

1 UNITED STATES OF AMERICA
2 FEDERAL TRADE COMMISSION
3 OFFICE OF ADMINISTRATIVE LAW JUDGES

4 In the Matter of)
5 Benco Dental Supply Co.,)
6 a corporation,)
7 HENRY SCHEIN, INC.,) Docket No. 9379
8 a corporation, and)
9 PATTERSON COMPANIES, INC.,)
10 a corporation,)
11 Respondents.)
12 -----)

13 February 7, 2019

14 9:46 a.m.

15 TRIAL VOLUME 17

16 PART 1, PUBLIC RECORD

17
18 BEFORE THE HONORABLE D. MICHAEL CHAPPELL

19 Chief Administrative Law Judge

20 Federal Trade Commission

21 600 Pennsylvania Avenue, N.W.

22 Washington, D.C.
23
24

25 Reported by: Josett F. Whalen, Court Reporter

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Benco Dental Supply, et al.

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1	FEDERAL TRADE COMMISSION					
2	I N D E X					
3	IN THE MATTER OF BENCO DENTAL SUPPLY CO., et al.					
4	TRIAL VOLUME 17					
5	PART 1, PUBLIC RECORD					
6	FEBRUARY 7, 2019					
7						
8	WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS	VOIR
9	JOHNSON	4772				
10		4876	4884	4930		
11	MAURER	4935				
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25	(none)					

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1 P R O C E E D I N G S

2 - - - - -

3 JUDGE CHAPPELL: Okay. We're back on the
4 record, Docket 9379.

5 When we were last here, December 19 I recall,
6 government rested.

7 By e-mail respondents informed me you expect to
8 rest by Friday, February 15. Is that still your
9 estimate?

10 MR. OLIVER: Yes, Your Honor.

11 JUDGE CHAPPELL: Do you believe you'll need all
12 three days next week?

13 MR. OLIVER: Yes, Your Honor, I believe we
14 will.

15 JUDGE CHAPPELL: Okay. In the event we are not
16 finished by the 15th, we will continue on our Wednesday
17 through Friday through March 1 in the event that's
18 needed.

19 This is for government counsel. Do you recall
20 the rules and requirements to request a rebuttal
21 witness that I went over in the prehearing conference?

22 MS. KAHN: Yes, Your Honor.

23 JUDGE CHAPPELL: So I don't need to go over
24 those again.

25 MS. KAHN: No, Your Honor.

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1 JUDGE CHAPPELL: And at this time do you
2 anticipate requesting rebuttal?

3 MS. KAHN: Not at this time, Your Honor.

4 JUDGE CHAPPELL: Very good. Thank you.

5 Next witness. Unless you have something
6 further.

7 MR. OLIVER: Nothing from us, Your Honor.

8 MS. KAHN: Nothing.

9 JUDGE CHAPPELL: All right.

10 MR. OLIVER: Your Honor, Benco Dental calls
11 Dr. John Johnson, an expert witness.

12 - - - - -

13 Whereupon --

14 JOHN HENRY JOHNSON, IV

15 a witness, called for examination, having been first
16 duly sworn, was examined and testified as follows:

17 DIRECT EXAMINATION

18 BY MR. OLIVER:

19 Q. Good morning, Dr. Johnson.

20 A. Good morning.

21 Q. Could you please state your full name for the
22 record.

23 A. My name is John Henry Johnson, IV.

24 Q. Dr. Johnson, before we start this morning, I'd
25 like to just point out to you that we have on the

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1 table next to you a binder containing a hard copy of a
2 number of documents that we may be referring to during
3 the course of your testimony today. We'll also be
4 showing copies of those documents on the screen in
5 front of you. Please feel free to consult either the
6 hard-copy document or the screen, whichever you
7 prefer.

8 We've also placed a bottle of water on the
9 table next to you.

10 A. Thank you.

11 Q. Dr. Johnson, what is your current profession?

12 A. I'm a professional economist and the owner of
13 an economic consulting firm.

14 Q. How long have you held this position?

15 A. Approximately nine and a half years as the CEO
16 of Edgeworth Economics. I've been a professional
17 economist for almost twenty years.

18 Q. What is your educational background?

19 A. I have a bachelor's degree in economics with a
20 minor in English literature from the University of
21 Rochester in Rochester, New York; and I have a Ph.D. in
22 economics from the Massachusetts Institute of
23 Technology in Cambridge, Massachusetts.

24 Q. Did your studies focus in any particular field
25 of economics?

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1 A. Yes.

2 Q. What field was that?

3 A. I focused on multiple fields, including
4 microeconomics, econometrics and labor economics.

5 Q. Can you please briefly summarize the past
6 professional positions that you have held.

7 A. Yes. I'll go sequentially backwards.

8 I had worked before founding
9 Edgeworth Economics in 2009, I worked at two other
10 economic consulting firms, Criterion Economics and
11 NERA Economic Consulting.

12 I also was a professor at the University of
13 Illinois at Champaign-Urbana. And I've also taught as
14 an adjunct professor at Georgetown University's
15 Public Policy Institute.

16 Q. Now, to what extent, if at all, did your past
17 positions involve antitrust economics?

18 A. Virtually my entire professional career has
19 involved the study of antitrust economics. I have
20 worked professionally in this field, as I said, for
21 almost two decades. I've studied numerous industries,
22 theories of the firm, cartels, monopolization,
23 boycotts. Pretty much every day of my career is spent
24 on antitrust issues.

25 Q. You also mentioned briefly teaching positions.

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1 What teaching positions have you held?

2 A. Well, I started my career out of MIT at the
3 University of Illinois, where I taught undergraduate
4 and graduate courses, including in econometrics.

5 As an adjunct professor at Georgetown's
6 Public Policy Institute I taught courses on antitrust
7 and public policy.

8 Q. And to what extent do your current activities
9 involve antitrust economics?

10 A. Well, I testify regularly and am hired as a
11 consultant in all sorts of different types of
12 engagements involving antitrust, and I regularly work
13 on antitrust issues, as I said, basically every day for
14 the last two decades.

15 Q. You mentioned testifying previously.

16 Can you briefly describe instances in which you
17 have testified as an expert witness.

18 A. Yeah. I probably testified about 75 times as
19 an expert witness in a wide range of matters, and of
20 those, probably three dozen of those are on antitrust
21 litigation.

22 Q. Now, how many of those matters involve
23 distribution of dental products?

24 A. This is the third matter I have worked on
25 involving dental product distribution.

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1 Q. Which are the other two?

2 A. The first one is a litigation called SourceOne
3 versus Patterson, Schein and Benco. And the other one
4 was a class action called In re Dental Products [sic]
5 Antitrust Litigation.

6 Q. Can you briefly describe what those two cases
7 involved.

8 A. Yes.

9 The first case, the SourceOne litigation,
10 involved allegations that the defendants in that case
11 had failed to or had boycotted certain dental
12 associations. And that assessment involved looking at
13 the expert report of Dr. Jeffrey Leitzinger,
14 particularly with respect to market definition issues,
15 certain characterizations of the industry he made, and
16 particularly about how Benco operated in the dental
17 product industry.

18 Q. And what did you do with respect to the class
19 litigation?

20 A. With respect to the class litigation I was
21 asked to assess the class-wide methodologies put
22 forward by two experts, Dr. Solow, a professor from the
23 University of Iowa, and Dr. James T. McClave, a
24 statistician.

25 That case was more data-intensive, where I

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1 looked at extensive pricing data, discounting data,
2 also dealt with obviously any issues related to Benco's
3 positioning in the business and the industry, but those
4 types of issues.

5 Q. And when did you first become involved in those
6 two cases?

7 A. I was first retained in those cases in the
8 third quarter of -- third to fourth quarter of 2016.

9 Q. How, if at all, did your work in the SourceOne
10 and the class action cases inform your work in this
11 matter?

12 A. Well, now having worked on dental products and
13 dental product distribution for the last three years,
14 it definitely informed my opinions here, both with
15 respect to my understanding of the industry,
16 furthering my knowledge of distribution markets, which
17 is actually an area I have worked on extensively in
18 other industries, including wholesale grocery products
19 and pool product distribution, but basically it formed
20 one part of the foundation of my expert report in this
21 case.

22 Q. What were you asked to do in this matter?

23 A. Well, I have a slide --

24 MS. FRANCE: Objection, Your Honor. This
25 slide is clearly leading. A paid expert shouldn't

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1 need a slide deck to tell him what his assignment was
2 in this case, and it's clear from the language of the
3 slide that it's designed to lead the expert to a
4 particular answer, and I would ask that counsel remove
5 the slide.

6 JUDGE CHAPPELL: Okay. First of all, you are?

7 MS. FRANCE: My name is Jamie France on behalf
8 of complaint counsel.

9 JUDGE CHAPPELL: Response?

10 MR. OLIVER: Your Honor, if I could ask a
11 couple of questions to establish a background about the
12 slide deck?

13 JUDGE CHAPPELL: You didn't respond to her
14 objection.

15 MR. OLIVER: Your Honor --

16 JUDGE CHAPPELL: She says why does this guy
17 need to be told what he's doing, he ought to know
18 that.

19 How do you respond to that?

20 MR. OLIVER: I respond to that that this is a
21 deck that the expert himself prepared because he
22 believes it helps explain the testimony that he intends
23 to present here in this court today.

24 JUDGE CHAPPELL: So are you conceding that he
25 needs this, he can't tell us without looking at this?

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1 Is that what you're telling me?

2 MR. OLIVER: I'm not conceding that.

3 JUDGE CHAPPELL: Well, then why don't you pull
4 this and go ahead. The objection is sustained.

5 MR. OLIVER: Thank you, Your Honor.

6 MS. FRANCE: Thank you, Your Honor.

7 BY MR. OLIVER:

8 Q. Can you please explain what you were asked to
9 do in this matter.

10 A. Yes.

11 So my assignment in this matter was to assess
12 the expert report of Dr. Robert Marshall, particularly
13 with respect to issues including his definition of the
14 relevant markets, his assessment of industry
15 characteristics, particularly his assessment that an
16 economist is capable of opining on the fact of
17 collusion.

18 I was asked to also assess his assessment of
19 unilateral self-interest, and I was also asked to
20 assess his assessment of competitive impact.

21 In addition, I was also asked to explain how
22 Benco particularly competes in the industry and how
23 their unique positioning was relevant and in many cases
24 ignored by Dr. Marshall.

25 Q. Did you prepare a report in connection with

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1 this matter?

2 A. Yes, I did.

3 Q. Could you please turn in your binder to tab 2.

4 And we'll also pull up on the screen a document
5 we marked as RX 2834.

6 MS. FRANCE: Your Honor, if we could ask
7 counsel for a copy of the binder, please.

8 MR. OLIVER: Oh. I apologize.

9 MS. FRANCE: Thank you.

10 JUDGE CHAPPELL: Let me say this to hopefully
11 prevent a number of objections, especially regarding an
12 expert witness.

13 The expert report has the opinions in it. It
14 says what it says. It's in evidence; correct?

15 MR. OLIVER: That's correct, yes, Your Honor.

16 JUDGE CHAPPELL: So this is not a fact witness.
17 And it's true that screen was leading, and because you
18 objected to it and it was a valid objection, I
19 sustained it. But, you know, there are objections that
20 matter and objections that don't matter. Think about
21 it.

22 Go ahead.

23 MR. OLIVER: Thank you, Your Honor.

24 BY MR. OLIVER:

25 Q. So if I direct your attention to the document

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1 at tab 2 in your binder, it's a document marked as
2 RX 2834, also a copy on the computer screen in front of
3 you.

4 Dr. Johnson, what is the document that's been
5 marked as RX 2834?

6 A. This appears to be a complete copy of my expert
7 report filed in this matter on September 5, 2018.

8 Q. If I could also direct your attention to the
9 document that -- excuse me -- at tab 3 in your binder.
10 We'll bring a copy of that up on the screen as well.
11 That has been marked as RX 1140.

12 Dr. Johnson, what is the document that has been
13 marked as RX 1140?

14 A. This appears to be a redacted version of my
15 expert report in the SourceOne litigation filed on
16 April 28, 2017.

17 Q. If I could ask you to turn, please, to tab 4 in
18 your binder, and we'll also pull up on the screen a
19 document that has been marked as RX 1141.

20 A. Okay.

21 Q. What is the document that has been marked as
22 RX 1141?

23 A. This is a copy of my expert report in the class
24 action matter, that also is redacted.

25 Q. Can you please explain your understanding of

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1 the redactions in RX 1140 and RX 1141.

2 A. My understanding is that there is places in my
3 FTC report I have cited and incorporated by reference
4 to my prior reports. The sections that are not
5 redacted are sections that were cited as part of my
6 opinion in this case.

7 Q. Now, do RX 2834, RX 1140 and RX 1141 contain a
8 statement of your opinions in this matter, the bases
9 and reasons for your opinion and the data and materials
10 and other information you considered in reaching your
11 opinions?

12 A. Yes.

13 Q. Dr. Johnson, can you please briefly summarize
14 your conclusions that you reached in this matter.

15 JUDGE CHAPPELL: Before you do that, I have a
16 question for respondents. If I'm reading this correct,
17 I see this witness identified as Benco's expert
18 witness, I see another witness identified as
19 Patterson's expert witness.

20 Am I to understand that any opinions from this
21 witness -- and again, I haven't read the reports. I
22 don't read the evidence. I hear the evidence, but when
23 it's a document, I get to that after trial.

24 Are the opinions of Benco's expert only to
25 apply and to be utilized by, for any purpose, Benco and

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1 no other respondent? Is there any understanding there
2 among respondents?

3 You can confer if you want.

4 (Pause in the proceedings.)

5 MR. OLIVER: Your Honor, we consider the
6 expert witnesses, just as any other witness who
7 testifies here, as evidence in the record, and the
8 evidence in the record is available for any respondent
9 to cite to.

10 We have -- we are presenting Dr. Johnson with
11 respect to those aspects or those interpretations, if
12 you will, the issues that have particular relevance to
13 Benco, but the other respondents may choose to rely on
14 certain of the testimony of Dr. Johnson, and I think
15 the same would apply with respect to their experts.

16 JUDGE CHAPPELL: So if I understand you
17 correctly, certain opinions will by their nature and
18 content apply only to Benco.

19 MR. OLIVER: I think perhaps the better way for
20 me to explain it if I could, Your Honor, is to say that
21 we have had Dr. Johnson focus in those particular
22 aspects of the evidence that is particularly relevant
23 to Benco. Now, much of his testimony may also have
24 relevance to Schein and to Patterson, but we have asked
25 him to focus on issues that are of particular relevance

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1 to Benco.

2 JUDGE CHAPPELL: All right. Thank you.

3 BY MR. OLIVER:

4 Q. Dr. Johnson, could you please summarize the
5 conclusions that you've reached in this matter.

6 MS. FRANCE: Objection. Your Honor, for the
7 record, again, this slide is clearly leading the
8 witness to a particular answer that's up on the slide.
9 Counsel has not laid any foundation, and it's clear
10 from the slide that this is leading.

11 JUDGE CHAPPELL: Under the federal rules, you
12 can ask a witness opinions without underlying support
13 and data. That's why we have cross-exam. Overruled.

14 MS. FRANCE: Thank you, Your Honor.

15 BY MR. OLIVER:

16 Q. Dr. Johnson, can you please summarize the
17 opinions that you have reached in this matter.

18 A. Yes. I've prepared a slide to make it a little
19 bit easier, but at a high level, the first series of
20 opinions have to do with market definition. And there,
21 what I have assessed is I have assessed the analyses by
22 Dr. Marshall, and I have determined that Dr. Marshall
23 has ignored the implications of his own local market
24 definition.

25 With respect to product markets, I have two

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1 main opinions. The first has to do with sets of
2 products that Dr. Marshall has ignored, particularly
3 his failure to account for evidence that
4 direct-selling manufacturers and what I would call
5 partial line or non-full-line distributors compete in
6 certain local markets, and second, in my opinion, that
7 he has also inappropriately combined consumables and
8 equipment in the same relevant product market despite
9 the fact that the competitive conditions in those
10 two -- for those two types of products are vastly
11 different.

12 With respect to his opinions on market
13 structure, Dr. Marshall has put forward a paradigm that
14 implies that a set of industry characteristics can be
15 evidence of the likelihood or a market is more likely
16 for collusion and yet, in addition to the fact that
17 that paradigm is not complete, the very set of industry
18 characteristics that he has put forward do not apply in
19 the dental product industry.

20 If we can go to the next slide, please.

21 With respect to the alleged exclusionary nature
22 of the conduct, first, I've assessed Dr. Marshall's
23 assessment of buying groups and their unilateral
24 self-interest of Benco, and I've found that his
25 analysis is based on a series of flawed assumptions

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1 that are unreliable.

2 In addition, he has failed to consider
3 important issues with respect to Benco's unilateral
4 self-interest, particularly the opportunity cost of
5 their investing their resources in other, more viable
6 business opportunities.

7 In addition, I also have assessed his opinion
8 that there existed a structural break in the industry
9 purportedly because of Benco's partnership with
10 Elite Dental Alliance.

11 JUDGE CHAPPELL: For the benefit of the
12 prosecuting attorney, my previous ruling was based on
13 Federal Rule 705 if you want to check it out.

14 Go ahead.

15 MR. OLIVER: Thank you, Your Honor.

16 BY MR. OLIVER:

17 Q. Dr. Johnson, before we proceed, just to be
18 certain we do have the appropriate background, can you
19 please explain who prepared the slides that one of
20 which is currently showing on the screen.

21 A. I did.

22 Q. Whose idea was it to prepare the slides that
23 are currently showing on the screen?

24 A. I decided to prepare them because we're
25 dealing with fairly technical issues and I thought it

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1 would be helpful to have them as I explain my opinion
2 today.

3 Q. And what is the basis of the material that is
4 contained in those slides?

5 A. The summary of the various elements of my
6 expert report which I tend to explain -- which I intend
7 to explain in my direct testimony today.

8 Q. And those are the reports that we referred to a
9 few moments ago?

10 A. Yes.

11 Q. Thank you.

12 Let's turn then if we could to the first of
13 your conclusions regarding the relevant market, and in
14 particular let's start with the relevant geographic
15 market if we could, please.

16 And if you could turn in your binder to I
17 believe it is tab 5.

18 And if we could pull up on the screen CX 7100.
19 And I ask you to turn to page 7100-010. This is a
20 page within the expert report of Dr. Marshall.

21 A. One second, please.

22 Okay.

23 Q. And this is a page of Dr. Marshall's expert
24 report that summarizes conclusions that he reached.

25 And if I could direct your attention to

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1 paragraph 11.

2 And the first sentence of that paragraph reads,
3 "Second, my analysis shows that the relevant geographic
4 markets are no larger than the United States, and [are]
5 local in nature."

6 Do you see that?

7 A. I do.

8 Q. And if I could also ask you to turn further
9 back in Dr. Marshall's report to page 7100-090.

10 A. Okay.

11 Q. And I'd like to direct your attention to
12 heading III.B on that page.

13 In that heading Dr. Marshall states, "The
14 relevant geographic markets in this matter are local in
15 nature."

16 Do you see that?

17 A. Yes.

18 Q. Do you agree with those conclusions?

19 A. In part I do and in part I do not.

20 Q. Can you please explain what part you do agree
21 with and what part you do not agree with.

22 A. Yes.

23 One area where Dr. Marshall and I appear to
24 agree is that we both opine that the markets are in
25 fact local in nature, and so for that respect I do

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1 agree with him.

