 781. But the Court made clear that a truncated examination must be justified based on "the circumstances, details, and logic" of the specific restraint at issue, and is appropriate only if the "experience of the market" has been "so clear" that a truncated analysis will permit "a confident conclusion about the principal tendency of a restriction." *Id*.

Here again, Complaint Counsel's evidence falls far short of this standard. Complaint Counsel failed to identify *any* general marketplace experience across multiple industries, let alone "*empirical* evidence" or marketplace experience "so clear" as to permit a "confident conclusion," that an agreement not to bid for the business of buying groups – while leaving unaffected robust competition for the individual members of buying groups – always or almost always causes harm to competition. *Id*. Complaint Counsel offered no record of prior academic or empirical marketplace study of the effects of the type of agreement at issue. Complaint Counsel's expert, Dr. Marshall, offered no opinion as to whether the alleged agreement should be regarded as inherently suspect. FF 636-38. Nor has Complaint Counsel presented any evidence of the effects of such agreements in other industries, market situations, or time periods. In its Pre-Trial Brief, Complaint Counsel relied on two graphs taken from their expert's report (Complaint Counsel's Pre-Trial Brief at 54), covering a grand total of 351 out of some 200,000 dentists in the United States, (FF 1026), and derived from methodology replete with errors (FF 1023-25), as the total basis on which it expects Your Honor to find that the alleged agreement is of a type that "always or almost always" causes harm to competition. This falls woefully short of evidence from which Your Honor can make a "confident conclusion" as to the effect of the alleged agreement such that an analysis of the actual effects is unnecessary.

In short, Complaint Counsel's evidence failed to provide a sufficient basis to establish that the purported agreements are "inherently suspect" or to justify truncating a rule of reason analysis.

2. The Record Fails to Support the Allegation of Harm to Competition

The Commission voted upon and issued a complaint in this matter that does *not* allege a violation based on a traditional rule of reason analysis in its complaint. Complaint Counsel

cannot now try to overcome the absence of evidence to support a truncated analysis by arguing that it has presented a watered-down version of a rule of reason case. Any such argument is inconsistent with the Commission's complaint.

Furthermore, the evidence of anticompetitive harm presented by Complaint Counsel is inherently unreliable. Complaint Counsel rely on the testimony of Dr. Marshall to argue that the alleged agreement caused harm to competition. But Dr. Marshal's assertion that Respondents' alleged conduct caused harm to competition is fundamentally flawed and contradicted by the evidence.

Dr. Marshall admitted that he failed to find anticompetitive harm in any relevant geographic markets. FF 1345-53. This alone renders his conclusions unreliable. As Dr. Johnson explained, an economist cannot define competitive impact without a relevant product or geographic market in which to look. FF 1351. Because Dr. Marshall failed to determine competitive impact in properly defined relevant markets, it is impossible to him to assert that he accurately evaluated competitive conditions. FF 1345-53.

Dr. Marshall's failure to conduct a proper analysis is of particular concern because the record evidence contradicts his assertion that Respondents' conduct caused anticompetitive harm. FF 1353-78. The fundamental issue is whether dentists paid more for dental products. As Dr. Johnson explained, Dr. Marshall's theory of anticompetitive effects would require evidence of elevated margins and prices. FF 1376. Yet Dr. Marshall didn't study this. Dr. Marshall did not perform any analysis of the extent to which Benco, Schein and Patterson competed for the business of individual dentists, including dentists who were members of buying groups. FF 1354. Dr. Marshall conceded that there seemed to be substantial competition for the business of individual dentists. FF 1355. Dr. Marshall further conceded that, from the analysis that he did

perform, he had no reason to believe that Benco, Schein and Patterson did not compete aggressively for the business of individual dentists, including dentists who were members of buying groups. FF 1356-57. Indeed, Dr. Marshall admitted that he saw evidence that Benco was competing for the business of individual dentists, including dentists who were members of buying groups. FF 1358. He conceded that, [redacted] FF 1359.

[redacted] FF 1378.

Complaint Counsel failed to prove that the alleged agreement caused harm to competition.

III. The Evidence Fails to Establish That Benco Violated Section 5 of the FTC Act.

Complaint Counsel also alleges that Benco violated Section 5 of the FTC Act by extending an invitation to Burkhart Dental to join the purported agreement discussed above. Complaint ¶¶ 11, 89-90. This allegation fails both as a matter of law and of fact.

