PUBLIC

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

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

BENCO DENTAL SUPPLY CO.'S PRE-TRIAL BRIEF

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INTRODUCTION

Complaint Counsel's case against Respondents fails for multiple, independent reasons. In a case where Complaint Counsel is required to establish that Respondents entered into an agreement that harmed competition, the evidence fails to support (1) a reasonable inference that the Respondents entered into any agreement; or (2) that the alleged agreement resulted in any harm to competition. The dental supply industry has been and remains highly competitive. Dental distributors compete on price, availability of products, speed of shipment and value-added services. Benco, Henry Schein, Inc. ("Schein"), and Patterson Companies, Inc. ("Patterson"), along with a multitude of other competitors, serve a fragmented base of independent dentists with strong preferences for specific dental products. These market dynamics, and not any alleged collusion, have affected the success of what the Complaint Counsel defines as so-called "Buying Groups."

A "buying group" is merely a loosely-organized group of buyers, in this case independent dentists, that claims to be able to consolidate their purchases in order to gain additional discounts from distributors. Not only do these buying groups have no common ownership, they often do not have centralized ordering and processing. The evidence will show that since at least 1996, Benco has had a policy that it does not recognize as a single customer groups of independent dentists that lack a common or majority owner, regardless of what the group calls itself, because such groups provide no economic value to Benco (the "Policy").[1] In particular, loosely-organized groups of independent dentists cannot obtain purchasing compliance from their purported members, and therefore cannot assure a volume of sales that would warrant prices

[1] In contrast, large corporate group dental practices (also referred to as dental service organizations, or "DSOs"), to whom Benco sells dental supplies and equipment, have a single or majority owner with centralized purchasing for dental supplies, and therefore can secure the necessary purchasing volume and lower costs of service to justify being classified in Benco's "Large Group" pricing tier.

lower than the already-competitive prices and value-added services that Benco sales representatives individually negotiate with dentists. Nor can loosely-organized groups of dentists accept centralized bulk deliveries, provide their own sales and support services, or take other actions that would reduce Benco's service costs. In addition, Benco's long-standing philosophy is that it does not want to put anyone, or anything, between it and its customers, which are the independent dental practices that decide what dental supplies and equipment to purchase.

Benco's Policy is neither confidential nor competitively sensitive. To the extent Complaint Counsel claims that there were communications between Benco and representatives of Schein, Patterson, or Burkhart, evidencing a conspiracy not to deal with buying groups, Complaint Counsel greatly exaggerates the number of such communications, and attaches far-fetched inferences to the scant communications concerning buying groups. The limited communications in this case are misinterpreted, taken out of context, or ambiguous—at best. They are neither direct nor circumstantial evidence of any agreement. Furthermore, the evidence will show that none of the alleged participants to the conspiracy changed their behavior in any way between the alleged conspiracy and non-conspiracy periods. Rather, each Respondent continued to independently evaluate whether or not to do business with any buying group, and each Respondent's decisions and actions differed amongst themselves as to dealings with buying groups during the alleged conspiracy.

Complaint Counsel has also failed to establish that the alleged conspiracy has had any detrimental effect on competition. Instead, Complaint Counsel argues that it is not required to establish harm to competition, either because the alleged conspiracy constitutes a *per se* violation of the law, or because harm may otherwise be presumed. Neither assertion is correct, and Complaint Counsel's failure to establish factual harm to competition dooms its case.

Finally, Complaint Counsel's assertion of an "invitation to collude" claim against Benco under Section 5 of the FTC Act is legally and factually deficient. First, the evidence does not support the existence of any conspiracy that Benco supposedly invited Burkhart to join. Second, caselaw does not support extension of liability under Section 5 to the ambiguous statements relied upon by Complaint Counsel on this claim.