2 The reasons I agree with him is including
3 there's numerous product distribution -- dental product
4 distributors in various geographic areas somewhat
5 limited in their geographic scope. I know from my
6 analysis of Benco's pricing data that prices paid by
7 Benco's customers are determined at a local level. In
8 fact, one of the things I quote in my expert reports
9 speaks to the fact of discounting in prices at the
10 local level and wide latitude for territory
11 representatives to set prices for their customers in a
12 locality.

13 Another analysis I refer to with respect to
14 local markets has to do with the timeliness of
15 deliveries. In the Merger Guidelines, one of the ways
16 you can define a relevant geographic market is --
17 particularly in circumstances where product is
18 delivered to the customer is you can look at how far
19 the product is shipped. And in my reports, my prior
20 reports particularly, I show different analyses of
21 timeliness of deliveries and travel distances.

22 So for all of those reasons, I agree with
23 Dr. Marshall in principle that the geographic markets
24 are local in nature.

25 Q. You've just summarized a number of different

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1 factors.

2 What consequences do those factors have for
3 geographic markets definition?

4 A. Well, the important part is, if one is going to
5 try to assess alleged antitrust conduct, relevant
6 product market and geographic market definition will be
7 critical, so to the extent we're going to try to assess
8 that conduct, it has to be done in a properly defined
9 relevant market.

10 Q. Now, do you agree with the way Dr. Marshall
11 applied the definition of the geographic market in this
12 matter?

13 A. No.

14 So that's where Dr. Marshall and I disagree,
15 and I have prepared a slide on this as well.

16 So Dr. Marshall, after opining that the
17 relevant markets are local, actually did not perform
18 his analyses in any defined local relevant market.
19 None of his purported profitability analyses, the very
20 ones from which he defines purported unilateral
21 self-interest for Benco or, as a matter of fact, for
22 any other distributor, were ever performed in a
23 relevant local market. In fact, all of them draw upon
24 a bunch of larger set of dentists from across the
25 country.

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1 Throughout, he also relies extensively on
2 share calculations. His calculation hinges on what is
3 the share of Benco, of Burkhart, of Patterson, of
4 Schein, but if you don't properly define the market,
5 share is a meaningless concept, at least for the
6 purpose he used it for.

7 So, throughout, what does he fail to do? He
8 doesn't account for regional competition. He doesn't
9 account for that set of local distributors that could
10 constrain competition. He doesn't account for the very
11 variation in prices that are determined at the local
12 level.

13 So for all of those reasons, when Dr. Marshall
14 goes forward with his analyses, he has failed to
15 actually take account of his own opinion that the
16 markets are localized in nature.

17 Q. Now, which aspect of Dr. Marshall's conclusions
18 do you believe were affected by Dr. Marshall's failure
19 to properly apply his conclusion that the geographic
20 markets in this matter are local?

21 A. Dr. Marshall's subsequent opinions on industry
22 characteristics collusive [sic] to collusion,
23 particularly his share calculations, Dr. Marshall's
24 subsequent conclusions with respect to unilateral
25 profitability of buying groups, Dr. Marshall's

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1 subsequent conclusions about competitive impact are all
2 implicated by his failure to analyze them in a relevant
3 geographic market.

4 Q. So let's turn next if we could to the relevant
5 product market definition, and if we could turn back to
6 Dr. Marshall's report behind tab 5 in your binder, if
7 we could pull up document CX 7100, and let me direct
8 your attention to page 7100-010 and particularly to
9 paragraph 10 on that page.

10 That paragraph states, "First, the relevant
11 product market is the full line of dental products and
12 services sold through full-service distributors to
13 independent dentists. Neither direct sales from
14 manufacturers nor sales from distributors that do not
15 offer full service were in the relevant product
16 market."

17 Do you see that?

18 A. I do.

19 Q. If we could also turn further back in his
20 report to page 7100-073.

21 And if I could direct your attention to
22 paragraph 179 on that page.

23 This paragraph states, "I conclude that neither
24 substitution away from full-service distributors'
25 products and services, nor arbitrage to defeat price

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1 discrimination, are sufficient to constrain the pricing
2 of a hypothetical monopolist of the full line of dental
3 products and services sold through full-service
4 distributors to independent dentists. Consequently, I
5 conclude that the market alleged in the FTC's complaint
6 is a relevant product market."

7 Do you see that?

8 A. Yes.

9 Q. Do you agree with Dr. Marshall's assertions
10 regarding the relevant product market?

11 A. No, I do not.

12 Q. Why do you disagree with Dr. Marshall's
13 assertions regarding the relevant product market?

14 A. Well, I've prepared a series of slides and
15 there's two --

16 MS. FRANCE: Objection. Your Honor,
17 respectfully, the slides are still leading regardless
18 of whether the witness prepared them or not. And
19 rule 705 allows him to testify without disclosing
20 underlying facts or data, but it does not address
21 leading questions.

22 MR. OLIVER: Your Honor, the slide has nothing
23 to do with the question. If the issue is whether the
24 question is leading, the question is not leading. The
25 slide is a slide prepared by Dr. Johnson as part of

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1 his testimony to assist his testimony here in court
2 today.

3 JUDGE CHAPPELL: Is the slide information
4 covered in his report?

5 MR. OLIVER: It is based on information from
6 his report, that's correct, Your Honor.

7 JUDGE CHAPPELL: The testimony of an expert is
8 locked in by the expert report. No amount of leading
9 is going to change that, so I'm going to allow it.
10 Overruled.

11 MS. FRANCE: Thank you, Your Honor.

12 JUDGE CHAPPELL: There's no way any more
13 evidence is coming in based on any leading question
14 because we're within the four corners of the expert
15 report. Okay?

16 MS. FRANCE: Thank you, Your Honor.

17 BY MR. OLIVER:

18 Q. Dr. Johnson, do you have the question in
19 mind?

20 A. I'm sorry. Could you repeat the question,
21 please.

22 Q. Why do you disagree with Dr. Marshall's
23 assertions regarding the relevant product market in
24 this case?

25 A. Okay. So there's two broad categories of

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1 reasons that I disagree with Dr. Marshall. The first
2 has to do with his ignoring competitive constraints
3 from manufacturer direct sales and from other dental
4 product distributors, such as local distributors,
5 partial line distributors, e-mail distributors, and the
6 like.

7 The second set of issues I have have to deal
8 with his inclusion of equipment and consumables in the
9 same relevant product market.

10 Q. Okay. Let's start if we could with direct sale
11 manufacturers.

12 JUDGE CHAPPELL: Just maybe to help move
13 things along because we've had a break, when an expert
14 is on the stand, what I consider a valid objection is
15 an objection that this testimony or this opinion is not
16 within the expert's report, FYI.

17 And when that objection is made, then the
18 person proffering the expert will need to either
19 through the expert or through consultation with staff
20 find whether that information is in the report or not.
21 And if it's not, it will not be allowed.

22 That's how we protect the record.

23 Go ahead.

24 MR. OLIVER: Yes. Understood, Your Honor.

25 Thank you.

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1 BY MR. OLIVER:

2 Q. Dr. Johnson, before we unpack your answer,
3 let's start if we could by my asking you if you could
4 please explain the supply chain for dental products.

5 A. Yes. So I think it's helpful if we start to
6 approach the issue of relevant product markets to
7 understand the supply chain, and this is an exhibit
8 from my expert report that I prepared. I believe it's
9 Exhibit 1 in my expert report.

10 The idea here is, we have to think about how
11 is it that dental products get to the very people that
12 use them. And at the bottom of this chart in the gray
13 boxes are the dentists. Now, they can be independent
14 dentists like my dentist who is in my office building
15 who's got an office by himself. That's an independent
16 dentist. It could be a small practice with a few
17 dentists. It could be a larger practice, sometimes
18 what's called corporate dentistry or DSOs, dental
19 service organizations. Those are larger groups of
20 dentists like Bright Smiles from what I've seen in the
21 area, where there's a group of dentists under one
22 corporate umbrella, all of whom work for the same
23 brand.

24 There are other ways, other types of
25 customers, dental laboratories, for example. And then

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1 there are buying groups, but of course, buying groups
2 are somewhat middlemen for whom independent dentists
3 would get product.

4 So the question is: How can product get to
5 this set of dentists? Well, first of all, you have
6 the manufacturers. There are two broad product
7 categories, consumable manufacturers and equipment
8 manufacturers.

9 What are consumables? If you think about a
10 dentist, what do they do on a daily basis, the drill
11 bits, the anesthetics, the cotton, the gloves, all of
12 this things that are used, literally consumed, on a
13 daily basis in serving your dental customers.

14 Now, equipment manufacturers, they provide
15 totally different products. They provide the giant
16 chair you sit in, the lights, you know, maybe the
17 computer software, but things like that.

18 The equipment manufacturers are, obviously,
19 one-off purchases. You don't need a new chair every
20 day. You don't need a new x-ray machine every day.

21 So you have these two different types of
22 product groupings.

23 And then there's a third box on the right,
24 Other Suppliers, which I put in for completeness sake.
25 These can be things like software. Sherman Dental in

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1 fact is the toy supplier, and so if you've ever taken
2 your kid to the dentist, you know, they get a toy for
3 like getting their teeth drilled, that's what
4 Sherman Dental does.

5 But that's the range of products.

6 How do those products get to the dentists?

7 Well, one avenue is they can be sold directly to the
8 dentists. And about 25 percent of the products are
9 sold direct from manufacturers to dentists. That's an
10 estimate in my report based on various estimates from
11 the respondents.

12 The other avenue, which is part of what this
13 case is about, is about distribution, so there's also
14 the case that products go from the manufacturers to
15 distributors. We're going to hear and talk a lot about
16 distribution today and perhaps over the course of this
17 case we've talked a lot about distribution.

18 Full-service distributors provide the full line
19 of both consumable and equipment products. Now, what
20 do I mean by "full line"? I don't mean every single
21 product, but I mean a large suite of products on the
22 consumable side and the equipment side.

23 Then there's other distributors, what I might
24 call partial line or we'll talk about a little bit more
25 non-full-service distributors. They provide either

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1 only consumables, maybe only equipment, maybe a more
2 limited set of product or maybe product without other
3 services that are required.

4 So the important point as we approach from a
5 real-world perspective how are we going to think about
6 product markets here is to think about what's the
7 difference between consumables and equipment and what
8 are the pathways that consumables and equipment get to
9 dentists, direct from manufacturers, through
10 full-service distribution and through other channels of
11 distribution.

12 Q. Okay. Dr. Johnson, now, if we could perhaps
13 start with a top line of your diagram, and let me ask,
14 why do you disagree with Dr. Marshall's conclusion that
15 direct sale manufacturers are not the relevant product
16 market?

17 A. Okay. So if we could go, I do have a slide on
18 this as well.

19 So Dr. Marshall starts from a position that
20 direct-selling manufacturers aren't even considered in
21 his relevant market. He doesn't -- none of his testing
22 involves direct selling. He just rules them out of
23 hand in his analysis.

24 However, we know from the evidence, the
25 economic evidence, the real-world evidence of how this

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1 works in the industry that I cite in my report, first,
2 as much as 25 percent of dental products are sold
3 directly to dentists by manufacturers, so their
4 exclusion without even any analysis just doesn't make
5 sense as a matter of economics.

6 But if we actually also look at what both the
7 distributors said, Benco and the other distributors all
8 view direct manufacturers as competitors. That's a
9 directly relevant fact to the market definition.

10 We know that dentists regularly source dental
11 products from both distributors and direct-selling
12 manufacturers, particularly because of the evidence in
13 the class action where the dentists spoke to
14 multisourcing. And the buying groups, in fact the very
15 buying groups that Dr. Marshall studies, Kois and
16 Smile Source, partner with direct-selling
17 manufacturers.

18 Q. Is there anything in particular from the buying
19 group examples that informed your opinion here in this
20 matter?

21 A. Yeah. I thought this was actually quite
22 important that I cited this in my expert report. This
23 is the quote from the John Kois deposition, right,
24 where he talked about the fact that "I think in the
25 beginning they [group members] certainly didn't see the

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1 value of the program, because it's not just dental
2 supply companies that dentists purchase from, it's also
3 direct companies that they work with, and so until we
4 enlisted other direct companies to be involved in our
5 buyers club, then the appeal for the buyers club option
6 became much greater."

7 This is the type of economic evidence that
8 speaks to the fact that the very buying groups at issue
9 viewed it as essential to have direct manufacturing as
10 part of what they offered to their clients. That is
11 strong evidence that the exclusion of direct-selling
12 manufacturers from the relevant market does not make
13 sense as a matter of economics.

14 Q. Dr. Johnson, if I could ask you to please to
15 turn to tab 7 in your binder, we'll pull up on the
16 screen a document marked as RX 1100. This is a Kois
17 document identifying vendors participating in the Kois
18 buying group.

19 And I note, by the way, that this was included
20 in your expert report in the list of materials you
21 considered in connection with your report.

22 Now, what, if any, was the significance of this
23 document to your conclusion regarding the relevant
24 product market?

25 A. So, again, this is something that I cited in

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1 my report, and here you'll see this is materials from
2 the actual Kois buying group. And you'll see the
3 heading Participating Vendors. And if you look under
4 these participating vendors, you see Burkhart Dental, a
5 distributor, but then you also see a number of
6 direct-selling manufacturers.

7 Brasseler USA is a direct-selling manufacturer.

8 If you go to the next page, Dentsply Sirona,
9 right in the middle there, is a direct-selling
10 manufacturer. And here you see they're offering
11 discounts off implant systems and regenerative
12 products.

13 If we go to the next page, two pages down,
14 Zimmer Biomet is a direct-selling manufacturer.

15 So this is just further evidence that the
16 notion of a relevant product market that doesn't even
17 consider direct-selling manufacturers is problematic
18 and not consistent with the economic evidence, the way
19 an economist would view competition to assess relevant
20 product markets.

21 Q. Now, Dr. Johnson, we've heard testimony that
22 most direct sale manufacturers do not supply a broad
23 range of products and many supply only niche products.

24 Now, how, if at all, does that affect your
25 conclusion that they may be included in the relevant

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1 product market?

2 A. That doesn't affect my conclusion. That is not
3 relevant for the conclusion that direct-selling
4 manufacturers can constrain for some because built into
5 that is the presupposition that dentists don't
6 multisource, but in fact dentists do multisource. They
7 regularly source across multiple suppliers.

8 In order for direct-selling manufacturers to
9 constrain competition, it doesn't have to be that they
10 offer every single product that a distributor does, it
11 just has to be that they compete for some of them.
12 And in fact, that's exactly what the evidence tells
13 us.

14 Q. Now, we've also heard testimony that dentists
15 are too busy to seek out multiple sources of supply.

16 Now, how, if at all, does that affect your
17 testimony -- your conclusions in this matter?

18 A. Okay. Well, in the class action case, the
19 In re Dental Supplies Antitrust Litigation, we did
20 have some detailed information from a series of
21 dentists. The eight dentists in that case who were
22 deposed and provided their data were put forward as
23 representative of all the entire class of other
24 independent dentists.

25 And I did prepare a table in my report, both

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1 based on the testimony and the data, where I looked at
2 what they said about where do they source from. And
3 what I found was that dentists do, all of them,
4 regularly source across multiple suppliers, including
5 both distributors and direct-selling manufacturers.

6 For example -- and this is just one of the
7 examples -- Down to Earth Dental bought most of their
8 dental supplies from six or seven companies, including
9 Brasseler, for example. In fact, they also bought some
10 of their dental supplies from Amazon and eBay.

11 So this just flies in the face of the assertion
12 that dentists are too busy to multisource. In fact,
13 that's just not what the evidence in the class case
14 suggested.

15 Q. Now, to what extent would purchasing from
16 direct sale manufacturers require dentists to forgo
17 value-added services provided by full-service
18 distributors?

19 A. Yeah, that also isn't true, and there's two
20 reasons for that.

21 First of all, purchasing from a direct sale
22 manufacturer does not mean that you still cannot get
23 certain services from the full-service distributors you
24 purchased from.

25 But second, there are actual companies that

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1 provide just the services. Dental Fix Rx I believe is
2 the name of one that I cite in my expert report, so the
3 idea that there aren't opportunities to get service
4 that you need is just not true.

5 Q. Turn next to non-full-service distributors, and
6 let me start by asking you, what are non-full-service
7 distributors?

8 A. Okay. So again I prepared a slide and I think
9 it's -- non-full-service distributors, there's a number
10 of things that fit into this category. They can
11 include distributors who focus on online sales, over
12 the phone, through the mail. They usually don't have
13 those in-person sale representatives, and they offer
14 limited services.

15 But these are companies which we've heard in
16 the course of the litigation, again, Darby, Safco,
17 Scott's, Net32, all examples of limited-service
18 distributors.

19 Q. Now, do you agree with Dr. Marshall's
20 conclusion that non-full-service distributors are not
21 in the relevant product market?

22 A. No, I do not.

23 Q. Why not?

24 A. So, once again, Dr. Marshall has put forward
25 some inapposite analysis that doesn't speak to the

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1 issue of the constraints of limited service or online
2 distributors, right. And again, he has a very
3 all-or-nothing approach that they have to -- that
4 they -- if they compete, you know, they have to
5 compete in a certain way to actually provide a
6 constraint.

7 First of all, he did not perform a proper
8 analysis of the presence of the limited-service
9 distributors. What he did is he put forward an
10 analysis in one of his tests that simply said, Well, I
11 don't see that people buy from Darby frequently. Well,
12 that's not a relevant test for whether they belong in
13 the market.

14 In fact, the testimony that I cite in my report
15 from Benco and the other respondents actually talk
16 about competing directly with limited-service
17 distributors at least in some local markets. Benco
18 itself actually testified that Darby and Safco are a
19 significant competitor to them in many local markets.

20 Another thing I would point out is
21 Dr. Marshall, in his own analysis of Smile Source, he
22 actually showed Darby had over 24 percent of the
23 purchases made by active Smile Source customers in
24 2016, and yet he wants to say but they're not in the
25 relevant product market. I don't understand how those

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1 two things are consistent.

2 Q. If we could turn back to Dr. Marshall's report
3 for a moment at tab 5 in your binder. This is CX 7100.
4 And let me ask you to turn, please, to page 7100-076.

5 And let me direct your attention to heading
6 III.A.3 on that page.

7 A. I'm sorry. One second.

8 Okay. Thank you.

9 Q. And heading III.A.3 reads, "Empirical evidence
10 shows that mail-order/telesales/Internet purchasing was
11 not in the relevant product market."

12 Do you see that?

13 A. Yes.

14 Q. Oh, and I should -- by the way, Dr. Johnson, I
15 should also point out that the copy of the -- of
16 Dr. Marshall's report that you are looking at contains
17 some passages with yellow highlighting. Those passages
18 have been designated in camera and should not be
19 revealed in this session. The portions of the report
20 that I'll be referring to are all in the public
21 session, but I do please ask you, when you're looking
22 at that, please do not reveal in this session any of
23 the materials that have been highlighted in yellow in
24 that copy.

25 A. I will not.

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1 Q. Thank you.

2 So looking under heading III.A.3 to subheading
3 III.A.3.a, you see that that reads, "Evidence shows
4 that customers almost never exclusively purchase from
5 Darby."