A. The Caselaw Fails to Support the Commission's Alleged Violation of "Invitation to Collude".

Considerable controversy has surrounded the question of what conduct, if any, is permissible under Sherman or Clayton Acts but nevertheless prohibited under the amorphous standard of Section 5 of the FTC Act. Although the Supreme Court has held that the reach of Section 5 is potentially broader than the antitrust statutes, appellate courts have overturned attempts by the Commission to apply it without proper limits. In *Boise Cascade Corp. v. FTC*, the Commission challenged industry-wide use of delivered pricing that, the Commission argued, facilitated collusive pricing in the industry. The Commission did not allege an actual agreement among competitors with respect to pricing, and therefore did not allege that the practice violated the Sherman Act. Nevertheless, the Commission found that the practice violated Section 5 of the FTC Act. Boise Cascade appealed, and the Ninth Circuit overturned the Commission's decision. The court held, "in the absence of evidence of overt agreement . . ., the Commission must demonstrate that the challenged pricing system has actually had the effect of fixing or stabilizing prices." *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 577 (9th Cir. 1980).

Ever since *Boise Cascade*, proof of actual harm to competition has formed a central principle of the Commission's enforcement of Section 5. Indeed, in 2015, the Commission adopted a specific enforcement statement based on the principle that "an act or practice challenged by the Commission [under Section 5] must cause, or be likely to cause, harm to competition or the competitive process." Fed. Trade Comm'n, Statement of Enforcement

Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (August 13, 2015).

Commission challenges to "invitations to collude" have never been tested in the courts. The Commission has entered into consent agreements with various respondents over the years to resolve specific investigations, but a court has never been presented with the opportunity to consider whether a free-standing invitation, that is not prohibited by Section 1 of the Sherman Act, would constitute a violation of Section 5 in light of *Boise Cascade* and the Commission's Statement of Enforcement Principles.

Application of Section 5 of the FTC Act to an invitation to collude is inconsistent with those standards. By definition, FTC enforcement with respect to an invitation – in the absence of an agreement – involves no actual harm to competition. A rejected invitation has not "actually had [an] effect" on competition. *Boise Cascade*, 637 F.2d at 577. Nor is there any prospect of future harm to competition from a rejected invitation. Therefore, there is no reason for an order. Enforcement is based on conduct that the Commission finds objectionable rather than conduct that actually causes harm to competition and requires remediation. This fails to satisfy the standard of "actually ha[ving] [an] effect" on competition set by the Ninth Circuit in *Boise Cascade* and echoed by the Commission in its Statement of Enforcement Principles.

Complaint Counsel in its Pre-Trial Brief cites to the Commission opinion in *In re McWane* as supporting application of Section 5 of the FTC Act to invitations to collude. (Complaint Counsel's Pre-Trial Brief at 61.) But the Commission's opinion in that matter dates from 2012, and is inconsistent with the Commission's subsequent Statement of Enforcement Principles, which the Commission published in 2015. Nor does the Commission's opinion in *In re McWane* explain how that position can be reconciled with the Ninth Circuit's decision in

Boise Cascade. For both of these reasons, the Commission's opinion in *In re McWane* does not provide persuasive precedent in this matter.

B. The Evidence Does Not Establish A Clear Invitation to Enter Into An Unlawful Agreement.

Even if an "invitation to collude" constitutes a cognizable offense under Section 5 of the FTC Act, the evidence fails to support a conclusion that Benco extended an invitation to collude, and application of Section 5 to this vague communication would violate the standards for freestanding enforcement of Section 5 of the FTC Act.

1. The Evidence Fails to Establish That Benco Extended an Invitation to Collude to Burkhart.

As explained above and in Benco's Proposed Findings of Fact and Respondents' Joint Conclusions of Law, the evidence failed to establish any agreement between Benco, Schein and Patterson not to do business with buying groups. Furthermore, none of the communications addressed above, between Benco and Schein, or Benco and Patterson, evidence any "invitation to collude" by Benco, they were nothing more than permissible attempts by Benco to gain market intelligence to better compete in the market.