BACKGROUND

Benco is a privately-owned, full-service distributor focusing exclusively on the distribution of dental supplies and related services. The third-generation family-owned company was founded in Pennsylvania in 1930, and for the majority of its existence, Benco operated as a regional distributor, with its principal customer base in Northeastern Pennsylvania and later into New York, Ohio, and Virginia. In the mid-1990's, the third generation of management began to develop and implement a plan to grow Benco into a nationwide distributor by gradually expanding Benco's presence, region-by-region, across the country. Benco grew by vigorously competing with entrenched distributors, Patterson and Schein as well as local regional distributors. It acquired existing smaller local distributors, hired employees of existing distributors, and grew through ground-up expansion. As Benco expanded, it built a reputation among its competitors for a strong brand, aggressive pricing, and "high touch" customer service. Benco also added showroom, warehouse and distribution facilities in order efficiently fulfill customer orders. Now, Benco operates five distribution centers as well as 50 regional showrooms. Benco has roughly 1300 employees, including approximately 750 regional sales, service, and support personnel. As of 2016, Benco supplied roughly 39,000 different dental practices across all 50 states. Benco's market share has been estimated to be between 7 and 11 percent of the sales of dental products that are sold by distributors. Benco is thus much smaller than the other Respondents in this action: Patterson (with a market share estimated to be between

29 and 33 percent), and Schein (with a market estimated to be between 34 and 43 percent of sales of dental products sold through distributors).

Complaint Counsel alleges that in 2013, Benco was the "ring leader" and conspired with co-Respondents to refuse to work with or offer discounts to buying group customers. However, the evidence will show that long before the alleged conspiracy, Benco already had in place its Policy not to recognize as a single customer groups of independent dentists that lacked common ownership (the types of groups Complaint Counsel refers to as buying groups), because such buying groups interfered with Benco's "high touch" sales philosophy and added no economic value to Benco's sales and marketing success. That Policy was unilaterally adopted in 1996 – almost two decades before the start of the alleged conspiracy. The evidence will show that Benco adopted that Policy because buying groups did not present Benco with an attractive economic opportunity: they request lower prices without lowering Benco's cost to serve the independent dentists and without adding sales volume. Because these types of groups are purely voluntary, they do not require compliance by their "members" with any agreement to purchase from the buying group's selected distributor. Without effectively consolidating demand, the buying groups do not reduce the transaction costs associated with numerous small orders from geographically fragmented individual dentists nor do they drive sufficient volume to compel manufacturer discounts. Moreover, the buying groups interject a third party into the supply chain, diminishing Benco's valuable direct relationship with the dentist. Rather, the buying groups would free ride on Benco's considerable investments in relationships with dentists, product promotion, warehousing, and support.

Although Benco has consistently (and unilaterally) refused to work with buying groups, the evidence will show that Complaint Counsel's overarching theory, that Benco and other

Respondents jointly refused to work with "groups comprised of dental practitioners who sought to leverage collective purchasing power to obtain lower prices" (Complaint Counsel's Pre-Trial Brief, at 1) – is unsupported. The evidence will show that Benco *was* willing to work with groups who sought to leverage their purchasing power to obtain lower prices to the extent such groups were able to effectively consolidate demand and lower Benco's own cost of service. The evidence will show that prior to and continuing into the alleged conspiracy period, Benco was willing to work with groups that met the following criteria: (1) all offices are wholly owned by a single entity; (2) a single entity owns all the hard assets of all offices and a dentist or multiple dentists own the practices; (3) a single entity has majority ownership in all the offices, but may have multiple minority partners; (4) a management company with no ownership in any office, but can compel purchasing from vendors it chooses, provides purchasing services for the group, and is the entity that is invoiced for the group, and is the entity that pays the bills for the group; or (5) any group of combinations of numbers 1 through 4. Benco subsequently revised this policy so that it would only offer discounts to "group" customers who had a common ownership. Benco has found that groups that lacked common ownership – like the so-called "buying groups" at issue in this proceeding – could not control their members' purchasing decisions, and thus were not attractive business partners. The evidence will show (1) that Patterson and Schein similarly acted unilaterally and independently during the alleged conspiracy as to how they evaluated and worked with buying groups and other groups trying to leverage purchasing power, and (2) that each company acted differently with regard to buying groups during the alleged conspiracy period.