6 Do you see that?

7 A. Yes.

8 Q. And then if you could turn two pages further on
9 to CX 7100-078.

10 A. Okay.

11 Q. And at the top of that page is subheading
12 III.A.3.b identifying Benco's entry into
13 Southern California. And in paragraph 196 immediately
14 under that subheading, the final sentence of that
15 paragraph reads, "The results of that test support the
16 conclusion that the candidate market is a relevant
17 product market."

18 Do you see that?

19 A. I do.

20 Q. And these I'll refer to what I believe
21 Dr. Marshall referred to as his SSNIP tests.

22 Now, do you agree with these assertions of
23 Dr. Marshall based on his SSNIP tests?

24 A. No.

25 Q. Why not?

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1 A. Well, I've prepared a slide on this as well
2 that just summarizes.

3 So in my report I speak to the issues with
4 both of these analyses, and so for the sake of trying
5 to be efficient, the first set of critiques for the
6 most part have to deal with both of his analyses, both
7 the Darby -- what I'll call the Darby analysis and
8 what I'll call the Benco Southern California analysis.

9 First is his Darby analysis simply says small
10 shares or infrequent purchases by a subset of dentists
11 is enough to rule out that customers do not view
12 limited-service distributors as a substitute. However,
13 that's not a relevant SSNIP test.

14 Further, he ignores Benco's competition with
15 Darby and all of the other limited-service
16 distributors. One of the other things that I cite in
17 my report is testimony from Benco that they use
18 selective price overrides, discounting, to make
19 Benco's prices competitive with limited-service
20 distributors. Benco is very concerned about
21 competition from Darby.

22 Now, the second set of bullets here have to do
23 more directly with the Southern California Benco
24 example. Here, what Dr. Marshall has done is an
25 analysis where he improperly extends certain counties

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1 in Southern California to all local geographic
2 markets.

3 Now, when I say "selected counties" what I mean
4 is Dr. Marshall put forward an analysis for
5 Southern California in which he excluded Los Angeles.
6 Well, how can that be a proper test of anything about a
7 Southern California local market?

8 Then he says, Well, based on Benco's entry, I
9 can somehow determine that this is a relevant test.
10 That just doesn't make economic sense.

11 Again, the other part of this that he ignores
12 was Darby increasing their sales to Smile Source
13 customers from 2 percent to 24 percent in his own case
14 studies.

15 So based on all of these observations, the
16 conclusion from Dr. Marshall's SSNIP test doesn't make
17 sense as a matter of economics. It's inconsistent
18 with the other economic evidence that he did not
19 assess or did not consider in putting forward that
20 conclusion.

21 Q. Dr. Johnson, just so the record is clear,
22 referring to your slide 14 -- this is on
23 RXD 01015-014 -- can you please explain precisely which
24 of the bullet points there refer to both of
25 Dr. Marshall's SSNIP tests and which of the bullet

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1 points refer specifically to the Southern California
2 SSNIP test?

3 A. The first bullet point refers to both.

4 The second bullet point refers to -- is
5 relevant to both.

6 The fourth bullet point is relevant to Darby
7 only.

8 Q. Now, what effect, if any, do you believe that
9 Dr. Marshall's exclusion of direct sale manufacturers,
10 non-full-service distributors and online distributors
11 have on his overall conclusions?

12 A. Once again, if what we're doing as an antitrust
13 economist is trying to assess certain conduct and
14 we're going to define a relevant antitrust product
15 market, if you don't define the market properly, then
16 all of your subsequent analyses are in error, so his
17 analysis of -- any analysis based on market shares,
18 market characteristics, he hasn't assessed them in the
19 properly defined relevant market.

20 Any assessment of unilateral interest of Benco
21 or for any other distributor, since it's based on
22 shares, if he doesn't define a relevant market
23 correctly, you can't draw any meaningful conclusions.

24 Any assessment of competitive impact, if you
25 don't show what the relevant market is and you haven't

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1 accounted for the proper competitive constraints, how
2 can you possibly put forward an opinion that something
3 had an anticompetitive impact or not if you don't have
4 the competitive constraints right.

5 So basically all of his subsequent opinions are
6 contaminated by his failure to define the product
7 markets correctly.

8 Q. Dr. Johnson, let's turn next if we could to the
9 issue of equipment and consumables.

10 Now, how, if at all, did Dr. Marshall
11 distinguish between distribution of equipment and
12 distribution of consumables in his relevant product
13 market analysis?

14 A. Dr. Marshall treats them as in the same
15 relevant product market. He says they just -- they
16 can be treated as if it's one product, one product
17 market.

18 Q. And do you agree that distribution of
19 equipment and distribution of consumables should be
20 lumped together in a single relevant product market?

21 A. No, I do not.

22 Q. Why not?

23 A. So when we think about this issue with respect
24 to combining products in the same market, one of the
25 things you want to think about first of all is, well,

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1 what are the competitive conditions that shape each of
2 them.

3 As I explained before, and I don't want to be
4 repetitious, but just to be clear, consumables are
5 those daily products, the products a dentist uses in
6 servicing their clients each day: the drill bits, the
7 cotton swabs, the anesthetics, the fillings, the
8 fluoride. Right? We need those more frequently, so
9 dentists buy them more frequently, and they have to
10 replenish them, and they need them quickly.

11 Dental equipment is larger and obviously
12 purchased less frequently. You don't buy a new chair
13 every week for your -- unless you're a really picky
14 dentist I guess, you don't buy new chairs and new x-ray
15 equipment every single day. They're occasional
16 purchases. They're more expensive. They're larger.
17 They can't be shipped as far, as it turns out.

18 So think about then what is the implications of
19 the differences in those products. Well, the types of
20 distribution required requires different skills in
21 different sales reps. The sales rep that's going to
22 sell you fluoride or cotton or things for your daily is
23 not going to be the same person that's going to give
24 you all the information on your new x-ray machine that
25 you're trying to buy. It's a different skill set,

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1 right.

2 There's actually different economic models of
3 pricing within Benco for its products, in terms of the
4 sales reps, in terms of the pricing categories, and
5 there's a lot of evidence in my expert report about
6 differences between equipment and sales at Benco.

7 In addition -- and again, I did this in my
8 prior expert report which I incorporated by reference
9 and cited -- equipment products have a much more local
10 distribution pattern. Well, that's not surprising.
11 If I'm going to ship a giant chair, it's not as easy to
12 get it across the country as if I'm going to ship
13 something else like, you know, a bottle of an
14 anesthetic or something like that.

15 And then finally, it's probably not
16 surprising, given where we started this discussion,
17 that the sources of supply and particularly the
18 competition Benco faces will vary across consumables
19 and equipment. The companies that make the
20 consumables are often not the same manufacturers of
21 the equipment.

22 So for all those reasons, in order for these
23 to even plausibly be in the same relevant market,
24 giving Dr. Marshall the benefit of the doubt, it would
25 have to be to have the same competitive conditions, and

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1 even then that's not clear. But given they don't have
2 the same competitive conditions, there's no way
3 consumables and equipment can be in the same relevant
4 product market.

5 Q. Now, what, if any, is the effect on
6 Dr. Marshall's conclusions of his failure to
7 distinguish between different -- excuse me -- between
8 the distribution of equipment and the distribution of
9 consumables?

10 A. Well, once again, if in assessing the effect of
11 the alleged antitrust conduct, if you haven't properly
12 accounted for all the competitive constraints, meaning
13 you don't have the market definition correct, then
14 each of the subsequent analyses, the industry
15 conditions collusive -- conducive to collusion, the
16 unilateral self-interest calculations based on shares,
17 the competitive impact calculations, all of them are
18 unreliable.

19 Q. So wrapping up the issue of the relevant
20 product market then, considering collectively
21 Dr. Marshall's failure to include direct sale
22 manufacturers, his failure to include non-full-service
23 distributors and online distributors, his errors in
24 the SSNIP tests and the failure to distinguish between
25 consumables and equipment, what is the overall effect

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1 of those errors on Dr. Marshall's conclusions?

2 A. First, his geographic and product markets are
3 simply wrong as a matter of economics and inconsistent
4 with the economic evidence in this case, and as a
5 result, each of his subsequent analyses are also in
6 error because without a proper relevant market each of
7 the subsequent economic analyses are also rendered
8 unreliable.

9 Q. Let's turn next, please, to the issue of
10 market structure and whether the market structure is
11 conducive to collusion. And if we could start by
12 turning back to Dr. Marshall's report, if we could pull
13 up CX 7100, please. And in Dr. Marshall's report let
14 me direct your attention to page 7100-011 and
15 specifically to paragraph 12 on that page.

16 Now, the first sentence of that paragraph
17 reads, "Third, the industry structure was conducive to
18 effective collusion against dental buying groups."

19 Do you see that?

20 A. I do.

21 Q. And if I could ask you to turn also in his
22 report, please, to page CX 7100-111.

23 A. Okay.

24 Q. And let me direct your attention specifically
25 to paragraph 281.

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1 That paragraph reads, "The structure of the
2 market for the full line of dental products and
3 services sold through full-service distributors to
4 independent dentists was conducive to effective
5 collusion against dental buying groups for several
6 reasons."

7 Do you see that?

8 A. I do.

9 Q. Do you agree with those conclusions?

10 A. No, I do not.

11 Q. And before I follow up on that and ask you why,
12 I'd like to set the stage and ask first, what can
13 economics tell us about whether an industry is
14 conducive to collusion?

15 A. So as an economist, you know, we have to be
16 realistic about what it is we can properly opine on
17 and what is beyond our area of expertise. And with
18 respect to what I call conspiratology, the notion that
19 an economist can offer an opinion about the existence
20 of a conspiracy or even conduciveness to collusion,
21 that is quite outside of the mainstream of what an
22 economist can do.

23 So first of all, the idea that you can look at
24 some paradigm of the nature that Dr. Marshall has put
25 forward here, some set of characteristics and say,

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1 well, because these characteristics exist, this
2 industry is conducive to collusion, that really
3 does -- is not very helpful as a matter of, you know --
4 I don't know how it's actually helpful to the court.
5 That would be the court's decision.

6 But as a practical matter, the reason is, the
7 very set of characteristics that he's put forward as
8 conducive to collusion are also the very same set of
9 characteristics that would undermine the ability of a
10 cartel to perform at all.

11 So as a practical matter, just as a matter of
12 economics, there's somewhat limited utility to this
13 paradigm of saying this is likely to be an industry of
14 collusion or not. There aren't bright lines. There
15 aren't objective ways to determine that, so that's
16 first.

17 But then, second, and what I've opined on here
18 in addition is, even if we accepted his paradigm as a
19 correct economic analysis, the industry
20 characteristics that he's put forward don't apply
21 across the board in the dental product distribution
22 industry.

23 Q. Let me follow up particularly on the second
24 point. If we could set aside for the moment the
25 overall premise of whether Dr. Marshall's exercise is

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1 useful and noting the limits of what economics can tell
2 us about the question, can you please explain why you
3 disagree with the specific elements that Dr. Marshall's
4 analysis focuses on with respect to factors that he
5 believes are conducive to collusion.

6 A. Yes. I've prepared a slide on this as well if
7 I could.

8 So, again, let's think about the exercises.
9 Dr. Marshall has a paradigm. Here's a set of
10 characteristics that exist across the board in dental
11 product distribution, and because all these
12 characteristics exist, this industry is ripe for
13 collusion.

14 But he's got the characteristics wrong with
15 respect to certain elements, right.

16 First, because he's ignored important
17 competitive constraints, because he ignores
18 direct-selling manufacturers, because he ignores
19 partial line distributors, because he ignores
20 mail-order distributors, because he combines
21 consumables and equipment in the same market, he has
22 no ability to actually tell us whether or not the
23 market structure actually would be conducive to
24 collusion.

25 The idea behind these characteristics is that a

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1 given individual, a given dentist, would not have the
2 ability to turn away from someone that was
3 participating in a cartel or some kind of collusive
4 agreement, so if you exclude large swaths of potential
5 competitive constraints, how can you draw a meaningful
6 conclusion about likelihood of collusion. You can't.

7 Second -- I'm sorry.

8 Q. Go ahead. Continue.

9 A. Second, he also talks about market
10 concentration and the high -- the relatively highly
11 market -- market shares in this industry. But once
12 again, without properly defining which geography and
13 which products, what does it mean to say something has
14 a high market concentration.

15 There are certain areas, for example, where
16 Benco was very small. In Seattle they had half
17 a percent, right. But because he didn't define a
18 relevant geographic market, he doesn't know whether
19 these are high or low across the board or in any
20 specific area. He just hasn't done a complete
21 assessment.

22 In addition, he talks about barriers to entry.
23 It's a hard industry to get into. Well, that ignores
24 the fact that at least in certain geographies Benco has
25 successfully expanded. Now, I understand their

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1 expansion was over twenty years, but not their
2 expansion in Seattle, not their expansion in
3 Los Angeles. That expansion occurred in the time
4 period we're studying here, so the very notion that
5 there's high barriers to entry is somewhat incomplete
6 given Benco's own experience.

7 And I think last he's ignored the competitive
8 positioning of Benco in the assessment of distributors'
9 relative bargaining power with the manufacturers. And
10 this is particularly important because if the people at
11 the top of my supply chain -- we started with the
12 consumables and the equipment manufacturers -- can
13 actually apply pressure to the distributors, then that
14 would be another factor that would cut against the
15 likelihood of being in a cartel.

16 Q. Let's break that down into pieces if we could.
17 To start, you state that Dr. Marshall's asserted
18 relevant markets ignore important competitive
19 constraints. What do you mean by that?

20 A. Okay. So, once again, these are the very same
21 set of issues with respect to relevant markets. To the
22 extent direct-selling manufacturers constrain comp- --
23 or provide competition, non-full-service distributors
24 provide competition, there's local and regional
25 distributors that provide competition, the idea that

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1 the structure is conducive to collusion is undermined.
2 He can't just simply say, without defining a proper
3 market and accounting for all of the competitive
4 constraints, that somehow the market structure implies
5 this is ripe for collusion.

6 Q. Now, what is the significance of Dr. Marshall's
7 error of lumping together Benco with larger shares of
8 Patterson and Schein?

9 A. I believe I have another slide.

10 Okay. So with respect to market
11 concentration, he said there's sort of two key points.
12 First, if you don't define a relevant market, what does
13 it mean to be a concentrated industry, what does that
14 mean. You have to take account of the competitive
15 dynamics.

16 Benco at least is smaller than the other
17 respondents, and Benco doesn't have a significant sale
18 share in all of the markets. I think I said before
19 Seattle about half a percent in 2014.

20 It also ignores the fact that as you go in
21 different local areas, other distributors have a larger
22 presence. Darby might have a larger presence.
23 Burkhart might have a larger presence. That would
24 change any calculation of relevant market
25 concentration, and that's not something that

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1 Dr. Marshall took into account in his characterization
2 of the industry characteristics.

3 Q. You also stated that Dr. Marshall's assertions
4 regarding barriers to entry ignored Benco's own
5 experiences. What did you mean by that?

6 A. Okay. So if we could go to the next slide.

7 So this map I think is instructive because this
8 is actually a Benco Dental products
9 ordinary-course-of-business document that I cite in my
10 expert report. And what this shows is their view of
11 the various regions across the country.

12 Now, although it is not always the case that
13 the way a company views geographies necessarily exactly
14 squares with what a true antitrust geographic market
15 definition would be, this clearly shows each of the
16 geographic localities that Benco considers the range of
17 competition.

18 And one of the things Benco systematically did
19 is they went from the Pennsylvania area, across the
20 country, area by area. They acquired sales
21 relationships, they enhanced their distribution, and
22 they went into different areas.

23 So in the period we care about particularly for
24 this case, this is when Benco did expand into the
25 northwest, into California.

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1 So as they expanded, that is sort of further
2 evidence that within a given locality there may not be
3 quite the barriers to entry that Dr. Marshall
4 characterizes broadly. That again cuts against his
5 paradigm that because there's high barriers to entry,
6 the industry is conducive to collusion.

7 Q. You also stated that Dr. Marshall's conclusion
8 that manufacturers lack bargaining power failed to
9 consider Benco's relative position. Can you please
10 explain that.

11 A. Yeah. I think this is important because,
12 you know, Dr. Marshall's paradigm on manufacturers
13 says, look, the distributors are so important that
14 there can be no pushback from the manufacturers with
15 respect to any ability to constrain any, quote-unquote,
16 coordinated activity. But in fact we know that's not
17 true. There's ample economic evidence that I cite in
18 my report about manufacturers pushing back on
19 distribution.

20 One part of this in fact, the other
21 respondents have exclusive agreements with
22 manufacturers. That is a policy that Benco doesn't
23 have in general. But Benco represents a very small
24 portion of many manufacturers' sales. They are just a
25 smaller distributor than some of the others in the

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1 industry. I have an analysis of the data in my prior
2 reports that I cite that shows that. All right?

3 But again, let's go to the real-world
4 experience. The actual negotiating experience
5 demonstrates that many manufacturers have bargaining
6 power with Benco.

7 A-dec was a very -- was I believe a chair
8 manufacturer who pushed hard on Benco, and ultimately
9 Benco lost that business. I tell that story and cite
10 that evidence in my expert report where I talk about
11 the A-dec experience. And there, that was costly to
12 Benco, but it is a demonstration of the fact that the
13 manufacturer had significant bargaining power in that
14 circumstance.

15 One other point I make in my report is that
16 manufacturers of key brands or unique products are also
17 viewed as having higher bargaining power. People know
18 about Dentsply false teeth, for example, they know that
19 brand, so there are certain of these large
20 manufacturers that do have brand recognition, and that
21 also is going to require or allow them to push back on
22 distributors.

23 So for all of these reasons, this
24 characteristic or this idea that manufacturer
25 bargaining power could not discipline the respondents

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1 from allegedly colluding is just not consistent with
2 the economic evidence.

3 Q. Now, taking these four aspects of
4 Dr. Marshall's analysis that you've just described
5 together, the failure to properly define the market,
6 lumping Benco's shares together with others,
7 exaggerating the barriers to entry, and underestimating
8 the bargaining power of manufacturers, what's the
9 collective significance of these errors on
10 Dr. Marshall's conclusion that the structure of the
11 relevant market is conducive to collusion?

12 A. Well, as I explained before, it is not a
13 proper economic analysis to try to draw these fine
14 lines and interpret collusion based on economic
15 evidence in isolation. But even if I accepted his
16 paradigm as making it more likely if these conditions
17 existed, the conditions don't exist uniformly in such a
18 way that he can draw that conclusion.

19 Q. Now, what is the impact on Dr. Marshall's
20 overall conclusions of his erroneous assertion that the
21 industry is susceptible to collusion?

22 A. Well, if he has failed to define the relevant
23 product and geographic market and his industry
24 characteristics are not an appropriate economic
25 analysis, what he's left with is basically his

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1 unilateral self-interest analysis and his
2 interpretation of communications. That's what's left.

3 Q. Let's turn next then if we could to the issue
4 of Benco's unilateral self-interest.

5 If I could ask you to turn back to
6 Dr. Marshall's report in your binder, and we'll pull up
7 CX 7100. And let me direct your attention to
8 page 7100-011.

9 And let me ask you to look specifically at
10 paragraph 13.

11 The first sentence of that paragraph reads,
12 "Fourth, Respondents' conduct towards dental buying
13 groups was inconsistent with acting in their own
14 unilateral economic self-interest and consistent with
15 coordinated action."