Complaint Counsel asserts that three communications between Benco and Burkhart in 2013 and 2014 are evidence that Benco invited Burkhart to collude. But the evidence cannot support such a finding. First, in October 2013, Mike McElaney, a Benco employee who had previously worked for Burkhart, had a telephone conversation with his former colleague at Burkhart, Jeff Reese. Mr. Reese claims that during that call, Mr. McElaney said that buying groups were "not good for the medical industry" because of "declining margins." FF 640. Reese believed that Benco was, in fact working with buying groups at the time, and directly asked Mr. McElaney if Benco was working with buying groups, McElaney declined to answer. FF 641 (Reese Tr. 4377-78 ("I said, so you're not working in this space. Is that correct? And he never

answered.")). Indeed, Reese found the conversation with McElaney "a little perplexing" because Reese believed that Benco was working with group purchasing organizations. FF 642. In a second call that Reese claims occurred between him and McElaney a few weeks later, Reese again asked McElaney if Benco was working with buying groups, and McElaney again did not again give a clear response. FF 643. There is no evidence that McElaney discussed Benco's policy, or Schein's or Patterson's view of buying groups, during those calls. FF 644. Mr. Reese's belief that Benco did business with buying groups, and Mr. McElaney's refusal to respond to Reese's direct questions about whether Benco did business with buying groups, demolish any suggestion that these conversations were intended as an invitation for Burkhart to join any agreement to refrain from doing business with buying groups.

Mr. Reese has testified inconsistently with regard to an alleged conversation he supposedly had with Chuck Cohen at an industry conference in the Fall of 2013. Reese first testified that his only interactions with Mr. Cohen were an "informal passing in the hallway," or "maybe just an acknowledgement". FF 646. At trial, Mr. Reese changed his testimony and said that he had a conversation with Mr. Cohen and Mr. McElaney at a DTA meeting in Florida in the fall of 2013, which was the "really the first time [he] had met" Cohen. FF 646. Mr. Cohen does not recall any discussion with Reese at the DTA meeting, and Mr. Cohen's notes from the meeting do not reflect any discussion or meeting with Mr. Reese. FF 647. Mr. Reese admitted at trial, though, that *in none of the conversations he described did Benco ever suggest how Burkhart should conduct its business*. FF 648 (Reese Tr. 4389 ("Q. Over the course of those three conversations with Benco about buying groups, was there any suggestion of how Burkhart should conduct its business? A. No.")). Reese's consistent perception was that Benco, itself was doing business with buying groups at that time or was willing to do business with buying groups.

FF 649. Reese denied being ever being 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. FF 650. And 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. FF 651.

2. Application of Section 5 to This Vague Communication Would Violate Standards for Freestanding Enforcement of the FTC Act.

The Commission must provide clear guidance to distinguish between lawful and unlawful conduct when applying Section 5 independently of the Sherman and Clayton Acts. The Second Circuit provided the clearest statement of this requirement in its *Ethyl* decision. In that case, the Commission found that competitors' independent use of delivered pricing, advance notice of price changes, and "most favored nation" pricing terms violated Section 5 of the FTC Act despite the absence of an explicit agreement or monopoly power. The Second Circuit overturned the Commission's decision. The Court insisted that the Commission's application of Section 5 independently of the Sherman and Clayton Acts must be subject to "appropriate standards" to ensure that respondents' rights are protected. As the court stated, "[a]s the Commission moves away from attacking conduct that is either a violation of the antitrust laws [or] collusive, coercive, predatory, restrictive or deceitful, and seeks to break new ground by enjoining otherwise legitimate practices, the closer must be our scrutiny upon judicial review." *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 137 (2d Cir. 1984). The court explained,

> When a business practice is challenged by the Commission, even though, as here, it does not violate the antitrust or other laws and is not collusive, coercive, predatory or exclusionary in character, standards for determining whether it is "unfair" within the meaning of § 5 must be formulated to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable. Otherwise the door would be open to arbitrary or capricious administration of § 5 . . ..

Id. at 138. The court emphasized that the Commission also has a special obligation to ensure that enjoined conduct is clearly defined and articulated. The court stated that the Commission "owes a duty to define the conditions" under which conduct claimed to violate Section 5 would be unlawful "so that business will have an inkling as to what they can lawfully do." *Id*. at 139.

In addition to failing to satisfy the requirements of *Boise Cascade* and the Commission's Statement of Enforcement Principles, the alleged invitation to collude in this matter also fails to meet the *Ethyl* standard. The communications at issue here do not involve an explicit invitation specifying the details of a proposed unlawful agreement. This is a far cry from an invitation in which the alleged instigator spells out the details and offers a quid pro quo, and the recipient merely has to accept to form a specific unlawful agreement.[16]

Challenge of a clear invitation under Section 5 of the FTC Act might at least satisfy the *Ethyl* standard, although it would still fail to satisfy the requirements of *Boise Cascade*. The present case, by contrast, fails to meet the requirements of either the Second Circuit in *Ethyl* or the Ninth Circuit in *Boise Cascade*. The evidence of an alleged invitation to collude in this matter simply will not meet the legal standard for application of Section 5 of the FTC Act.