Benco expects that the evidence will show clearly that Benco adopted and has maintained its own Policy against dealing with "buying groups" for compelling, procompetitive business

reasons. There is no evidence, nor has there been any suggestion, that the Policy was adopted to thwart competition. Thus, the lack of buying group relationships is completely consistent with rational, independent decisions that best served the self-interest of Benco absent any agreement among Respondents.

ARGUMENT

I. Complaint Counsel's Evidence Fails to Show an Agreement.

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). In order to establish a violation of the law, therefore, Complaint Counsel must establish that Benco acted pursuant to an agreement with Patterson and Schein. 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 existence of an agreement may be established through direct or circumstantial evidence.

Contrary to Complaint Counsel's assertion (Complaint Counsel's Pre-Trial Brief at 51), there is no direct evidence of any agreement among the Respondents to refrain from doing 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, L.L.C. v. Am. Media, Inc.*, 899 F.3d 87, 103 (2d Cir. 2018), "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 "a 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). There is no such direct evidence of the agreement alleged by Complaint Counsel.

Benco expects that the evidence will show, at most, ambiguous circumstantial evidence that is insufficient to find that Benco violated any law. Circumstantial evidence, unlike direct evidence, requires further inferences to establish the proposition being asserted. Circumstantial evidence that may support an inference of conspiracy include "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. Complaint Counsel's theory is that Respondents acted in parallel to refuse to do business with buying groups. Although, as explained below, the evidence will show 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." *Id.* 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.").

Furthermore, in *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, the Court explained that it is impermissible to find a violation of the antitrust laws by drawing an inference of conspiracy from evidence that is equally consistent with independent conduct as with illegal conspiracy — or, as the Court has called it, "ambiguous" evidence. 475 U.S. 574, 597 n.21

(1986). *See also Anderson News*, 899 F.3d at 104-05 ("A jury's choice between [] two equally likely explanations for defendants' conduct, one legal and one illegal, would 'amount to mere speculation.'") (citing *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 258 (2d Cir. 1987).) The Court so ruled in *Matsushita* because "mistaken inferences" in antitrust cases may "chill the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 588. Thus, a finding of conspiracy requires "evidence that tends to exclude the possibility" that the defendant was "acting independently." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984); *id.* at 768 (explaining that a plaintiff must present "evidence that tends to exclude the possibility of independent action" by the defendants – that is, "evidence that reasonably tends to prove that the [defendants] had a conscious commitment to a common scheme designed to achieve an unlawful objective.").

Benco expects the evidence at trial to show independent conduct by Benco that is not actionable under the antitrust laws.

A. The Limited Communications Concerning Buying Groups Do Not Support An Inference Of Conspiracy.

Complaint Counsel's theory is based on (1) a small number of ambiguous communications among the respondents, following which Complaint Counsel claims that (2) Respondents' coordinated their behavior to engage in parallel conduct (refusing to do business with buying groups) contrary to the firms' individual economic interests. Although Complaint Counsel purportedly identifies numerous communications among the Respondents, Benco expects that the evidence at trial will show that the total number of communications is far lower than Complaint Counsel claims; that there are, in fact, only a handful of communications that concern buying groups, and none of those communications explicitly or implicitly reference the existence of an agreement not to do business with or provide discounts to buying groups.

Furthermore, the evidence will show that there was no “parallel conduct” by the Respondents following the claimed communications, and that each Respondent’s conduct was consistent with its own independent economic interest.

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.’”).

Benco expects that the evidence at trial will show limited communications between Benco and its competitors concerning buying groups that do not evidence any agreement. These communications merely reiterate Benco's long-standing non-confidential policy of not doing business with buying groups – which was easily observable in the industry – or were efforts to gather and exchange information that Benco and co-Respondents either (1) ignored, or (2) used to make independent business decisions. For example, Complaint Counsel tries to make a case for conspiracy based upon communications concerning the ownership structure of a group of dentists, but such information was then used by Benco to independently determine that the ownership structure was sufficiently centralized for Benco to proceed to bid on – and win – the business. Benco expects that the evidence will show that there is no suggestion of any anti-competitive conduct related to any of the communications cited by Complaint Counsel.