16 Do you see that?

17 A. I do.

18 Q. And let me ask you to turn also in that same
19 document to page 7100-151 and specifically to
20 paragraph 352 on that page.

21 Picking up at the end of the first line in that
22 paragraph, it reads, "I conclude that Schein, Patterson
23 and Benco's conduct of not bidding for buying group
24 business was inconsistent with acting in their own
25 unilateral economic self-interest."

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1 Do you see that?

2 A. I do.

3 Q. Do you agree with those conclusions of
4 Dr. Marshall?

5 A. No.

6 Q. Why not?

7 A. Well, I analyzed Dr. Marshall's assessment of
8 buying groups, and in particularly this part I focus on
9 is his calculations on what would have been in -- or
10 his claim that partnering with buying groups would have
11 been in the unilateral self-interest of Benco and the
12 other respondents.

13 And these analyses are, first, relying on a
14 series of unsupported assumptions, which just simply
15 undermine their utility. They rely on these flawed and
16 misleading studies regarding the alleged profitability
17 of buying groups. They also fail to consider Benco's
18 opportunity cost.

19 And once again, these studies are very
20 divorced from the real-world realities of how the
21 dental product distribution business works, and this
22 is one of the critical errors he made in these
23 analyses.

24 And then lastly, he also relies on a second
25 characterization of what's called a structural break in

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1 Benco's behavior, and yet not only is that also an
2 improper analysis, but it's actually, again, taking his
3 paradigm as given, it's just not consistent with the
4 economic evidence.

5 Q. Let me start by asking, what do you understand
6 the reference to a company's value proposition?

7 A. Okay. So in a general sense, as an economist,
8 when we talk about value proposition, what we mean is
9 it's the way that a given company goes to the market,
10 what is it that they're selling to their customers in
11 terms of what's the -- what's the value added that they
12 can receive, so is it because we're known for having
13 the lowest price, is it because we're known for having
14 the highest customer service, is it because we're known
15 for having the highest quality product, is it something
16 else.

17 Every company goes to the market, they're
18 trying to sell a product, and how they sell that
19 product, what it is they are telling their customers,
20 here's the value we bring to you, that's the broad
21 construct of a value proposition in economics.

22 Q. Now, during the time period from 2011 to 2015,
23 what do you understand Benco's value proposition to
24 have been?

25 A. Okay. So I prepared a slide on this.

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1 So based on my research on Benco, Benco's
2 value proposition was to offer customers the best
3 value, better than its competitors, but not only
4 competing on price.

5 So they have a very high-touch sales model,
6 and the entire focus has been what is it we can do to
7 sort of get to our customers and provide them the best
8 possible customer experience.

9 So Benco has these territory sales
10 representatives. They're trained. They go out. They
11 really want to develop these one-on-one relationships
12 with the customers. That's part of what they bring to
13 the table. What they're selling their customers on is
14 the idea that if you work with Benco, you get your
15 needs met, you know who your sales rep is, you know we
16 can help you assess how to make your dental practice
17 better.

18 Now, part of that is their investment in their
19 sales reps on the consumables products, their equipment
20 specialists on the equipment side, but also part of
21 that there's been other investments.

22 One of the things Benco did is they have these
23 CenterPoint showrooms. I actually went to a
24 CenterPoint showroom in Pennsylvania at Benco's
25 headquarters, and you know, the colloquial term they

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1 use is this is the dental Disney World. But what it
2 is, it is a series of dental offices that they mock up
3 where dentists can come and tour this facility and try
4 out different chairs and different equipment and move
5 the equipment and work with the architect to sort of
6 like, okay, what would be the right configuration.
7 There were kids' dental offices at this giant facility,
8 x-ray machines.

9 So that's one part of it. That's the ties.
10 That's a good example of how they're really trying to
11 serve their customer.

12 They also have invested extensively in their
13 distribution network. That's probably how they've done
14 their regional expansion.

15 And they've also made an investment in
16 electronic purchasing channels, including one
17 particular, Peerless, which is one of their
18 purchasing -- their sales software, which allows for
19 more efficient ordering.

20 So Benco, their approach to this particular
21 industry: high-touch sales model, put the customer
22 first, even if that means they don't always have the
23 lowest price.

24 Q. Are you familiar with the term "dental service
25 organization" or "DSO"?

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1 A. Yes, I am.

2 Q. In your understanding, what is a DSO?

3 A. Okay. Well, I did prepare a slide on this as
4 well, but "DSO" stands for dental service organization.
5 I think of it as corporate dentistry.

6 So what is corporate dentistry? I'm talking
7 about Bright Smiles, was the one that I believe in the
8 D.C. area I've seen. But basically that's groups of
9 dentists under one corporate umbrella where there is
10 centralized decision makers, centralized purchasing
11 agents.

12 They can agree to volume commitments. They can
13 agree to specific market baskets of products, and as a
14 result, that leads to lower costs for the
15 manufacturers. If you've got a hundred dentists in one
16 location and one person is ordering for them, you can
17 place larger consolidated orders, which reduces
18 shipping costs.

19 And also DSOs order electronically instead of
20 through a sales representative, which also reduces
21 selling costs.

22 So the way I think of the DSOs are these large
23 corporate dentists that have centralized
24 decision-making to get their dental products.

25 Q. In your understanding, did Benco do business

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1 with DSOs during the 2011 to 2015 time period?

2 A. Yes, they did.

3 Q. Now, based on your economic understanding, why
4 did it make economic sense for Benco to do business
5 with DSOs?

6 A. Okay. So part of it has to do with the fact
7 that the DSOs also fit into the value proposition but
8 allow for certain cost savings.

9 So because it is the fact that you have all
10 these dentists in one location and particularly
11 centralized decision-making, those DSOs can commit to
12 Benco, we're going to buy this much volume, we're going
13 to buy these specific products from you.

14 When they commit to those specific products,
15 that's what allows Benco to go negotiate with the
16 manufacturers upstream and say, Oh, we can get -- we
17 can guarantee you this volume, so you should give us a
18 discount. Right.

19 Because they can place these consolidated
20 orders, it does reduce the shipping costs.

21 And again, because there's electronic ordering,
22 you don't need a hundred sales reps to service the
23 hundred dentists, it can be a much, much smaller sales
24 force with respect to the DSOs.

25 Q. Now, what do you understand Benco's policy

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1 regarding buying groups to have been between 2011 and
2 2015?

3 A. Well, I also prepared a slide on this, but my
4 understanding of Benco's policy is they did not work
5 with buying groups.

6 Q. And what do you understand Benco's business
7 rationale for that policy to have been?

8 A. Okay. So Benco's business rationale for the
9 buying groups was they didn't work with them for the
10 following economic reasons.

11 First, they did not believe buying groups
12 could ensure compliance of their members.

13 What does "compliance" mean? Well, I think
14 this is where the contrast with the DSOs actually is
15 really helpful. They couldn't allow or they couldn't
16 get guarantees that buying group members would
17 purchase -- would change their purchasing behavior such
18 that they would guarantee volume. They just couldn't
19 do that. They couldn't guarantee that they would buy
20 from Benco at all, unlike the DSO that could make
21 commitments.

22 Benco could not rely on the buying groups to
23 lower Benco's cost to serve.

24 For example, buying groups still have to ship
25 to all those dentists no matter where they are.

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1 And most important, Benco didn't need to work
2 with buying groups to grow its business because they
3 had a very successful strategy. Their value
4 proposition was about not having people between Benco
5 and their customer, and the buying groups would put
6 someone between them. That was a big issue for Benco.

7 So at the end of the day, though, from an
8 economic perspective, if you can't guarantee
9 compliance, if you can't guarantee volume, you can't
10 guarantee that you're going to buy a certain bundle of
11 goods, then what are you giving discounts for, you're
12 not getting anything in return for that, whereas with
13 the DSO model, for example, you had guaranteed volume,
14 you had a guaranteed basket of goods, it would make
15 sense to give pricing there because you can negotiate
16 better pricing from the manufacturers, a simple matter
17 of economics.

18 Q. So how did Dr. Marshall reach his conclusion
19 that Benco acted contrary to its unilateral economic
20 self-interest?

21 A. Well, Dr. Marshall did a series of calculations
22 looking at five examples related to two buying groups,
23 Kois and Smile Source.

24 Q. Now, Dr. Marshall concludes that Burkhart
25 gained share following its agreement with Kois buying

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1 group as well as following its agreement with
2 Smile Source buying group.

3 Why do you disagree with his conclusion that
4 this shows that buying groups can drive volume?

5 A. So -- well, first, the ex post observation that
6 somehow share increased for Burkhart doesn't tell us
7 anything about what Benco could have relied upon in
8 making their business decision before partnering with a
9 buying group. Right?

10 In fact, Kois and Smile Source both acknowledge
11 in their testimony that they could not require their
12 members to purchase from a specific supplier. And when
13 you look at the data, you see Kois buying group only
14 purchased less than half their dental products from
15 Burkhart. If you look at Smile Source, they purchased
16 from six different distributors in 2016.

17 So the notion that a buying group could be
18 relied upon or allowed to enforce compliance, that just
19 doesn't square with the actual economics of what
20 happened.

21 Q. Why isn't it enough for buying groups simply to
22 produce some amount of marginal volume?

23 A. Well, there's several reasons that's not
24 enough.

25 First, let's think about the economics. Benco

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1 has a high-touch, sales representative,
2 customer-oriented approach. Buying groups, without
3 being able to drive compliance, without being able to
4 drive a certain share of product, without guaranteeing
5 purchases of certain products so those negotiations
6 could happen with the manufacturers, without any
7 consolidated shipping, all of those things mean it
8 wouldn't lower Benco's costs to serve them, so
9 essentially you're asking for discounts and you're not
10 getting any of the benefits that make business sense
11 for why you would give the discounts at all.

12 Q. Even though buying groups cannot guarantee
13 volume and do not permit a distributor to reduce costs,
14 Dr. Marshall concluded -- and here I'm referring back
15 to Dr. Marshall's report at CX 7100-151 at his
16 paragraph 352 -- Dr. Marshall concluded that it is,
17 quote, not bidding for buying groups was inconsistent
18 with Benco acting in its own unilateral economic
19 self-interest.

20 Do you see that?

21 A. I do.

22 Q. And do you agree with that conclusion?

23 A. No, I do not.

24 Q. Why not?

25 A. I have a slide if we could advance, please.

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1 Okay. So, first, let's start with the fact
2 that Dr. Marshall in those studies, out of all of the
3 buying groups that he purportedly has in his report, he
4 only studies five examples. And it's actually only
5 two. It's Kois and Smile Source.

6 So first of all, it's just how can you extend
7 or determine anything meaningful from looking at these
8 two examples. But even there, taking it at its face
9 value, there are several unsupported assumptions
10 regarding sales shares and margins.

11 He has not causally tied the changes in shares
12 or profitability to buying groups versus any other
13 things that were going on at the same time.

14 His assessment of Benco ignores the
15 opportunity cost to Benco of working with buying
16 groups.

17 He's also failed to account for local
18 geographic markets and other competitive constraints.

19 And he's failed to control for any other
20 economic factors that would have changed, for example,
21 between 2011 and 2016 that could have also driven his
22 results.

23 Q. Let's take those one at a time if we could.

24 First, you state that Dr. Marshall's analysis
25 is based on a number of unsupported assumptions. Can

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1 you please explain what you mean by that.

2 A. Yes.

3 So, first, what Dr. Marshall has done is he
4 takes his experience of Smile Source dentists or Kois
5 dentists and he tries to extend based on sales shares
6 and profit margins what he says what was the potential
7 business that Benco or one of the other respondents
8 could have gained or lost basically as a result of
9 partnering with a buying group.

10 But in doing those calculations, first, he
11 assumes the entirety of the changes in sales shares
12 are due to partnering with a buying group and nothing
13 else, so no assessment of anything else that would have
14 changed the behavior or any reason why any of those
15 dentists bought more product from one -- from one of
16 the distributors versus another.

17 He also assumes no other economic factors would
18 change sale shares. In other words, nothing else
19 changed during those five-year periods in
20 Dr. Marshall's analysis.

21 I think he compounds the error then because his
22 study, and particularly with respect to Benco -- and
23 potentially other respondents, too, but I studied
24 Benco -- the baseline-period margin, that first thing
25 he's going to say this represents how much you were

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1 making before, he assumed that the margin for the
2 limited number of dentists in that group represents
3 the profitability trade-offs Benco was actually
4 facing.

5 And his treatment-period margin, which is,
6 quote-unquote, what would have happened with a buying
7 group, is also for a limited set of buying group
8 customers and that somehow that's representative of the
9 profitability Benco could have earned.

10 But none of those are realistic assumptions.
11 And at the end of the day, the sum total of that is not
12 only can he not tie these calculations to buying
13 groups, but he's completely ignored the part of the
14 story which is what else could Benco have done that
15 would have been more profitable or more useful with
16 their resources.

17 Q. Let me follow up on that last point you just
18 made. I believe you referred earlier to the
19 opportunity cost of buying groups. And can you please
20 explain what you meant by that.

21 A. Yes.

22 So opportunity cost is a common concept in
23 economics, sort of -- sorry -- textbook 101 economics,
24 one of the things you learn early on. And it has to
25 do with the fact that anytime we make any investments,

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1 any choices, any business decisions, it's not just the
2 direct cost, but it's what you're forgoing, the
3 opportunity cost.

4 And here, Dr. Marshall has just simply said,
5 Well, I'm going to look at what, quote-unquote, they
6 have to do with -- what they could gain from looking
7 at the buying group but has completely ignored any
8 trade-offs that occurred in partnering with the buying
9 groups rather than selling to their own customer base.

10 And so here, Dr. Marshall, he's ignored the
11 fact that Benco does have to choose how to use their
12 limited resources to grow profitably.

13 The incremental sales that Dr. Marshall points
14 to is really only a small percentage of the overall
15 sales in nearly all MSAs. I mean, there are some of
16 those MSAs where there's three or four dentists he's
17 talking about, and I'll show some numbers on that in a
18 second.

19 But also Benco had their own successful
20 strategy that allowed them to grow, and Dr. Marshall
21 simply said that, well, doesn't consider that, why
22 would they do something else, they should just look at
23 buying groups.

24 And I think this was all particularly
25 surprising to me because Dr. Marshall in his own

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1 report -- this is a direct quote that he just simply
2 ignored in his unilateral profitability analysis
3 because in another section of his report he said
4 "...any decision to expand geographically, or into
5 services, would likely be related instead to strategic
6 considerations about having success in service the
7 overall business in that new geography or segment, not
8 a particular buying group."

9 That's what he failed to do in his unilateral
10 calculations. That's what's wrong with them.

11 Q. Did Dr. Marshall perform a counterfactual
12 analysis?

13 A. No, he did not. He testified very clearly
14 about that, that he did not do that.

15 Q. Can you please explain how you as an economist
16 understand the concept of a counterfactual analysis.

17 A. Okay. So let's start at the highest level. A
18 counterfactual analysis is kind of what it sounds like,
19 it's counter to fact, so if we're studying something
20 like buying groups, what is the alternative, what is --
21 you know, in antitrust parlance we often think about it
22 as we see an actual world, we try to model a but-for
23 world absent the conduct.

24 There's any number of counterfactuals one could
25 study, but the point is we don't just focus on one

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1 piece of an assessment, we have to focus on, well,
2 what's the alternative, what's the other side. We have
3 to focus on the other side. That's the mistake that
4 Dr. Marshall made.

5 Q. Now, how, if at all, is a counterfactual
6 analysis used in antitrust economics?

7 A. Counterfactual analyses are used every day in
8 antitrust. I mean, when we do analyses of conduct, we
9 are thinking to ourselves, well, what would have
10 happened in the alternative. That's just a -- it's a
11 part of the -- it's kind of the bread and butter of
12 what we do.

13 Q. Now, setting aside the other problems with
14 Dr. Marshall's five studies of doing business with the
15 Kois and Smile Source buying groups and assuming that
16 proper studies could have been structured, would a
17 counterfactual analysis be appropriate for those types
18 of studies?

19 A. Yes.

20 Q. And why is that?

21 A. Well, again, if we're going to try to study any
22 particular phenomenon, we want to know what the
23 alternative world looks like. We want to know what
24 else could have happened. Dr. Marshall just failed to
25 consider that despite his recognition that that would

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1 have been an important strategic consideration.

2 Q. What is the effect of Dr. Marshall's failure to
3 apply a counterfactual analysis on his conclusions in
4 his five studies of doing business with the Kois and
5 Smile Source buying groups?

6 A. Look, I kind of liken it to, you know, you
7 write a book, but you only write the first chapter, and
8 the rest of it is blank. He didn't finish the story,
9 so how can you draw any conclusions from the first
10 chapter. He just has no basis to draw the conclusions
11 he has. He didn't do the full work he needed to do to
12 draw those conclusions.

13 MR. OLIVER: Your Honor, at this time I request
14 we move to an in camera session.

15 JUDGE CHAPPELL: All right. At this time
16 we'll go into in camera session. I'll need to ask
17 those not subject to the protective order to leave the
18 courtroom.

19 (Whereupon, the proceedings were held in
20 in camera session.)

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1 (The following proceedings were held in
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(End of in camera session.)

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1 (The following proceedings continued in
2 public session.)

3 MR. OLIVER: I guess that's it.

4 JUDGE CHAPPELL: I'm not sure. Let's give them
5 a moment to file in.

6 MR. OLIVER: Okay. Very good.

7 (Pause in the proceedings.)

8 BY MR. OLIVER:

9 Q. Dr. Johnson, you also said that Dr. Marshall's
10 conclusions failed to control for other factors. What
11 did you mean by that?

12 A. Okay. So when we as economists approach
13 issues in terms of trying to evaluate or attribute a
14 causation or causality to a given phenomenon, in this
15 case partnering with buying groups, we have to make
16 sure that nothing else was also changing at the same
17 time.

18 So Dr. Marshall has ignored several other
19 contemporaneous factors that would affect both his
20 share calculations and his margin calculations: if
21 product mix across regions changed at all in those
22 years; if product mix over time changed at all; if
23 there was any of those other sources of competition
24 from local distributors, direct manufacturers, that
25 would affect margins; also how did the sales and

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1 margins to the non-buying group dentists change over
2 time.

3 Without doing that analysis, you can't draw a
4 conclusion about what the effects of the buying groups
5 were to Benco or anyone else for that matter.

6 Q. So what's the significance of Dr. Marshall's
7 failure to control for these other factors?

8 A. Well, this is just another independent reason
9 separate from all my other criticisms that
10 Dr. Marshall's analysis is unreliable as a matter of
11 economics.

12 Q. So taking these errors together that you've
13 just described, his reliance on unsupported
14 assumptions, his reliance on five flawed studies and
15 his failure to conduct a counterfactual analysis, as
16 well as his failure to control for other factors,
17 what's the collective significance of these errors on
18 Dr. Marshall's assertion that Benco must have acted
19 pursuant to a conspiracy?

20 A. Look, first of all, an economist cannot opine
21 that the behavior was pursuant to a conspiracy. But
22 further, the analysis doesn't tell us anything about
23 Benco's unilateral self-interest. And as I've shown,
24 it actually was in Benco's unilateral self-interest to
25 not partner with buying groups.

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1 Q. And can you please explain why in your view it
2 was in Benco's unilateral self-interest not to deal
3 with buying groups.

4 A. Well, I think as I explained before, all you
5 have to do is look at what their other business
6 opportunities were and what else they could do. And as
7 we saw, there was growth across each of the MSAs by
8 pursuing a different strategy.