[16] Consent agreements that the Commission has accepted from investigation targets in order to avoid litigation are clearly not precedent in this matter. Nevertheless, the facts at issue in many of those consent agreements are instructive, as they illustrate the sharp difference between the clear invitations at issue in many of those consent agreements and the vague communications at issue in this matter. *See, e.g., In re Quality Trailer Products Corp.*, 115 F.T.C. 944 (1992) (representatives of Quality Trailer told a competitor that Quality Trailer would not sell certain axle products below a specified price if the competitor would do the same); *In re AE Clevite, Inc.*, 116 F.T.C. 389 (1993) (representative of Clevite faxed to competitor a list of prices for locomotive engine bearings that Clevite wanted its competitor to follow); *In re Valassis Communications, Inc*., 2006 FTC LEXIS 25 (2006) (Valassis proposed to competitor News America pricing of $6.00 per thousand for full page newspaper advertisements and $3.90 per thousand for half-page newspaper advertisements).

CONCLUSION

For the foregoing reasons, Complaint Counsel has failed to establish that Benco has violated Section 5 of the FTC Act, and Complaint Counsel's request for an order granting the relief sought in the Notice of Contemplated Relief should be denied.

Dated: April 11, 2019

Respectfully submitted,

By: */s/ Kenneth L. Racowski*

Howard D. Scher (howard.scher@bipc.com)
Kenneth L. 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 D. Oliver (gdoliver@jonesday.com)
JONES DAY
51 Louisiana Ave., NW
Washington, D.C. 20001
Phone: 202-879-3939

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2019, I delivered via electronic mail a copy of the foregoing 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

James J. Long
Jay W. Schlosser
Briggs and Morgan, P.A.
80 South Eighth Street, Suite 2200
Minneapolis, MN 55402
Tele: (612) 977-8582
Email: jlong@briggs.com
Email: jschlosser@briggs.corn

Joseph A. Ostoyich
William C. Lavery
Baker Botts L.L.P.
1299 Pennsylvania Avenue NW
Washington, DC 20004
Tele: (202) 639-7905
Email: joseph.ostoyich@bakerbotts.com
Email: william.lavery@bakerbotts.com

Counsel for Patterson Companies, Inc.

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@sidlev.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: April 11, 2019 By: */s/ Kenneth L. Racowski*

Notice of Electronic Service

I hereby certify that on April 18, 2019, I filed an electronic copy of the foregoing Benco's Post Trial Brief, Benco's Proposed Findings of Fact, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on April 18, 2019, I served via E-Service an electronic copy of the foregoing Benco's Post Trial Brief, Benco's Proposed Findings of Fact, upon:

Lin Kahn
Attorney
Federal Trade Commission
lkahn@ftc.gov
Complaint

Ronnie Solomon
Attorney
Federal Trade Commission
rsolomon@ftc.gov
Complaint

Matthew D. Gold
Attorney
Federal Trade Commission
mgold@ftc.gov
Complaint

John Wiegand
Attorney
Federal Trade Commission
jwiegand@ftc.gov
Complaint

Erika Wodinsky
Attorney
Federal Trade Commission
Complaint

Boris Yankilovich
Attorney
Federal Trade Commission
byankilovich@ftc.gov
Complaint

Jeanine K. Balbach
Attorney
Federal Trade Commission
jbalbach@ftc.gov
Complaint

Thomas H. Brock
Attorney
Federal Trade Commission
TBrock@ftc.gov
Complaint

Jasmine Rosner
Attorney
Federal Trade Commission
jrosner@ftc.gov
Complaint

Howard Scher
Attorney
Buchanan Ingersoll & Rooney PC
howard.scher@bipc.com
Respondent

Kenneth Racowski
Attorney
Buchanan Ingersoll & Rooney PC
kenneth.racowski@bipc.com
Respondent

Carrie Amezcua
Attorney
Buchanan Ingersoll & Rooney PC
carrie.amezcua@bipc.com
Respondent