B. Respondents Did Not Engage In Parallel Conduct Or Coordinate Their Behavior During The Claimed Conspiracy Period.

The evidence will show that there was no parallel conduct or coordination of activities among Respondents, indeed, there was no change in respondents' behavior as a result of the alleged conspiracy. The evidence will show that during the alleged conspiracy, each respondent continued to pursue its previously determined strategy, for example, Benco continued its almost twenty-year old practice of declining to provide discounts to buying groups. The evidence will show that there was no change of conduct that would indicate that the parties were trying to conform their conduct to any agreement.

Furthermore, Benco expects that the evidence will show that the Respondents did not engage in parallel conduct. During 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 will show 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 alleged conspiracy; and
- Patterson which previously did not deal with buying groups or other large groups, started considering doing so and engaged independent consultants to assist it in mapping out a strategy for dealing with group purchasing.

Benco expects that the evidence will show independent consideration and decision-making that is inconsistent with, and defeats any inference of a conspiracy among Respondents.

C. The Evidence Will Show That There Was No Conduct Contrary To Responents' Individual Economic Interests.

Benco further expects that the evidence will show that, even if there had been parallel conduct, the Respondents acted in accordance with their individual self-interest, which also 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).

Benco expects the evidence to show that each Respondent had an independent economic incentive not to deal with buying groups unless such dealings would sufficiently increase the

volume of sales to members of the group or reduce costs of servicing group members. Benco itself unilaterally adopted and has maintained its policy of not doing business with buying groups for compelling, procompetitive business reasons. Buying groups that do not have common ownership do not lower Benco's cost to serve the independent dentists members and cannot provide compliance or increased purchasing volume. Therefore, when such a group approaches Benco seeking lower prices for its purported members, Benco has no compelling business reason to provide lower prices without increased volume or a corresponding reduction of Benco's costs to serve the individual dentists. Moreover, these types of "groups" interject a third party into the supply chain, diminishing Benco's valuable direct relationship with its customers.

The evidence will show that as a general rule, buying groups could neither grant exclusivity, nor guarantee volume, nor reduce costs – and therefore Benco had no incentive to do business with them. It was thus to be expected that Benco would choose not to do business with many – or any – buying groups and would seek out as much information about a group's ownership structure before bidding for a group's business.

II. Complaint Counsel's Evidence Fails To Establish Harm To Competition.

Even if Complaint Counsel were able to prove that the Respondents had formed an agreement not to do business with buying groups, Complaint Counsel lacks evidence that the alleged agreement restricted competition. Indeed, the Commission's complaint fails even to allege that the asserted agreement actually 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).[2] Every one of these allegations relies on a *presumption* rather than actual evidence of harm to competition. Benco expects that Complaint Counsel will be unable to establish the predicate requirements for application of such a presumption in this case. And where the Commission has chosen not to allege a violation based on a traditional rule of reason analysis in its complaint, Complaint Counsel cannot now try to patch up the holes in its case by trying to introduce a full rule of reason analysis into the case.

The Supreme Court established over a century ago that the antitrust laws prohibit only agreements that unreasonably restrict competition. *Standard Oil Co. v. United States*, 221 U.S. 1, 60-68 (1911); *United States v. American Tobacco Co*., 221 U.S. 106, 178-181 (1911). Complaint Counsel bears the burden of establishing that the alleged agreement in fact caused harm to competition. Complaint Counsel is unable to satisfy this burden.

Recognizing from the outset that it lacked evidence of actual harm to the ultimate purchasers – dentists – the Commission instead issued a complaint based on presumptions of harm. Thus, Complaint Counsel seeks to avoid its traditional burden in such a case by asserting that Your Honor should presume that the alleged agreement has caused harm to competition. 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. But in light of the actual evidence revealed during discovery, Complaint Counsel's argument is misplaced. Benco expects that the evidence presented by Complaint Counsel at trial will fail to provide the requisite basis for treating the alleged agreement as either

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[2] 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.

unlawful *per se* or as subject to any presumption of harm to competition (whether labeled "inherently suspect" or considered in a "truncated" analysis).