9 So it's not enough to focus in isolation on
10 buying groups alone or some very small subset of buying
11 groups; you have to look at the business rationale more
12 broadly to understand.

13 Q. Let's turn next if we could to the issue of
14 Dr. Marshall's so-called structural break.

15 If we could pull up CX 7100 again. This is
16 Dr. Marshall's report. And let me direct your
17 attention to page 7100-190 and specifically to heading
18 V.E on that page.

19 And that heading reads "Changes in conduct by
20 Schein, Patterson and Benco."

21 Do you see that?

22 A. Yes.

23 Q. And then within that section, let me ask you to
24 turn to page 7100-196.

25 And let me direct your attention to

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1 paragraph 450. And that reads, "I observe a structural
2 break for Benco in late 2015 and early 2016."

3 Do you see that?

4 A. Yes, I do.

5 Q. And then if you look at the following
6 paragraphs, beginning with paragraph 451, you see a
7 discussion of Benco partnering with Cain Watters to
8 launch Elite Dental Alliance.

9 Do you see that?

10 A. Yes.

11 Q. Do you agree with Dr. Marshall's assertion that
12 Benco's partnering with Cain Watters to launch
13 Elite Dental Alliance constituted a structural break?

14 A. No.

15 Q. Why not?

16 A. Okay. So, again, there's two levels at which
17 we need to talk about the structural break analysis or
18 lack of analysis.

19 First let's talk about what a structural break
20 is to an economist. A structural break comes from the
21 concept from the field of econometrics. It's a
22 statistical concept. And what it represents is, when
23 we have data, we look to see if the fundamentals in the
24 data have changed with statistical testing. Okay.
25 It's based on empirical testing. It's not based on

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1 your subjective assessment of a set of characteristics,
2 right.

3 Dr. Marshall did not do any statistical
4 testing. This is just his opinion, subjective
5 opinion, not an objective, measurable test.
6 All right.

7 However, trying to put myself in the position
8 of Dr. Marshall, even if we accepted that he somehow
9 looked at behavior, it turns out he didn't look at the
10 whole story again and didn't actually understand how
11 Elite Dental actually was different than buying groups
12 and therefore would not represent a structural break in
13 terms of their behavior.

14 Q. So just so the record is clear then, in
15 economic terms, what is meant by a structural break?

16 A. Structural break is an econometric phenomenon
17 where you use statistical testing on a model to show
18 whether or not the various factors in the model have
19 changed. And it's often relied on, not to be too
20 technical, what's called a Chow test, a chi-square
21 test. There's specific testing and meaning to that
22 term, and it's not the meaning that Dr. Marshall used
23 it for here.

24 Q. Now, why is that commonly understood economic
25 definition not consistent with the way Dr. Marshall

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1 used the term "structural break"?

2 A. Because the point of the economic definition is
3 for objectivity, we have an objective standard by which
4 to judge whether there's a structural break.

5 What Dr. Marshall did is said, Well, I looked
6 at some characteristics in behavior, and I didn't even
7 do it in a complete fashion, and I've determined
8 that's a structural break. That's just not an
9 appropriate analysis, especially when you ignore the
10 critical factors that would imply your determination is
11 wrong.

12 Q. Well, in your view, does Benco's partnership
13 with Cain Watters to form Elite Dental Alliance
14 represent a structural break as that term is used in
15 economics?

16 A. No. It can't represent a structural break
17 because in fact it doesn't represent a change in
18 economic behavior.

19 Q. Can you please explain what you mean by the
20 fact that it does not represent a change in economic
21 behavior?

22 A. Yeah. I think to do that we have to understand
23 a little bit better what the nature of the
24 Elite Dental Alliance structure was, so if we could go
25 to the next slide, please.

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1 Okay. So Dr. Marshall ignored -- and I believe
2 he testified in this court, because I've read the
3 transcript, that he didn't know about these
4 characteristics of Elite Dental Alliance, which is
5 pretty important if you're going to try to determine
6 whether something represents a change in behavior,
7 right, what made Elite Dental Alliance a unique
8 business opportunity to Benco.

9 First, sales volume. EDA had minimum purchase
10 requirements in order to receive a discount. That
11 addressed Benco's concerns over minimum volume
12 guarantees. You had to buy a certain amount of product
13 in order to qualify for the discount. That's different
14 than a buying group story where you give the discount
15 and hope maybe you'll get the volume.

16 Second, there was additional compliance built
17 into the Elite Dental Alliance business model. The
18 partnership with Cain Watters, which is a financial
19 firm, provided additional encouragement to customers to
20 purchase from Benco during their annual financial
21 counseling. All right.

22 In addition, EDA members were larger practices,
23 in part because of this Cain Watters partnership, that
24 had minimum gross production requirements of
25 \$2 million. That also addressed Benco's cost-to-serve

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1 concerns.

2 And finally, Benco wasn't just a passive side
3 partner, they had -- this was a partnership, so they
4 had some control over the development of the program.
5 They knew they were the exclusive distributor of EDA,
6 so it was very different in structure than sort of the
7 buying group model that Dr. Marshall puts forward and
8 says this represents a change from.

9 Q. Now, how, if at all, do the factors that you
10 just identified relate to Benco's value proposition?

11 A. Well, again, if we think about back to the
12 value proposition, this is -- this starts to address
13 their concerns, right. By having those minimum
14 purchase requirements, they know that they are
15 guaranteeing volume for the discounts they give.
16 They're not just hanging out there giving a discount
17 with the hope that maybe someone will buy if they give
18 it to them. They actually know that.

19 They also know that they have a set of
20 customers with fairly large minimum gross production
21 requirements, and that puts them in a better position
22 for their negotiations with manufacturers, so overall,
23 this is consistent with their value proposition, but it
24 doesn't have the same problems that the buying group
25 model would have for them.

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1 Q. Now, how, if at all, did Dr. Marshall evaluate
2 these specific elements of EDA?

3 A. Dr. Marshall's testimony that I read said he
4 didn't -- he wasn't aware of these elements of EDA, so
5 I don't know how he could have assessed that this
6 represented a structural break if he didn't know the
7 salient features that mattered for the purposes of
8 doing the assessment.

9 Q. Now, with respect to allegations of collusion,
10 what conclusions, if any, can be drawn from Benco's
11 partnership with Cain Watters to form
12 Elite Dental Alliance beginning in 2016?

13 A. Okay. Well, once again, it is inappropriate
14 for an economist to opine about the existence of
15 collusion. That is beyond the scope of what
16 economists can do. It's just not economic science.
17 We're not conspiratologists.

18 But what I can speak to is the fact that the
19 fact that Dr. Marshall somehow is representing that
20 this represents a structural break and that was a
21 change in behavior, he just has it wrong.
22 Elite Dental Alliance was a different type of
23 organization with -- which addressed many of Benco's
24 concerns about the buying group model. That's why
25 this is very distinct and different and why he has it

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1 wrong.

2 Q. Now, what's the significance of all the various
3 errors that you've identified with respect to
4 Dr. Marshall's analysis of Benco's unilateral
5 self-interest, what's the significance of all those
6 errors together on his overall conclusion that Benco
7 must have acted pursuant to a conspiracy?

8 A. As I think I've said a few times, but I guess
9 it's a very important point, an economist is not
10 appropriate to opine on the existence of a conspiracy.
11 That's not what we do. What we can talk about is
12 economic evidence and how that economic evidence is
13 consistent or inconsistent with certain economic
14 behavior.

15 None of Dr. Marshall's analyses could lead you
16 to the conclusion he's led to because for each of them
17 he has it wrong.

18 On the unilateral self-interest piece, by
19 failing to account for the other business
20 opportunities, by failing to understand the difference
21 and the distinct nature of Elite Dental Alliance versus
22 the traditional buying group model, he's completely
23 gone with the wrong conclusion.

24 Once again, he hasn't looked at the totality of
25 the economic evidence in drawing his conclusion. He

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1 did a fairly isolated mathematical calculation that is
2 divorced from the real-world realities of how the
3 dental products distribution industry and particularly
4 how Benco operated their business.

5 MR. OLIVER: Thank you.

6 Your Honor, at this point we'd like to go into
7 our final in camera session, please.

8 JUDGE CHAPPELL: About how long do you think
9 you need?

10 MR. OLIVER: I'm guessing about 15 to
11 20 minutes, Your Honor.

12 JUDGE CHAPPELL: Okay. At this time we'll go
13 back into in camera session. I'll need to ask those
14 subject to the protective order to leave the
15 courtroom.

16 (Whereupon, the proceedings were held in
17 in camera session.)

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(End of in camera session.)

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1 (The following proceedings continued in
2 public session.)

3 JUDGE CHAPPELL: All right. Go ahead.

4 MR. OLIVER: Thank you.

5 BY MR. OLIVER:

6 Q. So, Dr. Johnson, to summarize, what are your
7 overall conclusions with respect to the opinions that
8 Dr. Marshall has offered in this matter?

9 A. So I've prepared this slide to try to capture
10 the full extent of my opinions the best I could in a
11 summary slide.

12 Dr. Marshall's analyses are just fundamentally
13 flawed as a matter of economics, and at each step of
14 the way he makes mistakes that just render them
15 unreliable.

16 He didn't apply his own local geographic
17 markets in the analysis.

18 He combined consumables and equipment in the
19 same product market.

20 He excludes other sources of competition,
21 manufacturer direct sales, non-full-service
22 distributors such as Darby.

23 He relies on a limited sample and erroneous
24 assumptions in his SSNIP tests.

25 For all those reasons, his relevant geographic

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1 markets and product markets are simply wrong. And
2 that, in and of itself, would be enough to invalidate
3 every other analysis that follows, but he made more
4 mistakes.

5 He improperly assessed the market structure
6 because he ignored key economic evidence about actual
7 economic characteristics. And as I said before, even
8 at that, there's some suspect utility in the reliance
9 on industry characteristics to tell us something about
10 likelihood of collusion.

11 His analysis of unilateral self-interest is
12 improper.

13 He has failed to conduct a counterfactual
14 analysis, and he made a series of unsupported
15 assumptions, most important, failing to look at the
16 opportunity cost of Benco's business opportunities
17 instead of partnering with buying groups.

18 He also relied on a flawed assessment of the
19 structural break, which in part is driven by his
20 misunderstanding of the salient features of the
21 Elite Dental Alliance partnership.

22 And finally, he's made unsupported assertions
23 that the conduct resulted in anticompetitive harm.

24 So as a sum total of all of these errors, I
25 find his analysis is not reliable as a matter of

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1 economics, and it surely cannot be used to determine
2 collusion or that it was not in Benco's unilateral
3 self-interest to partner or not partner with buying
4 groups.

5 MR. OLIVER: Your Honor, I have no further
6 questions. I pass the witness.

7 JUDGE CHAPPELL: Will there be any cross?

8 MR. OSTOYICH: Well --

9 MS. FRANCE: Yes, there will be, Your Honor.

10 MR. OSTOYICH: Your Honor, I do have a couple
11 follow-up questions for Dr. Johnson if that's
12 all right.

13 JUDGE CHAPPELL: You have a couple questions.
14 Anybody else on the right side?

15 MR. MUNKITTRICK: No questions for me.

16 MR. OSTOYICH: Just a couple I meant, not
17 literally two.

18 JUDGE CHAPPELL: You have less than five
19 minutes?

20 MR. OSTOYICH: Depending on how quickly I'm
21 allowed to speak, yes.

22 JUDGE CHAPPELL: Let's just do that after the
23 break.

24 We'll reconvene at 12:05.

25 (Recess)

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1 JUDGE CHAPPELL: Okay. We're back on the
2 record.

3 Further direct?

4 MR. OSTOYICH: Yes, Your Honor. Thank you.

5 MS. FRANCE: Objection, Your Honor. It's our
6 understanding that this can only be cross-examination,
7 not direct examination.

8 JUDGE CHAPPELL: Your understanding based on
9 what, Counselor?

10 MS. FRANCE: It's not their witness. It's
11 Benco's witness.

12 JUDGE CHAPPELL: All respondents get to
13 question all witnesses. Overruled. If that's an
14 objection, it's overruled.

15 MR. OSTOYICH: And if you want --

16 JUDGE CHAPPELL: Unless you would like to do
17 your cross on this attorney's questions and then let
18 him ask and then cross on his questions. Do you prefer
19 that?

20 MS. FRANCE: No. That's okay, Your Honor. We
21 can proceed. Thanks.

22 - - - - -

23 DIRECT EXAMINATION

24 BY MR. OSTOYICH:

25 Q. All right. Dr. Johnson, because the judge

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1 asked, I want to ask you about which parts of your
2 opinion may apply beyond just Dr. Marshall's view of
3 Benco but might apply to my client Patterson.

4 A. Okay.

5 Q. Now, if I understood your opinion correctly on
6 relevant product market, your opinion is that
7 Dr. Marshall's relevant product market is economically
8 unreliable because he ignored evidence in the record
9 that as much as 25 percent of the sales of dental
10 equipment and supplies are made direct by manufacturers
11 to dentists.

12 Do I have that right?

13 A. Yes, you do.

14 Q. And does that opinion that he's unreliable
15 because of that, does that apply equally to my client
16 Patterson?

17 A. I believe it would, yes.

18 Q. And your opinion that Dr. Marshall's relevant
19 product market is economically unreliable also is
20 based on your view that he ignored evidence in the
21 record that dental equipment and dental supplies
22 should not necessarily be in the same relevant product
23 market.

24 Do I have that right?

25 A. That --

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1 MS. FRANCE: Objection, Your Honor. This is
2 leading the witness on direct examination.

3 JUDGE CHAPPELL: I would say that technically
4 it's leading, but he's repeating testimony and saying,
5 "Do I have that right?" I'll allow that.

6 MS. FRANCE: Thank you.

7 THE WITNESS: The only -- I called them
8 consumables, but yes, other than that, that's correct.

9 BY MR. OSTOYICH:

10 Q. All right. And does your opinion about
11 Dr. Marshall's relevant product market being
12 economically unreliable also apply equally to my client
13 Patterson in that regard?

14 A. Yes, it does.

15 Q. And then you also had another basis that
16 Dr. Marshall's relevant product market was economically
17 unreliable because he ignored evidence in the record
18 that non-full-service distributors, Safco, Darby and a
19 bunch of other companies, also compete to sell dental
20 equipment and supplies to dentists.

21 Do I have that right?

22 A. Yes, you do.

23 Q. And does that opinion of yours also apply
24 equally to my client Patterson?

25 A. Yes, it would.

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1 Q. Your opinion on Dr. Marshall's geographic
2 market as I understood it was that it was economically
3 unreliable because he failed to ignore evidence in the
4 record of significant differences in each respondent's
5 share in local markets and in the competitive dynamics
6 of each local market around the country.

7 Do I have that right?

8 A. That is correct.

9 Q. And does your opinion apply equally to my
10 client Patterson?

11 A. Yes, that would.

12 Q. And then if I got it right, your opinion is
13 because Dr. Marshall's relevant product market and
14 relevant geographic market are economically unreliable,
15 all of his subsequent opinions are economically
16 unreliable; is that right?

17 A. Yes. That is correct.

18 Q. And would that apply equally, in your view, to
19 a critique of his opinion regarding my client,
20 Patterson?

21 A. To the extent those analyses also include
22 Patterson, yes.

23 Q. Your opinion was that Dr. Marshall was
24 economically unreliable regarding his opinion that the
25 market structure was conducive to collusion.

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1 Do I have that right?

2 A. Yes.

3 Q. Does your opinion apply equally to his view of
4 the market structure with regard to my client,
5 Patterson Company?

6 A. In the sense that when I was talking about
7 market structure I said that he couldn't draw those
8 conclusions based on the set of paradigm conditions,
9 yes. I don't have any specific opinion about
10 Patterson's share versus Benco's share that I know is
11 relevant. Benco's share is what I know about.

12 Q. Your opinion was that Dr. Marshall's
13 competitive effects analysis was also economically
14 reliable -- unreliable.

15 Do I have that right?

16 A. Yes.

17 Q. And does your opinion apply equally to my
18 client Patterson?

19 A. To the extent that I'm saying that the
20 competitive effects analysis is improper because of --
21 because of the assumptions and the various critiques,
22 yes. Obviously, I looked at information about Benco's
23 profit margins, but yes. If it's not valid, it's not
24 valid.

25 Q. Dr. Johnson, you proffered an opinion that

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1 Dr. Marshall's profitability analysis was economically
2 flawed.

3 Do I have that right?

4 A. Yes.

5 Q. Did you read his trial testimony?

6 A. I did look at it. Yes.

7 Q. I asked him a question when he was in your seat
8 up there, and I said, I noticed that your profitability
9 analysis in your report, that section doesn't cite a
10 single academic, peer-reviewed journal or article or
11 publication of any kind that endorses your
12 profitability analysis methodology. Do you remember
13 that?

14 A. I do.

15 Q. And his answer was: You're right, I don't cite
16 any academic, peer-reviewed journals for my opinion in
17 this regard. Do you remember that?

18 A. I do.

19 Q. I'll ask you, Dr. Johnson. Are you aware of
20 any academic, peer-reviewed journal that does analysis
21 and endorses the kind of profitability analysis that
22 Dr. Marshall applied in this case?

23 A. No.

24 Q. You, by my count -- I was keeping a little
25 scratch card up here -- by my count, you said today

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1 more than a dozen times that Dr. Marshall's opinions
2 are economically flawed and unreliable. And you have
3 that in your report as well. Is that fair?

4 A. Yes.

5 Q. What do you mean by those terms? What are you
6 trying to tell us?

7 A. Okay. So as an economist we have an accepted
8 canon of literature, of techniques, of methodologies.
9 Part of the reason why I went to school for all those
10 years, that's what I practice, and so there are
11 standards we apply when we offer economic opinions in
12 this industry.

13 As a professional economist and one who takes
14 my own reputation incredibly seriously, I look at work
15 objectively, and I determine whether or not it's in
16 line with the accepted standards of my profession.

17 And so when I say Dr. Marshall's analyses are
18 unreliable, not consistent with the economic evidence,
19 what I'm saying is he hasn't followed appropriate
20 practice or methods to draw his conclusions, and
21 therefore, it is inappropriate to draw those
22 conclusions as a professional economist.

23 Q. Have you ever heard the phrase "junk science,"
24 Dr. Johnson?

25 A. I have.

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1 Q. Would you say Dr. Marshall's opinions in this
2 case are junk science?

3 A. Look, I think I've been pretty clear about my
4 problems with it. I think, you know, "junk science" is
5 a bit of a legal term that comes from a Daubert
6 standard, but it clearly doesn't meet the accepted
7 scientific practices that we as economists apply.

8 Q. And your opinion in that regard, that
9 Dr. Marshall doesn't meet the accepted scientific
10 principles that economists should apply, that applies
11 equally with his opinion with regard to my client
12 Patterson?

13 A. Yes, it would.

14 MR. OSTOYICH: All right. I have nothing
15 further.

16 MR. MUNKITTRICK: No questions.

17 JUDGE CHAPPELL: Cross?

18 MS. FRANCE: Yes, Your Honor.

19 JUDGE CHAPPELL: Go ahead.

20 MS. FRANCE: Good morning, Your Honor.

21 Jamie France on behalf of complaint counsel.

22 May I approach the witness to hand out the
23 binder of materials?

24 JUDGE CHAPPELL: Yes.

25 (Pause in the proceedings.)