John McDonald
Locke Lord LLP
jpmcdonald@lockelord.com
Respondent

Lauren Fincher
Locke Lord LLP
lfincher@lockelord.com
Respondent

Colin Kass
Proskauer Rose LLP
ckass@proskauer.com
Respondent

Adrian Fontecilla
Associate
Proskauer Rose LLP
afontecilla@proskauer.com
Respondent

Timothy Muris
Sidley Austin LLP
tmuris@sidley.com
Respondent

Geoffrey D. Oliver
Jones Day

gdoliver@jonesday.com
Respondent

Craig A. Waldman
Partner
Jones Day
cwaldman@jonesday.com
Respondent

Benjamin M. Craven
Jones Day
bcraven@jonesday.com
Respondent

Ausra O. Deluard
Jones Day
adeluard@jonesday.com
Respondent

Joseph Ostoyich
Partner
Baker Botts L.L.P.
joseph.ostoyich@bakerbotts.com
Respondent

William Lavery
Senior Associate
Baker Botts L.L.P.
william.lavery@bakerbotts.com
Respondent

Andrew George
Baker Botts L.L.P.
andrew.george@bakerbotts.com
Respondent

Jana Seidl
Baker Botts L.L.P.
jana.seidl@bakerbotts.com
Respondent

Kristen Lloyd
Associate
Baker Botts L.L.P.
Kristen.Lloyd@bakerbotts.com
Respondent

James Long
Attorney
Briggs and Morgan, P.A.
jlong@briggs.com
Respondent

Jay Schlosser
Attorney
Briggs and Morgan, P.A.
jschlosser@briggs.com
Respondent

Scott Flaherty
Attorney
Briggs and Morgan, P.A.
sflaherty@briggs.com
Respondent

Ruvin Jayasuriya
Attorney
Briggs and Morgan, P.A.
rjayasuriya@briggs.com
Respondent

William Fitzsimmons
Attorney
Briggs and Morgan, P.A.
wfitzsimmons@briggs.com
Respondent

Hyun Yoon
Buchanan Ingersoll & Rooney PC
eric.yoon@bipc.com
Respondent

David Owyang
Attorney
Federal Trade Commission
dowyang@ftc.gov
Complaint

Karen Goff
Attorney
Federal Trade Commission
kgoff@ftc.gov
Complaint

Emily Burton
Attorney
Federal Trade Commission
eburton@ftc.gov
Complaint

Jessica Drake
Attorney
Federal Trade Commission
jdrake@ftc.gov
Complaint

Ashley Masters
Attorney
Federal Trade Commission
amasters@ftc.gov
Complaint

Terry Thomas
Attorney
Federal Trade Commission
tthomas1@ftc.gov
Complaint

Danica Nobel
Attorney
Federal Trade Commission
dnoble@ftc.gov
Complaint

Mary Casale
Attorney
Federal Trade Commission
mcasale@ftc.gov
Complaint

Thomas Manning
Buchanan Ingersoll & Rooney PC
Thomas.Manning@bipc.com
Respondent

Sarah Lancaster
Locke Lord LLP
slancaster@lockelord.com
Respondent

Owen Masters
Associate
Proskauer Rose LLP
omasters@proskauer.com
Respondent

Stephen Chuk
Proskauer Rose LLP
schuk@proskauer.com
Respondent

Rucha Desai
Associate
Proskauer Rose LLP
rdesai@proskauer.com
Respondent

Jessica Moy
Federal Trade Commission
jmoy@ftc.gov
Complaint

Thomas Dilickrath
Federal Trade Commission
tdilickrath@ftc.gov
Complaint

Caroline L. Jones
Associate
Baker Botts L.L.P.
caroline.jones@bakerbotts.com
Respondent

David Munkittrick
Proskauer Rose LLP
dmunkittrick@proskauer.com
Respondent

David Heck
Proskauer Rose LLP
dheck@proskauer.com
Respondent

Thomas Dillickrath
Deputy Chief Trial Counsel
Federal Trade Commission
tdillickrath@ftc.gov
Complaint

Josh Goodman
Attorney
Federal Trade Commission
jgoodman@ftc.gov
Complaint

Nair Diana Chang
Federal Trade Commission
nchang@ftc.gov
Complaint

Adam Saltzman
Buchanan Ingersoll & Rooney PC
adam.saltzman@bipc.com
Respondent

Peggy Bayer Femenella
Federal Trade Commission
pbayer@ftc.gov
Complaint

Jamie France
Attorney
Federal Trade Commission
jfrance@ftc.gov
Complaint

Kenneth Racowski
Attorney