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

Benco expects that Complaint Counsel's evidence at trial will fail to sustain its burden of proving 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*. Importantly, *per se* liability applies only if courts have "considerable experience with the type of challenged restraint," *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc*., 441 U.S. 1, 20 n.33 (1979), and based on that experience, can confidently conclude that a particular practice always or almost always harms competition. 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).

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" – is there an impact on competition. *Id. 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, "*[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.' . . . Accordingly, '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).

Here, the Complaint alleges that the purported agreement is a "conspiracy not to provide discounts to" or a "conspiracy not to compete for the business of" buying groups. Complaint Counsel argue that these are equivalent to a price fixing agreement or a boycott, respectively, and on the basis of those labels condemned as unlawful *per se*. Complaint Counsel's Pre-Trial Brief at 54-55. 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." *Broadcast Music,* 441 U.S. 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.

The alleged agreement is not price fixing because it determined nothing with respect to *customers* who actually purchased products. To be clear, buying groups are not customers. Benco expects that Complaint Counsel will fail to establish that buying groups perform the functions of customers. To the contrary, Benco expects the evidence to be clear that buying groups do not buy anything. Buying groups do not select products for purchase; they do not place orders; they do not take delivery; they do not stock inventory; they do not pay invoices due. They do nothing other than negotiate terms and take their cut. They are middle men.

And Complaint Counsel has not alleged 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. Rather, Benco expects the evidence to show that Benco, Patterson and Schein competed aggressively for the business of dentists, including members of buying groups. Benco, Patterson and Schein offered substantial discounts to dentists, including members of buying groups, to attract or keep their business. Benco expects that Complaint Counsel will fail to present any evidence of an agreement among Respondents to set the prices or discounts with respect to these actual customers – the dentists.

Even if there had been an agreement not to discount to buying groups (and the evidence will show that there was not), Complaint Counsel has not identified a single case establishing that an agreement only with respect to third-party negotiators, and leaving participants free to compete with respect to prices and discounts to actual end customers, is *per se* unlawful. There is no basis for courts or the Commission to claim that they can "confidently conclude" that such

an agreement will harm competition without conducting an evaluation of prices actually paid by end-customers.

Nor is the alleged agreement 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. v. Pacific 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. Benco expects that Complaint Counsel's evidence will fail to establish that the alleged

agreement pressured manufacturers or dentists not to deal with buying groups. Indeed, Benco expects that Complaint Counsel will be unable to prove that Benco, Patterson and Schein agreed to withhold services from any dentists, whether members of a buying group or not, or that they agreed not to purchase products from any manufacturer, whether that manufacturer dealt with buying groups or not. And without such evidence, the alleged agreement would fail 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*.

B. The Alleged Agreement Is Not Of A Type That Courts Presume To Be Unlawful Or Subject To A Truncated Analysis.

Similarly, Benco expects that Complaint Counsel's evidence at trial will fail to establish a basis for presuming that the alleged agreement harms competition or subjecting the issue to an abbreviated analysis.

Once again, the Supreme Court has instructed the Federal Trade Commission with respect to the applicable standards. And once again, Complaint Counsel fails to follow the Supreme Court's instructions. In *California Dental Association v. FTC*, 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 a truncated analysis may be 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 seek to avoid the difficult and tedious task of proving specific marketplace effects. Instead, Complaint Counsel wish to rely on "easy labels," *Broadcast Music,* 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* (and worse – this time, they willfully ignore the Supreme Court's specific guidance in that case). In *California Dental*, the Court was particularly critical of the appellate court's (and implicitly, of course, 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; rather, what is required is an enquiry "meet for the case." *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 marketplace experience has been "so clear" that a truncated analysis will permit "a confident conclusion about the principal tendency of a restriction." *Id*.

Here again, Benco expects Complaint Counsel's evidence to fall far short of this standard. Complaint Counsel has thus far failed to identify any general marketplace experience,

let alone experience so clear as to permit a "confident conclusion," that a purported agreement not to "provide discounts to" or "compete for the business of" third-party negotiators, but not affecting ongoing, vigorous competition for the business of end-customers, causes actual anticompetitive harm to those end-customers. In short, Benco expects that Complaint Counsel's evidence will fail to provide a sufficient basis to establish that the purported agreements are "inherently suspect" or to justify truncating a rule of reason analysis.