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1 MS. FRANCE: May I proceed, Your Honor?

2 JUDGE CHAPPELL: Go ahead.

3 - - - - -

4 CROSS-EXAMINATION

5 BY MS. FRANCE:

6 Q. Good afternoon, Dr. Johnson.

7 A. Good afternoon.

8 Q. Dr. Johnson, I'd like to take a look at
9 Appendix C of your report. You have it in your binder.
10 We'll put it up on the screen as well. It starts at
11 RX 2834-068.

12 And Appendix C lists the materials you relied
13 on to develop the opinions expressed in your report;
14 correct?

15 A. Yes.

16 Q. And you'll see halfway down the first page is a
17 list of transcripts of testimony in this FTC matter
18 that you relied on to develop your opinions; correct?

19 A. Yes.

20 Q. Out of 46 depositions in this case, you only
21 relied on six?

22 A. Six plus any deposition I cited in my other
23 expert reports.

24 Q. But out of the depositions, the 46 depositions
25 in this case, you only relied on six; correct?

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1 A. Yes.

2 Q. And out of 21 investigational hearings taken in
3 this case, you only relied on five; correct?

4 A. Yes.

5 Q. So out of 67 transcripts of testimony taken in
6 this case brought by the FTC, you only relied on 11?

7 A. Yes. With the one caveat that the part -- if
8 you go up on the screen a little bit, sir, in the
9 initial part, Court Filings, you see under "Expert
10 Report of Dr. Robert C. Marshall and associated
11 turnover," that's meant to incorporate by reference
12 anything he relied upon as well, which is what that
13 means.

14 So beyond that, these are the ones that I
15 called out separately, yes.

16 Q. So of the fact depositions and investigational
17 hearings taken in this case, you listed six here under
18 Testimony Transcripts -- or excuse me -- you listed
19 11 here; correct?

20 A. That is correct.

21 JUDGE CHAPPELL: I just want to make sure the
22 record is clear. You're asking the witness the ones he
23 relied on or the ones he reviewed?

24 MS. FRANCE: So this is his materials relied
25 on list, so I'm asking about the materials he relied

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1 on.

2 JUDGE CHAPPELL: All right.

3 BY MS. FRANCE:

4 Q. So, Dr. Johnson, I did the math, and
5 11 transcripts out of 67 is less than 17 percent.

6 Does that sound right to you?

7 A. Yes.

8 Q. So you only relied on 17 percent of the
9 transcripts in this case; right?

10 A. Well, as I said -- I'm not going to quibble
11 with the numbers -- that and whatever is in the
12 associated turnover of Dr. Marshall, yes.

13 Q. But if there's anything additional in that
14 associated turnover other than what's listed here,
15 that's not listed in your materials relied upon list
16 specifically; right?

17 A. Right. It's whatever is in Dr. Marshall's
18 relied upon materials plus these.

19 Q. So let's look a little more at this list of the
20 testimony transcripts.

21 Two of the transcripts you relied on were those
22 of Chuck Cohen; right?

23 A. Yes.

24 Q. And two of the transcripts you relied on were
25 those of John Kois, Jr.?

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1 A. Yes.

2 Q. And two of the transcripts you relied on were
3 those of Paul Guggenheim?

4 A. Yes.

5 Q. And then two of the transcripts you relied on
6 were those of Trevor Maurer; right?

7 A. That is correct.

8 Q. So that gets this 11 number down to 7; right?

9 A. I don't know how to parse the numbers. I
10 listed them separately because I don't believe they're
11 identical documents. One is an investigative hearing
12 testimony. One is a deposition.

13 So are you saying the number of individuals?

14 Q. Yes, I am.

15 A. Okay. By number of individuals, I count one,
16 two, three, four, five, six, yes, six. I believe
17 that's right.

18 Q. Have you heard of Tim Sullivan?

19 A. I have.

20 Q. He's the former president of Schein?

21 A. Yes.

22 Q. And you're aware that the FTC alleges Benco and
23 Schein conspired in part through communications between
24 Chuck Cohen and Tim Sullivan?

25 A. I read that in Dr. Marshall's report and I

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1 believe in the complaint.

2 Q. And yet you didn't even rely on Mr. Sullivan's
3 deposition transcript in preparing your report; right?

4 A. No, I didn't. Again, it's beyond the purview
5 of an economist to assess communications or be a
6 conspiratologist. That wasn't necessary to offer my
7 opinion.

8 Q. So that wasn't my question.

9 My question was: You didn't even rely on
10 Mr. Sullivan's deposition transcript in preparing your
11 report; right?

12 A. It is not cited in my report. If it's not
13 cited in my report, then it is not a basis for a
14 particular part of my opinion. There's other things in
15 my report I referred Mr. Sullivan in about, but I do
16 not see the deposition here.

17 Q. And apart from Mr. Sullivan's IH transcript,
18 you didn't rely on the testimony of any other Schein
19 witness in this case; right?

20 A. For the purposes of the depositions, that's
21 true. I do believe I cite some other Schein documents
22 and information in the various reports, though.

23 Q. Have you heard of Jeffrey Reece?

24 A. The name sounds familiar, but I couldn't place
25 exactly who that is.

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1 Q. And you didn't rely on Mr. Reece's testimony in
2 preparing your report; right?

3 A. Again, if it's not listed here, I did not rely
4 upon it.

5 JUDGE CHAPPELL: Just so we're clear on the
6 record, since the reports are due long before we're in
7 here, you're asking about testimony. Can you clarify
8 what you mean by "testimony"?

9 MS. FRANCE: Yes. I'm asking --

10 JUDGE CHAPPELL: With the witness.

11 MS. FRANCE: Yes.

12 BY MS. FRANCE:

13 Q. So that we're clear, did you understand my
14 question to mean the testimony that's listed here,
15 either deposition transcripts or IH transcripts?

16 A. Yeah. I had assumed you weren't trying to
17 trick me with other testimony, so I think when I was
18 answering what I meant is I do not see a deposition or
19 an investigative hearing transcript that I relied
20 upon.

21 Q. And Appendix C of your report also lists the
22 deposition transcripts from some prior matters that you
23 say you relied on to prepare your report for this case;
24 right?

25 A. Yes.

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1 Q. And that's on the page ending in -069? Do you
2 see that?

3 A. I do.

4 Q. So let's take a look at that list briefly.

5 It says you relied on the deposition transcript
6 of Frank Nowtash?

7 A. Yes.

8 Q. And Mr. Nowtash is the former owner of
9 Arnold Dental Supply; right?

10 A. Look, I don't from memory recall what all of
11 these people do. It's quite an exhaustive list, so
12 you'll have to represent that to me or I'd have to go
13 through my report and find the footnote where I
14 reference that. I couldn't do that from memory. I'm
15 sorry.

16 Q. So in preparing your report for this case, you
17 relied on the deposition transcript of a witness from a
18 different case and you didn't even commit to memory who
19 he is; is that your testimony?

20 A. My testimony is a little broader than that. I
21 didn't think this was a memory test. I thought I have
22 a very exhaustive expert report. Depositions are only
23 one part of the economic evidence I reviewed in
24 preparing my testimony. But if you're going to ask me
25 from memory to tell you the names of the more than

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1 30 or 40 people whose depositions I did cite, I'm just
2 not going to be able to do that here today.

3 Q. So Mr. Nowtash wasn't deposed in the FTC case;
4 right?

5 A. I don't know that for sure. That's not the
6 deposition I cited. I cited from a prior matter.

7 Q. Right.

8 So you relied on his deposition from a prior
9 matter, but you didn't even bother to find out whether
10 he provided testimony in this case?

11 A. Again, you -- I think it's a little out of
12 context. I cited this because I'm citing to him for a
13 specific proposition in one of my three reports. We
14 can go through the report and I can tell you exactly
15 what it is I looked at. My report is well-supported
16 based on the various things in my reports. That's
17 all.

18 Q. And Mr. Nowtash wasn't alleged to be part of
19 the conspiracy in the FTC case; right?

20 A. I do not recall him being part of a conspiracy
21 allegation in the FTC case, no.

22 Q. And Mr. Nowtash was not listed on any of the
23 parties' initial disclosures in the FTC case; right?

24 A. That, I don't know.

25 Q. And Mr. Nowtash wasn't listed on any of the

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1 parties' witness lists in the FTC case; right?

2 A. I just don't know.

3 Q. In fact, Mr. Nowtash isn't involved in the FTC
4 case at all; right?

5 A. Again, I don't know what you mean. To the
6 extent that I've cited it for an important economic
7 proposition or any economic proposition, at least my
8 approach to expert work is you try to be complete with
9 what it is you're relying upon.

10 So clearly Arnold Dental is something that
11 comes up in some of the discussion. That's the context
12 in which I believe I cited his deposition.

13 Q. But just to be clear, you did cite his
14 deposition from a different case and not this case
15 brought by the FTC; right?

16 A. Again, I think I'm having a little trouble with
17 your question because -- and maybe you're approaching
18 it from as an lawyer and I'm an economist. When I file
19 an expert report and I incorporate by reference my
20 prior reports, they are now part of this case.

21 So if you're talking about my report, this is
22 in my materials relied upon, that's part of this case.
23 If you're saying do I know if there was an FTC
24 deposition versus a deposition in SourceOne versus a
25 deposition in the class case, that, I can't speak to.

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1 Q. Dr. Johnson, in preparing your report for this
2 case, you did not consider evidence of communications
3 between Benco, Schein and Patterson about doing
4 business with buying groups; correct?

5 A. I believe what I testified was it is
6 inappropriate to do so. I read Dr. Marshall's report,
7 and I thought that entire section was completely
8 inappropriate for an economist to opine on.

9 Q. I don't think I got a direct answer to my
10 question, so I'm going to ask you again.

11 In preparing your report for this case, you did
12 not consider evidence of communications between Benco,
13 Schein and Patterson about doing business with buying
14 groups; correct?

15 A. No. Again, I don't think that's a fair
16 characterization.

17 No, I did not assess communications. I read
18 Dr. Marshall's report, and as I say, it's inappropriate
19 to assess communications, so no, it doesn't form a
20 foundation of my opinion. But I didn't ignore it.
21 It's inappropriate economic analysis.

22 Q. Dr. Johnson, in preparing your report for this
23 case, you did not rely on interviews with anyone;
24 right?

25 A. That's not true.

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1 Q. Then did you rely on interviews with someone?

2 A. Yes. In the prior cases, I had interviewed
3 Chuck Cohen, and I've spoken -- I cite that in my
4 reports. And I also interviewed -- I took a tour of
5 the dental showroom, and I also cite that in my prior
6 reports.

7 Q. And Chuck Cohen is the managing director of
8 Benco; right?

9 A. Yes.

10 Q. You don't recall discussing Benco's policy on
11 doing business with buying groups in that interview
12 with Mr. Cohen; correct?

13 A. I don't recall that as I sit here today, no.

14 Q. And you don't recall discussing Benco's
15 strategic plans in that interview with Mr. Cohen;
16 correct?

17 A. That's correct. I believe what I testified is
18 I didn't know what the strategic plans you were
19 referring or Ms. Balbach was referring to in my
20 deposition.

21 Q. So just to be clear, you do not recall
22 discussing Benco's strategic plans in that interview
23 with Mr. Cohen; correct?

24 A. No, I do not.

25 Q. And you interviewed Mr. Cohen sometime between

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1 December 2016 and April 2017; right?

2 A. Yes. Before the SourceOne report.

3 Q. And that was before the FT case -- the FTC even
4 filed this case; right?

5 A. That's true.

6 Q. Dr. Johnson, you did not calculate market
7 shares in a relevant product market in this case;
8 correct?

9 A. That's correct.

10 Q. And you did not calculate market shares in a
11 relevant geographic market in this case either;
12 correct?

13 A. That's correct.

14 Q. You have not offered an opinion about market
15 shares in any relevant market in this case; correct?

16 A. That is correct.

17 Q. You have not offered an opinion on whether
18 there is market power in the dental products industry;
19 correct?

20 A. Correct. I assessed Dr. Marshall's
21 assessment.

22 Q. And you did not do your own assessment of the
23 market power of Benco, Schein and Patterson; correct?

24 A. Again, I just want to be precise. I surely did
25 not put forward an analysis of affirmative market

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1 power, but I definitely offered an opinion about the
2 appropriateness of the market power conclusion from
3 Dr. Marshall.

4 Q. Right. So I didn't ask about Dr. Marshall. I
5 just asked about your affirmative assessment.

6 And you did not assess the market power of
7 Benco, Schein and Patterson; correct?

8 MR. OLIVER: Objection, Your Honor. Asked and
9 answered.

10 JUDGE CHAPPELL: He said, "Correct."
11 Sustained.

12 MS. FRANCE: Thank you, Your Honor.

13 BY MS. FRANCE:

14 Q. Dr. Johnson, in your report, you did not
15 analyze what discounts Benco might be offering to
16 compete for the business of independent dentists who
17 are buying group members; correct?

18 A. Again, I think that's not quite right.

19 First of all, in my reports I do have extensive
20 information about discounting, including many
21 appendices about actual prices paid, especially in the
22 class report, which I did incorporate by reference, so
23 that would bear on that issue. But if you're talking
24 about something beyond that, no.

25 Q. Simone, can we please put up Dr. Johnson's

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1 deposition at page 268 lines 5 through 8.

2 And Dr. Johnson, if you want to look in your
3 binder, it's RX 2965.

4 "QUESTION: So you don't have any analysis of
5 what discounts Benco might be offering to compete for
6 the members of buying groups?

7 "ANSWER: No."

8 A. This is -- there's a question before where I
9 talk at length about purchases by Smile Source, Kois,
10 and clarify that, so I just think you should put the
11 whole testimony up if you're going to quote it because
12 I think that would make it clear.

13 Q. Dr. Johnson, did I read that correctly?

14 A. You read it out of context, but you did read
15 that particular highlighted passage correctly, yes.

16 Q. And was that your testimony under oath at your
17 deposition?

18 A. Yes, it was. Including the paragraph before.

19 Q. Thanks, Simone. We can take that down.

20 Now, Dr. Johnson, in your report, you did no
21 economic analysis related to Benco's relationship with
22 Elite Dental Alliance; correct?

23 A. That's just incorrect.

24 Q. And why is that incorrect?

25 A. Well, if you look in my report, there's an

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1 entire section on Elite Dental and the economics of the
2 partnership, so you're just wrong.

3 Q. Well, that section in your report summarizes
4 Benco's views; right?

5 A. No. It summarizes my assessment of the
6 economics of the partnership.

7 Q. But you just relied on testimony and documents
8 from Benco in your assessment; right?

9 A. And my knowledge as a professional economist
10 who's offering an opinion on my understanding of the
11 economics.

12 Q. But you did no econometric analysis to come to
13 your analyses about Benco's relationship with EDA;
14 right?

15 A. Econometric analysis, no, but that's only one
16 type of economic analysis.

17 Q. And you did no data analysis to come to your
18 conclusions about Benco's relationship with EDA;
19 right?

20 A. Again, I don't know if that's a fair
21 characterization because there are numbers cited there,
22 but if you're talking about some other statistical
23 analysis, no.

24 Q. And you don't recall reviewing any buying
25 group proposals to Benco other than the one from EDA;

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1 right?

2 A. That's right. What I testified was just I read
3 Dr. Marshall's characterizations, but I did not look at
4 other buying group proposals.

5 Q. And you're not directly offering an opinion in
6 your report on whether Schein acted in its unilateral
7 self-interest with respect to buying groups; correct?

8 A. I have not offered an opinion about Schein.
9 Now, there may be elements of my opinion that might be
10 relevant to Schein, but that was not something that I
11 was asked to assess.

12 Q. And you are not directly offering an opinion on
13 whether Patterson acted in its unilateral self-interest
14 with respect to buying groups; correct?

15 A. Correct. I was not asked to assess Patterson's
16 unilateral self-interest. To the extent there are
17 parts of my critique that would be relevant, that could
18 be relevant, but that was not my assignment.

19 Q. And you're not expressing an opinion on whether
20 barriers to entry in the dental products industry are
21 high or low; correct?

22 A. That's correct. Because, as I said in my
23 deposition, high or low doesn't have meaning in
24 isolation.

25 Q. And related to market structure, your report

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1 comments on Dr. Marshall's view of the price elasticity
2 of independent dentists' demand; right?

3 A. Yes.

4 Q. And to make sure we're on the same page, as
5 you've pointed out, I'm a lawyer, not an economist, so
6 to describe the concept generally, price elasticity of
7 demand is a measure of how the quantity demanded of a
8 good or service changes in response to a change in the
9 price of that good or service; right?

10 A. That was a good textbook definition. Yes.

11 Q. So just at a basic level, price elasticity of
12 demand has to do with how price-sensitive customers
13 are; right?

14 A. I think that's a fair characterization. Yes.

15 Q. And price elasticity of demand or the price
16 sensitivity of customers is one market characteristic
17 that someone might look at to determine whether a
18 particular market is conducive to collusion; right?

19 A. I don't know how to answer that. Someone? I
20 mean, my freshman-year son could look at a
21 characteristic. If you're talking about an economist,
22 you need to be more precise. I'm sorry.

23 Q. So it's one market characteristic that
24 Dr. Marshall looked at to determine whether a
25 particular market is conducive to collusion; right?

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1 A. To be precise, it is a characteristic that
2 Dr. Marshall purports to look at and says supposedly
3 shows it's conducive to collusion. I don't agree that
4 that's correct.

5 Q. But you're not offering an opinion on whether
6 dentists are inelastic towards the purchase of dental
7 consumables and equipment; correct?

8 A. I think that's correct. What I testified at my
9 deposition was, the mere observation that dentists use
10 consumable products regularly is not enough, and if you
11 don't have the product market defined properly, I can't
12 actually define the elasticity of demand that he's
13 talking about.

14 Q. And you're not offering an opinion, your own
15 opinion, on what level of demand elasticity dentists
16 have for the services they purchase from Benco, Schein
17 and Patterson; correct?

18 A. Correct.

19 Q. You're not offering an opinion regarding
20 whether the conduct at issue here is a per se illegal
21 restraint of trade under the FTC Act; correct?

22 A. No. I'm not offering a legal opinion.

23 Q. And you're not offering an opinion on whether
24 an agreement between competitors not to discount to
25 customers would be anticompetitive; correct?

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1 A. Again, if I understand your question correctly,
2 I am not offering an opinion about some -- whether some
3 agreement exists, whether that automatically means
4 there's an anticompetitive effect as a legal matter,
5 no.

6 Q. So in fact, it's fair to say that your whole
7 report is a critique of Dr. Marshall; right?

8 A. No, I don't think that's fair to say.

9 Q. Simone, can we put up slide 41 of the
10 demonstrative used with Dr. Johnson.

11 (Pause in the proceedings.)

12 Dr. Johnson, you can take a look at it. I
13 believe you have it in your binder from your counsel or
14 from Benco's counsel.

15 A. Sorry. It was a cliffhanger.

16 Q. Do you recall testifying about that slide in
17 your direct examination?

18 A. I do.

19 Q. And slide 41 you testified summarizes the full
20 extent of your opinions; right?

21 A. I'm sorry. I recall testifying that the full
22 extent of my opinion is all my expert reports and all
23 of my slides, my deposition and all my testimony today,
24 not slide 41 in isolation.

25 Q. But you testified that slide 41 was a summary

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1 of the full extent of your opinions; isn't that
2 correct?

3 A. A summary, yes.

4 Q. And all of those opinions expressed on
5 slide 41 relate to Dr. Marshall's analyses; right?

6 A. I think that's a -- they relate. That's a
7 little different than saying there's nothing in here
8 that is affirmative, because there's several areas of
9 this, like local markets, which I said I agreed, or the
10 entire Benco analysis of unilateral profitability,
11 which I did all those charts. That was a large part of
12 my direct.

13 So I just think it's a little bit of a
14 mischaracterization to say that it's only a critique.
15 I agree it's a critique. I do agree with that.

16 Q. And some of that critique that you did you did
17 by relying on your SourceOne and class action reports;
18 right?

19 A. Yes.

20 Q. Well, so let's talk about that.

21 In addition to the FTC case that we're here for
22 today, you were retained by Benco in the SourceOne
23 case; correct?

24 A. Yes.

25 Q. You were also retained by Benco in the dental

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1 supplies antitrust class action litigation; correct?

2 A. Yes.

3 Q. For your expert report in this case, the FTC
4 case, you rely on your expert report from the SourceOne
5 case; correct?

6 A. Yes.

7 Q. And for your expert report in the FTC case, you
8 also rely on your expert report from the dental
9 supplies antitrust class action litigation; correct?

10 A. Yes.

11 Q. And the allegations in the SourceOne case are
12 different from those in the FTC case; correct?

13 A. That is correct.

14 Q. The SourceOne case involves a private
15 plaintiff; right?

16 A. Yes.

17 Q. And the SourceOne case is not about a
18 conspiracy not to discount to buying groups; right?

19 A. That is correct.

20 Q. Yet you rely on your report from the SourceOne
21 case in your report for the FTC case?

22 A. Of course.

23 Q. Now, the allegations in the class action
24 litigation are also different from those in the FTC
25 case; correct?

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1 A. That is true.

2 Q. The class action involves additional
3 defendants?

4 A. Yes.

5 Q. And the class action is not about a conspiracy
6 not to discount to buying groups; right?

7 A. That is also true.

8 Q. And yet you rely on your report from the class
9 action case in your report for the FTC case; right?

10 A. Of course.

11 Q. Dr. Johnson, in your direct examination, you
12 criticized Dr. Marshall for using 1,106 dentists as a
13 representative sample of 188,000 dentists nationwide;
14 right?

15 A. That was one of the critiques. Yes.

16 Q. And you've said that sample size couldn't tell
17 you anything meaningful; right?

18 A. About the buying group behavior, that is true.

19 Q. Well, let's take a look at what your report
20 presents about a sample of those 188,000 dentists.

21 Let's look at Exhibit 2 of your report. This
22 is RX 2834-020. We'll put it up on the screen for you
23 as well.

24 So in your report you claim Exhibit 2 shows
25 that dentists regularly source dental products across

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1 multiple suppliers; correct?

2 A. Yes. That's true.

3 Q. And this is related to your opinion on product
4 market; correct?

5 A. In part, yes.

6 Q. And as you testified earlier today, there are
7 about 188,000 dentists in the United States; right?

8 A. Yes.

9 Q. And Exhibit 2 lists the dental product
10 suppliers used only by select dentists out of those
11 188,000; right?

12 A. Yes. These are the named plaintiffs from the
13 class action litigation.

14 Q. And Exhibit 2 covers the purchases of only
15 seven dentists; right?

16 A. Right. The named plaintiffs that were
17 representative of the large class of dentists in the
18 settlement agreements, yes.

19 Q. So they're the named plaintiffs and not a
20 random sample of dentists; right?

21 A. No. But named plaintiffs are put forward as
22 representative in the class case, so that's a little
23 different.

24 Q. And the class case is one of the other
25 antitrust cases that you just told me does not involve

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1 a conspiracy not to discount to buying groups; right?

2 A. That is true.

3 Q. And other than their designation as class
4 representatives in that class action, there's no
5 particular reason why you included these seven dentists
6 in Exhibit 2; correct?

7 A. Well, it's not just the designation. It's the
8 fact that we have an extensive evidentiary record,
9 depositions, data, information to rely upon. There's
10 an enormous amount of information about the dental
11 product industry that I learned from my prior work.
12 That's what I've incorporated here.

13 Q. But you picked these seven dentists only
14 because they were class representatives in the class
15 action; right?

16 A. Yes. Because I had testimony and data that I
17 could actually look at. Absolutely.

18 Q. So I did the math, and 7 dentists out of
19 188,000 means you are merely relying on
20 0.00003723 percent of dentists for your analysis in
21 Exhibit 2.

22 Does that sound right to you?

23 A. I can't -- I'm not going to check your math in
24 my head. I believe you did it right. They're the
25 named representatives in the class. I've explained

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1 why they've been put forward as representative of a
2 broader set of dentists. That's all I can say.

3 Q. And you agree that this case, the FTC case, is
4 about a conspiracy not to discount to buying groups
5 composed of independent dentists; right?

6 A. That's true.

7 Q. But one of the named plaintiffs from the class
8 action listed here, Evolution Dental, isn't even an
9 independent dentist; right?

10 A. I would want to go back and check to see. I
11 just don't remember off the top of my head.

12 Q. Well, so it's your testimony that this case is
13 about discounting to buying groups composed of
14 independent dentists, but you don't even know if an
15 entity listed in your report is an independent dentist;
16 is that your testimony?

17 A. Yeah. I think that's a very unfair
18 characterization of my testimony.

19 What I said was, from memory I'm not going to
20 testify whether Evolution Dental fits into some
21 arbitrary definition of an independent dentist. I have
22 extensive expert reports that are all cited. It's not
23 a memory test. I stand by my opinion.

24 Q. So you're not aware sitting here today that
25 Evolution Dental is a dental lab; correct?

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1 A. I just don't recall. If you'd like to show me
2 something or let me go to my backup, I could look.
3 It's just not a memory test. I'm sorry.

4 Q. And five of the six dentists listed here in
5 Exhibit 2 are not even buying group members; right?

6 A. Yes.

7 Q. Exhibit 2 does not show who the primary
8 supplier is for each dentist; correct?

9 A. No. As I explained in my deposition, you
10 should go look at the testimony which I cite and the
11 data, which gives you all the answers. I cited them
12 all and footnoted them. That's where you'd get the
13 more detailed information if you needed that. But for
14 the purposes of this exhibit, this was sufficient for
15 what I was showing.

16 Q. So my next few questions are just going to be
17 about Exhibit 2, so I'd appreciate if you answer about
18 Exhibit 2.

19 Exhibit 2 does not show what products each
20 dentist bought from these suppliers; correct?

21 A. Exhibit 2 on the page does not. You'd have to
22 go to the sources at the bottom of Exhibit 2.

23 Q. And Exhibit 2, which we're looking at right
24 now, does not tell us if some of the suppliers might
25 have supplied nondental products to a dentist;

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1 correct?

2 A. You have to look at the testimony. The
3 testimony tells you they didn't. Exhibit 2 says
4 "Dental Product Suppliers."

5 Q. I'm sorry. I didn't get a direct answer to my
6 question. I'm going to repeat it.

7 Exhibit 2 does not tell us if some of the
8 suppliers might have supplied nondental products to a
9 dentist; correct?

10 MR. OLIVER: Objection, Your Honor. Asked and
11 answered.

12 MS. FRANCE: Your Honor, there's no clear
13 answer to my question.

14 JUDGE CHAPPELL: It wasn't clear. Overruled.

15 THE WITNESS: Okay. I will try again.

16 This is a chart that I put forward to represent
17 dental products --

18 JUDGE CHAPPELL: You need to listen. You need
19 to start with a yes or no. Then I'll allow a brief
20 explanation. Or if you can't give a yes or no, let us
21 know.

22 THE WITNESS: Okay. I don't think I can give a
23 yes or no unless I understand the question better. I'm
24 sorry.

25 So are you asking me if the table represents

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1 dental product suppliers or are you asking me is there
2 a note that says it doesn't represent other products
3 sold from distributors that are not dental products?

4 BY MS. FRANCE:

5 Q. Dr. Johnson, let me repeat this.

6 Exhibit 2 -- you're looking at Exhibit 2 -- it
7 does not tell us if some of these suppliers listed here
8 might have supplied nondental products to the dentists
9 listed here; correct?

10 A. No. Because it tells you that they provided
11 dental products.

12 Q. So just so that's clear, because I still don't
13 think this is clear, it does not tell us if some of
14 those suppliers might have supplied nondental products;
15 right?

16 MR. OLIVER: Objection, Your Honor. Asked and
17 answered.

18 MS. FRANCE: Your Honor, it still was not clear
19 to me what his testimony was.

20 JUDGE CHAPPELL: He said, "No." Move on.

21 BY MS. FRANCE:

22 Q. Dr. Johnson, Exhibit 2 does not show the
23 quantity a dentist purchased from each of these
24 suppliers listed here in Exhibit 2; right?

25 A. That's correct.

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1 Q. So Exhibit 2 does not show if a dentist
2 bought, say, 90 percent from a full-service
3 distributor; right?

4 A. That's correct.

5 Q. And Exhibit 2 doesn't show if a supplier has
6 products that cannot be purchased from a full-service
7 distributor; correct?

8 A. That is true.

9 Q. And Exhibit 2 does not show how many times a
10 dentist purchased from each of these suppliers;
11 correct?

12 A. That's correct.

13 Q. So if a dentist purchased only once from one of
14 these suppliers, that supplier could still be listed in
15 Exhibit 2; correct?

16 A. Hypothetically.

17 Q. And Exhibit 2 does not show the time period
18 over which each dentist purchased from each of these
19 suppliers; correct?

20 A. That is correct.

21 Q. Dr. Johnson, your report in the SourceOne case
22 analyzes how Benco's pricing and margins changed as
23 Benco entered new geographic areas; correct?

24 A. In part, yes.

25 Q. But you did not do any analysis to determine

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1 which competitors constrained Benco's pricing; right?

2 A. I'm sorry. I don't understand your question.

3 In which report?

4 Q. In the SourceOne report or in this report or
5 any other report that you've incorporated.

6 A. I'm sorry. Now I'm lost. I apologize. Could
7 you just try it again.

8 Q. Well, let me ask you this way.

9 So the pricing analyses in your SourceOne
10 report don't tell us specifically what Benco was
11 responding to with its price changes when it entered
12 new geographic areas; correct?

13 A. I'm sorry. I think you're going to have to
14 point me to which analyses you're talking about so we
15 can look at them because there's a lot of analyses and
16 I guess I just don't know what you're referring to. I
17 apologize.

18 Q. Dr. Johnson, do you recall testifying about
19 this at your deposition?

20 A. No, I don't.

21 Q. Would it refresh your recollection to see your
22 deposition testimony about these analyses?

23 A. Yes.

24 Q. All right. Please take a look at your
25 deposition transcript -- it's RX 2965 -- starting at

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1 page 260. Let me know when you're there and then I'll
2 give you the page lines or the line cites.

3 A. 260?

4 Okay. I'm there.

5 Q. Okay. Please read RX 2965 page 260 starting at
6 line 21. It continues onto the next page, 261.

7 (Document review.)

8 I believe around line 12 on page 261.

9 (Document review.)

10 A. Okay. I think I see what I -- what you're
11 referring to. Yes. And I don't think you
12 characterized my testimony properly in the prior
13 deposition.

14 Q. So did that testimony that you just read
15 refresh your recollection as to the analyses in the
16 SourceOne report that I'm asking you about?

17 A. Yes. If you're referring to the several pages
18 of analyses I referred to on page 261, yes.

19 Q. So let me ask you again, those pricing
20 analyses in your SourceOne report don't tell us
21 specifically what Benco was responding to with its
22 price changes when it entered new geographic areas;
23 correct?

24 A. So what you're referring to, yes, just to be
25 precise, yes, I talk about in my deposition that you

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1 just showed me that I'm not showing, for example, a
2 Darby specific analysis, I'm showing all Benco, but to
3 the extent that Darby has a presence in one of these
4 particular relevant markets, there's some relevance to
5 what I'm showing here.

6 Q. So just so we can clarify, I'll ask you
7 specifically about that.

8 So in those pricing analyses in the SourceOne
9 report, you did not isolate out what part of Benco's
10 price changes were due to competition from Darby;
11 right?

12 A. That is correct.

13 Q. And so if Benco was changing its prices in
14 response to competition from Patterson, that would be
15 captured in the pricing analyses also?

16 A. That is true. It would be the total
17 competitive conditions, direct manufacturers,
18 Patterson, Darby, partial line, everybody.

19 Q. So if Benco was changing its prices in response
20 to competition from Schein, that would also be captured
21 in the pricing analyses?

22 A. Sure.

23 Q. Dr. Johnson, you've submitted expert reports
24 and testified in other cases besides the one we're here
25 for today; correct?

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1 A. Yes, I have.

2 Q. And you submitted an expert report for the
3 defendants in the Mushroom Direct Purchaser Antitrust
4 Litigation; correct?

5 A. I did, yes. More exciting product market.

6 Q. And that case involved allegations that the
7 defendants conspired to fix mushroom prices; right?

8 A. Yes.

9 Q. And the FTC case against the respondents also
10 involves a price-fixing conspiracy; right?

11 A. Broadly.

12 Q. So in deciding a motion for class certification
13 in the Mushroom Direct Purchaser case, the court
14 critiqued your analysis; right?

15 A. I don't recall that -- I mean, it's a pretty
16 long decision. I don't recall a critique. What I
17 recall was two things, a Daubert motion that was filed
18 against me that was denied and a decision to certify
19 the class based on the opinion of Dr. --
20 Professor Elhauge, but I don't recall specific things
21 about -- I thought it was about whether rule 23 was
22 met. I'm not sure what you're referring to about
23 specific critiques of my work.

24 Q. So -- well, let's look at the court's opinion
25 on that motion for class certification that I had just

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1 asked you about and you said you didn't recall.

2 We're going to put up CXD 0029.

3 And we're going to look at the page ending in
4 009.

5 MR. OLIVER: Objection, Your Honor. This
6 appears to be an incomplete document. Could we have a
7 copy of the complete document for the witness to
8 review.

9 MS. FRANCE: Yes. We can provide counsel a
10 copy.

11 (Pause in the proceedings.)

12 May I approach the witness, Your Honor?

13 JUDGE CHAPPELL: Go ahead.

14 BY MS. FRANCE:

15 Q. So, Dr. Johnson, we're looking at the
16 page ending in 009, and we're going to blow that up on
17 the screen.

18 And we'll highlight the language that I want
19 you to focus on.

20 The court said, "In order to 'test' and
21 'separate out the lawful from the unlawful conduct'
22 Dr. Johnson presumes the very thing he claims to be
23 testing."

24 Do you see that?

25 A. I do.

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1 Q. And then the court also said, in order to reach
2 the results you did, you must make what seem to be
3 unreasonable assumptions.

4 Do you see that?

5 A. I see this, yes.

6 Q. Simone, we can take that down. Thank you.

7 And Dr. Johnson, you also submitted two expert
8 reports for the defendants in Roseman versus Bloomberg;
9 correct?

10 A. Yes, I did.

11 Q. And in response to a motion in limine, the
12 court excluded some of your testimony; right?

13 A. No, that's not right. I don't think so. In
14 Bloomberg -- which case are you talking about? I'm
15 sorry.

16 Q. Let me repeat my question.

17 You submitted two expert reports for the
18 defendants in Roseman versus Bloomberg; correct?

19 A. Oh, the wage and hours Bloomberg case. Yes.

20 Q. And in response to a motion in limine, the
21 court excluded some of your testimony; correct?

22 A. I don't recall that quite being the case.
23 There might have been something before trial, but I
24 don't -- you'll have to show me.

25 Q. So you served as an expert in that case, but

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1 you didn't even bother to commit to memory that your
2 testimony was excluded?

3 A. That's actually not the story. The judge
4 actually allowed my testimony and actually off the
5 bench said that she found it very probative of the
6 issues in the trial, and in fact she kind of scripted
7 the direct exam that she wanted me to give, so why I'm
8 confused is she was very complimentary of my work, so I
9 don't know what you're talking about.

10 If it's some legal issue with respect to what
11 the scope of the testimony could be, that's different,
12 but the judge in that case was very complimentary of my
13 work.

14 Q. And the court actually said that your testimony
15 was not admissible expert testimony because you were
16 editorializing; right?

17 A. I don't recall that. I recall that she said
18 off the stand that my report was very probative and
19 helpful. That's what I recall.

20 Q. And as you just test- -- you just told me, you
21 have testified and submitted expert reports in numerous
22 other matters; right?

23 A. Yes. That is true.

24 Q. Would you say that you've testified or
25 submitted a report in close to thirty other litigation

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1 matters in the past four years?

2 A. That's true. Yes.

3 Q. And those matters are listed in Appendix A of
4 your report; right?

5 A. Yes, that's true.

6 Q. Why don't you take a look at Appendix A in your
7 binder. This is RX 2834-054.

8 Appendix A is your CV; right?

9 A. Yes.

10 Q. And this contains a list of your testimony and
11 expert reports submitted in the four years prior to
12 September 2018; correct?

13 A. Yes, that's correct.

14 Q. And that starts on the page ending in
15 057 through 061.

16 Do you see that?

17 A. That's correct.

18 Q. So, Dr. Johnson, I counted these cases, and
19 apart from your two submissions that you have listed
20 related to the airline industry, you listed
21 29 litigation matters where you submitted an expert
22 report or live testimony or both in the past four
23 years.

24 Does that sound right to you?

25 A. Well, I'll take your word for it. Yes.

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1 Q. Would you please tell me the matters listed
2 there in which you testified for the plaintiffs.

3 A. The Liga Nacional de Fútbol Profesional versus
4 Federación Internacional De Football (FIFA) and the
5 one below that, Availability of Wage Rates Collectively
6 Bargained by Corrections Corporation of America and
7 United Government Security Officers of America,
8 Local 315, Under Contract.

9 Q. So you just told me two cases; right?

10 A. Yes, that's correct.

11 Q. And that's two out of 29?

12 A. Yes.

13 Q. So based on what you just told me, in the
14 27 out of the 29 litigation matters in the last four
15 years in which you submitted an expert report or live
16 testimony or both, those reports and testimony were
17 submitted on behalf of defendants; correct?

18 A. That's correct.

19 Q. And now, the two cases that you listed where
20 you testified for the plaintiffs, were either of those
21 an antitrust case?

22 A. No.

23 Q. So in fact, out of the 29 litigation matters in
24 the last four years in which you submitted an expert
25 report or live testimony or both, you testified for

1 zero antitrust plaintiffs; correct?

2 A. That is correct.

3 MS. FRANCE: Your Honor, we have a short
4 section of questions that we'd like to do in camera.

5 JUDGE CHAPPELL: All right. At this time
6 we'll need to go in in camera session. I need to ask
7 those not subject to the protective order to leave the
8 courtroom.

9 (Whereupon, the proceedings were held in
10 in camera session.)

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1 (The following proceedings were held in
2 in camera session.)
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(End of in camera session.)

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1 (The following proceedings continued in
2 public session.)

3 JUDGE CHAPPELL: Go ahead.

4 BY MS. FRANCE:

5 Q. Dr. Johnson, you agree that price sensitivity
6 is an issue in market definition generally; correct?

7 A. Yes.

8 Q. And you agree that assessing how consumers
9 respond to price increases can be part of proper market
10 definition; correct?