Indeed, Benco expects that the evidence will not only raise questions about the "principal tendency" of the purported agreement, but will actually demonstrate the absence of anticompetitive harm. The evidence will show that Benco consistently refused to deal with buying groups, but competed vigorously for the business of dentists – including members of buying groups – before, during, and after the period of the alleged agreement. The evidence will establish that Benco's practice would not have differed absent the communications in question. Benco's practice is fully explained by the buying groups' flawed business model, which failed to provide additional services to dentists, to effectively consolidate demand to drive volume, or to lower costs, and therefore was not valued by either manufacturers or the national full-service distributors. Benco expects that the evidence also will show that neither Patterson nor Schein changed its position with respect to buying groups during the relevant time period. And most importantly, Benco expects that the evidence will show that dentists were able to get the benefits of competitive pricing and discounts – whether they chose to purchase pursuant to the arrangements of buying groups or directly from full-service distributors. Benco expects Complaint Counsel's allegations to founder on its failure to carry its burden of establishing harm to competition.

III. The Evidence Fails To Establish That Benco Violated Section 5 Of The FTC Act.

The Commission's Complaint 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. This allegation fails both as a matter of law and, as Benco expects the evidence at trial to demonstrate, 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 confirmed 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. Federal Trade Commission*, 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 recently 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." FTC, 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 a series of agreements with 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. And it is not at all clear that it would pass muster. By definition, FTC enforcement with respect to an invitation – in the absence of an agreement – involves no actual harm to competition. Nor is there any prospect of future harm to competition from a rejected invitation. 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 set by the Ninth Circuit in *Boise Cascade*.

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 the vague alleged communications 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.

Complaint Counsel's claim under Section 5 rests upon three alleged conversations between a Benco employee and his friend and former colleague who worked at Burkhart. Complaint Counsel's Pre-Trial Brief, at 35-36. At trial, Benco expects the evidence to show that

(1) some of the alleged conversations did not take place; (2) the Benco employee did not inform the Burkhart employee of any Benco policy or practice of not dealing with buying groups; (3) the Benco employee did not mention any alleged agreement among Benco, Patterson and Schein; (4) the Benco employee did not invite Burkhart to join any conspiracy regarding buying groups; and (5) the Benco employee did not request that Burkhart take any action with regard to buying groups. Moreover, at the time of these alleged conversations, the Burkhart employee believed that Benco was, in fact, then currently selling to buying groups.

Complaint Counsel's only evidence in support of this claim are uncorroborated, vague allegations of one of the alleged participants to the alleged conversations. The evidence will show that the Burkhart employee does not even recall the words that Complaint Counsel asserts constituted a solicitation to collude. These alleged conversations cannot support a claim under Section 5.

2. Application Of Section 5 To The Vague Alleged Communications 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.

Although the Commission's consent agreements involving alleged invitations to collude were not tested before the courts and (as described above) there is reason to question whether any invitation to collude satisfies the requirements of *Boise Cascade* and the Commission's Statement of Enforcement Principles, a number of the past consent agreements at least satisfied the *Ethyl* standard. Certain of the Commission's consent agreements involved explicit invitations from one competitor to another specifying the precise details of a proposed unlawful agreement. In these matters, the recipient of the invitation merely had to respond "yes" to create an unlawful agreement. *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). Such invitations are clear; an enforcement error is unlikely, and there is little risk of business confusion.

The present case, by contrast, fails to meet the standard established by the Second Circuit in *Ethyl*. Benco expects that the evidence will show, at most, discussions and information seeking by Benco that does not involve any mention of a conspiracy or any invitation to participate in any conspiracy. Regardless of what the Commission has done in certain consent agreements, this evidence simply will not meet the legal standard for application of Section 5 of the FTC Act.

CONCLUSION

For the foregoing reasons, the evidence at trial will show that 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: October 9, 2018

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed documents that is available for review by the parties and the adjudicator.

October 9, 2018

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