11 A. Part of, yes.

12 Q. And you agree with the statement in the
13 Horizontal Merger Guidelines that market definition
14 focuses solely on customers' ability and willingness to
15 substitute away from one product to another in response
16 to a price increase; correct?

17 A. I agree that's in the Merger Guidelines and
18 that is one part of the analysis, yes.

19 Q. And your report cites that part of the
20 Merger Guidelines; right?

21 A. I believe it does. Yes.

22 Q. And in a general sense, if you're trying to
23 define a relevant product market in an industry, you
24 would consider what are the viable set of substitution
25 possibilities; correct?

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1 A. Yes. That would be something you would do.

2 Q. And it's possible that the substitution
3 possibilities could be impacted by elevated prices from
4 some market power in the industry; correct?

5 A. In some hypothetical sense it is.

6 Q. And in defining a relevant product market it's
7 possible that a substitute to which some customers turn
8 could be excluded from the market; correct?

9 A. Tautologically, that has to be true, of course.

10 Q. And Dr. Johnson, as an economist, you're
11 familiar with the hypothetical monopolist test or SSNIP
12 test; correct?

13 A. I am.

14 Q. And in fact, in your direct examination
15 earlier you testified about Dr. Marshall's SSNIP tests;
16 right?

17 A. Yes. What Dr. Marshall calls SSNIP tests.

18 Q. Now, I'm asking about your work for this case.
19 You did not conduct a SSNIP test to define a
20 relevant product market; correct?

21 A. That's correct. I assessed his SSNIP test and
22 the economic evidence he ignored.

23 Q. And in fact, you did not define a relevant
24 product market at all in this matter; correct?

25 A. That is correct.

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1 MS. FRANCE: Your Honor, may I have a minute to
2 consult with my co-counsel?

3 JUDGE CHAPPELL: Go ahead.

4 (Pause in the proceedings.)

5 MS. FRANCE: Your Honor, I have no further
6 questions at this time. I pass the witness.

7 JUDGE CHAPPELL: Thank you.

8 Anything further?

9 MR. OLIVER: Very briefly, Your Honor.

10 JUDGE CHAPPELL: Public or in camera?

11 MR. OLIVER: This should be open session.

12 JUDGE CHAPPELL: All right.

13 Make sure you have your next witness standing
14 by.

15 - - - - -

16 REDIRECT EXAMINATION

17 BY MR. OLIVER:

18 Q. So, Dr. Johnson, you were asked a number of
19 questions with respect to your earlier work in the
20 SourceOne and class litigation and your incorporation
21 of that work into this litigation. Do you recall those
22 questions?

23 A. Yes, I do.

24 Q. And then you were also asked some questions
25 with respect to the allegations and the differences in

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1 allegations in those litigations and the current
2 litigation. Do you recall those questions?

3 A. I do.

4 Q. Let me ask you more generally, if we could
5 start with the SourceOne litigation.

6 Can you please explain in a little bit more
7 detail what work you did in the SourceOne litigation
8 was relevant here and why it was relevant in this
9 litigation.

10 A. Okay. Well, in the SourceOne litigation I had
11 to start with an assessment of the industry and just
12 learn a lot about dental distribution. I mean, that's
13 where a lot of my initial background research, visiting
14 the dental Disney World, reading depositions, looking
15 at data, documents, understanding the real-world
16 realities of dental product distribution.

17 In that case I also had to assess
18 Dr. Leitzinger's proposed market definition. I had to
19 look at sort of who the competitors were, what the
20 importance of things like direct-selling manufacturers
21 were, Benco's expansion path, Benco's pricing.

22 So, obviously, you don't forget all that work
23 you did on the dental product distribution industry
24 when you come to the table in the next case.

25 In the class action case, I had to study,

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1 although the allegations were different, voluminous
2 pricing data from the same period, really dug into how
3 Benco priced their products, their discounting
4 strategies, a lot of industry characteristics which
5 were actually relevant for this case as well, and again
6 continued to enhance my knowledge of the dental product
7 distribution industry.

8 So when I got to the FTC case, I had built up
9 quite a lot of knowledge, and I cited several things
10 from my prior report that were particularly relevant to
11 the issues in this case.

12 Q. And with respect to aspects of Benco Dental's
13 activities that you described this morning, to what
14 extent did you also look at those in either the
15 SourceOne litigation or the class litigation?

16 A. Well, I looked at them in all three, but
17 they're -- you know, I obviously had to understand
18 Benco's business and understand how they -- what
19 products they sell, how they price, their pricing
20 policies, their strategies. That's what I had to
21 learn to offer and shape my expert opinion particularly
22 with respect to how the economics of this business
23 works.

24 Q. And why did you choose to incorporate those
25 particular portions of your earlier work into your

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1 opinions here in this case?

2 A. Because they were directly relevant statements
3 about the economics, and the allegations wouldn't
4 matter with respect to those. It's relevant economic
5 issues that inform my assessment of the allegations in
6 the FTC case as well as the other cases. The fact that
7 the allegations were different wasn't the important
8 point. It was the economics I was studying was
9 directly relevant to this case.

10 MR. OLIVER: I have no further questions,
11 Your Honor.

12 JUDGE CHAPPELL: Anything further?

13 MR. OSTOYICH: Not here, Your Honor.

14 MS. FRANCE: Nothing further, Your Honor.

15 JUDGE CHAPPELL: Thank you, sir. You may stand
16 down.

17 THE WITNESS: Thank you very much.

18 JUDGE CHAPPELL: Call your next witness.

19 MR. MUNKITTRICK: Your Honor, the next
20 witness --

21 THE REPORTER: I can't hear you.

22 MR. MUNKITTRICK: We had understood Dr. Johnson
23 would be a bit longer, so I think we can get Mr. Maurer
24 here in about ten minutes or so.

25 JUDGE CHAPPELL: This is why I said have your

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1 witness ready.

2 MR. MUNKITTRICK: Right.

3 JUDGE CHAPPELL: Why don't you get an accurate
4 assessment of how long it's going to take. Let me
5 know.

6 MR. MUNKITTRICK: Okay. Will do.

7 (Pause in the proceedings.)

8 JUDGE CHAPPELL: Would someone go see if you
9 can find the attorney who was supposed to give me an
10 assessment of time. I didn't intend for him to take
11 five minutes to give me a time assessment.

12 (Pause in the proceedings.)

13 MR. MUNKITTRICK: It will be about ten minutes,
14 Your Honor.

15 MR. KASS: To get through security.

16 JUDGE CHAPPELL: All right. If it's still ten
17 minutes, we'll take our lunch break.

18 MR. MUNKITTRICK: Okay. Thank you.

19 JUDGE CHAPPELL: We'll reconvene at 2:30.

20 (Whereupon, at 1:18 p.m., a lunch recess was
21 taken.)

22

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1 A. Smile Source is a group of independent
2 dentists. It's a franchise group in the
3 United States.

4 Q. What does that mean, "a franchise group"?

5 A. So we provide independent dentists the same
6 resources or similar resources to a group practice, but
7 they retain their dependence. As a franchise, they get
8 separate territories and they get a number of business
9 service offerings from us.

10 Q. Is Smile Source a buying group?

11 A. Smile Source is not a buying group, but buying
12 is a big component of what we do. There's really two
13 things we're focused on, is revenue growth and expense
14 reduction.

15 So expense reduction, we do have a GPO within
16 our franchise agreement, so we do have a formulary of
17 products, if you will, that deliver buying power. In
18 fact, it's based on research the reason why about
19 98 percent of members join. But once they're a member,
20 we focus on revenue growth through marketing, education
21 and practice management.

22 Q. So you said Smile Source is not a buying
23 group, but does Smile Source have a buying group
24 component?

25 A. Yes.

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1 Q. And you said it's made up of independent
2 dentists?

3 A. Independent. About 650 locations and a
4 thousand dentists.

5 Q. When did you begin working at Smile Source?

6 A. Late 2012.

7 Q. And you said there's 650 locations and a
8 thousand dentists.

9 That's today?

10 A. Today.

11 Q. What was it when you joined in 2012?

12 A. I remember around 32.

13 Q. Okay. It's grown significantly.

14 A. Yes.

15 Q. What was your first position when you started
16 at Smile Source?

17 A. Vice president of business development.

18 Q. And I take it you were promoted?

19 A. Yes.

20 Q. What was your next position?

21 A. President.

22 Q. And I think you said you're -- today you're
23 president and CEO?

24 A. Yes.

25 Q. When did you become CEO?

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1 A. Late '13.

2 Q. And when did you become president?

3 A. Mid-'13.

4 Q. Who are Smile Source's current distributor
5 partners?

6 A. It is Henry Schein Dental, Darby Dental,
7 Burkhart, Atlanta Dental and Nashville Dental.

8 Q. When did Smile Source enter into its current
9 relationship with Henry Schein?

10 A. Current relationship in February of 2017. It
11 was announced at the Midwinter.

12 Q. The Chicago Midwinter?

13 A. Yes.

14 Q. When you joined Smile Source, did you work with
15 Dr. Andy Goldsmith?

16 A. I did.

17 Q. And what was Dr. Goldsmith's role at
18 Smile Source when you joined?

19 A. So right prior to my arrival he was president,
20 and when I joined, he was demoted to chief dental
21 officer and moved to three days a week from five days a
22 week.

23 Q. When you joined Smile Source in 2012, did
24 Smile Source have a relationship with Henry Schein?

25 A. In 2012, not a formalized business relationship

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1 but an informal friendly, but no, no business
2 relationship.

3 Q. Did Smile Source have a formal business
4 relationship with Henry Schein prior to when you began
5 working at Smile Source?

6 A. Yes.

7 Q. Do you know how that relationship ended? Was
8 it Smile Source's decision or was it Henry Schein's
9 decision?

10 MS. GOFF: Objection. Foundation.

11 Mr. Maurer testified that he wasn't at
12 Smile Source at that time.

13 MR. McDONALD: If he says he doesn't know, then
14 he can tell us, and if he says this, then I'm happy to
15 ask him how he knows.

16 JUDGE CHAPPELL: I agree. That's overruled.

17 BY MR. McDONALD:

18 Q. Do you need me to ask the question again?

19 A. Sure.

20 Q. Do you know how the relationship between
21 Henry Schein and Smile Source ended? Was it a
22 Smile Source decision or was it a Henry Schein
23 decision?

24 A. Thank you.

25 I was told it was a Smile Source decision.

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1 Q. And who told you that?

2 A. Three people, Dr. Goldsmith, Todd Nickerson and
3 Tracy Rudy.

4 Q. And those are all Smile Source employees.

5 A. Yes.

6 Q. When did you personally first meet with
7 Henry Schein?

8 A. I don't know the exact date. I think we may
9 have had some informal meetings at trade shows in
10 2013.

11 Q. Okay. Let me show you what's marked as
12 Exhibit CX 2587. And it's going to come up on the
13 screen. But -- I'm sorry.

14 It's also -- if you want to look at the paper
15 copy for some reason, it's tab 1 in your binder.

16 This is a calendar invite with the subject HSD
17 and Smile Source meeting. The location is in
18 West Allis, which is Henry Schein Dental; is that
19 right?

20 A. Yes.

21 Q. And it's for January 22, 2014.

22 Do you see that?

23 A. I do.

24 Q. The attendees from HSD are Tim Sullivan -- do
25 you know Mr. Sullivan?

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- 1 A. I did.
- 2 Q. -- and John Chatham.
- 3 Do you know John Chatham?
- 4 A. I do.
- 5 Q. And Smile Source lists the attendees as
- 6 Trevor Maurer -- that's you; right?
- 7 A. Yes.
- 8 Q. And you were president at this time; right?
- 9 A. Yes.
- 10 Q. -- Dr. John McCall and Andy Goldsmith.
- 11 Do you see that?
- 12 A. I do.
- 13 Q. And did this meeting occur?
- 14 A. It did. John McCall was not in attendance, but
- 15 that meeting occurred.
- 16 Q. Were the other people, that is, Mr. Sullivan,
- 17 Mr. Chatham, yourself and Andy Goldsmith, in attendance
- 18 at this meeting?
- 19 A. Yes.
- 20 Q. Okay. What was the meeting about?
- 21 A. It was about the potential of working
- 22 together.
- 23 Q. All right. Did Smile Source have a
- 24 distributor partner at this time?
- 25 A. We did.

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1 Q. And who were those, well, it or those?

2 A. That would have been Burkhardt, Nashville Dental
3 and Atlanta Dental.

4 Q. Now, at this meeting in January of 2014, did
5 Henry Schein make a formal proposal to Smile Source at
6 the meeting?

7 A. Not at the meeting. It was more a dialogue of
8 what Smile Source was and what Schein could deliver.

9 Q. So if Dr. Goldsmith testified -- and he did,
10 I'll represent to you -- that after this meeting the
11 two of you went to the Harley-Davidson Museum and
12 discussed the proposal made by Henry Schein at this
13 meeting, he'd be mistaken.

14 A. Correct.

15 Q. That didn't happen.

16 A. There was no proposal at this meeting.

17 Q. Okay. Ultimately did Henry Schein make a
18 proposal?

19 A. They did.

20 Q. And let's look at tab 5, which is CX 4105.

21 Do you recognize this as the proposal that was
22 made by Henry Schein?

23 A. I do.

24 Q. And did you consider this to be a competitive
25 proposal by Henry Schein?

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1 A. Yes. It was similar to the deal we had in
2 place with Burkhart.

3 Q. Okay. If you'll look at the second page of the
4 PowerPoint, it -- the proposal philosophy, it says,
5 "Henry Schein Dental and Smile Source will form a
6 partnership which is 'win-win' for both parties.
7 There will be clear economic benefit to Smile Source
8 members (SSM's) beyond what they could individually
9 realize."

10 Do you see that?

11 A. I do.

12 Q. Was that important?

13 A. Yes.

14 Q. To Smile Source.

15 A. Yes. Very.

16 Q. On page 3, there's a bullet here that says
17 SSMS -- and the prior page says that that is
18 Smile Source members -- will also be offered free
19 Henry Schein Practice Analysis value annually. "This
20 analysis will provide a path for practice improvement
21 where the FSC will partner with the SSM to maximize the
22 practice's productivity."

23 Do you see that?

24 A. I do.

25 Q. Was that important to Smile Source?

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1 A. Yes.

2 Q. On page 4, the proposal says, "SSM's" -- and
3 again, Smile Source members -- "will be given a
4 discount on all products and services purchased from
5 Henry Schein Dental."

6 Was that important to --

7 A. Yes. Very.

8 Q. And the next one says, "Smile Source members
9 will earn an annual 2 percent cash rebate on all
10 purchases if they utilize three or more of HSD's
11 portfolio components."

12 Was that important?

13 A. Yes.

14 Q. Did you and Dr. Goldsmith discuss this proposal
15 from Henry Schein?

16 A. We did. I remember we received the proposal
17 from them and reviewed it in a restaurant -- I don't
18 remember the restaurant's name -- and reviewed it with
19 them on the telephone as we flipped through it.

20 Q. Okay. Did Dr. Goldsmith ever tell you that he
21 thought this proposal was a meaningless proposal?

22 A. I don't recall that.

23 Q. Did Dr. Goldsmith or anyone on the Smile Source
24 advisory board ever tell you they were offended by
25 Schein's proposal?

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1 A. No. I don't think so.

2 Q. How did the Henry Schein proposal compare to
3 what you were receiving from Burkhart at this time?

4 A. It was similar. And I would say that the
5 reason we didn't switch to Schein was just loyalty of
6 Burkhart. It's pretty typical to go to an incumbent
7 and say we're leaving you because we have a similar
8 offer. There's no benefit.

9 Q. Did you believe that Henry Schein would have
10 gone forward with this proposal if you'd accepted it?

11 A. Yes.

12 Q. And so I believe you said, but if you'll -- I
13 want the record to be clear.

14 Did Smile Source accept or reject this proposal
15 from Henry Schein?

16 A. We rejected this.

17 Q. And again, why did you reject it?

18 A. It was similar to what we already had. The
19 only benefit we would have seen is a national
20 footprint, but the pricing was the same.

21 Q. The pricing was the same you said?

22 A. Yes.

23 Q. Okay. After Smile Source -- and you can take
24 this down, Kurt.

25 After Smile Source rejected this proposal from

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1 Henry Schein in 2014, did you continue to remain in
2 contact with Henry Schein?

3 A. Yes.

4 Q. And who were you primarily in contact with?

5 A. Tim Sullivan.

6 Q. The president of Henry Schein.

7 A. Yes.

8 Q. Did you have communication with Mr. Sullivan
9 from the time of this proposal in 2014 until you
10 entered into a subsequent agreement with them in 2017?

11 A. Yeah. I would say ongoing.

12 Q. Ongoing.

13 I'd like you to look at RX 2444, which is
14 tab 9 for others in the binder. And I want to focus on
15 this e-mail that you sent to Mr. Sullivan on August 17,
16 2015.

17 And you sent Mr. Sullivan the e-mail and you
18 say, "Tim, I keep hearing good things about what
19 you're up to. How about we catch up soon?
20 Interested?"

21 Do you see that?

22 A. I do.

23 Q. Why did you reach out to Mr. Sullivan in
24 August of 2015?

25 A. Just to keep the discussion moving.

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1 Q. And was Mr. Sullivan interested in talking to
2 you?

3 A. Yes.

4 Q. He didn't tell you "No. We don't business with
5 buying groups"?

6 A. He did not.

7 Q. Did you wind up meeting with Mr. Sullivan
8 subsequent to this e-mail?

9 A. Yes.

10 Q. All right. And I'd like to look at CX 2605,
11 which is tab 2 in the binder.

12 And this is a calendar invite. It's to
13 Mr. Sullivan, Joe Cavaretta and yourself.

14 Do you see that?

15 A. I do.

16 Q. And it says here, "Trevor will meet Tim and Joe
17 at the hotel at 7:30 a.m. for breakfast, then they will
18 walk next door to the facility to start their meeting
19 around 8:00 a.m."

20 Do you see that?

21 A. I do.

22 Q. Did this meeting occur?

23 A. Yes.

24 Q. And this time, as opposed to you going to
25 West Allis, Mr. Sullivan and Mr. Cavaretta came to you

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1 in Kingwood; is that right?

2 A. Yes.

3 Q. And what was discussed at this meeting?

4 A. How we could work together.

5 Q. Was Smile Source interested in partnering with
6 Henry Schein at this time?

7 A. Yes.

8 Q. Did -- or was it your impression that
9 Mr. Sullivan and Mr. Cavaretta were interested in a
10 potential partnership with Smile Source at this time?

11 A. Yes.

12 Q. Did you make a deal at this meeting?

13 A. We did not.

14 Q. Did you meet with Mr. Sullivan, after this
15 meeting, at the Greater New York meeting?

16 A. Yes, I did.

17 Q. And what was discussed at that meeting?

18 A. Follow-up from this meeting and getting closer
19 to working together I guess.

20 Q. Was it your impression that Henry Schein was
21 preparing to make a proposal to Smile Source?

22 A. It was.

23 Q. All right. And if you'll look at
24 Exhibit CX 2607, which is tab 3.

25 A. 3?

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1 Q. Yes.

2 A. Okay.

3 Q. This is an e-mail from Mr. Sullivan to
4 yourself.

5 Do you see that?

6 A. I do.

7 Q. And did you receive this e-mail?

8 A. Yes.

9 Q. And Mr. Sullivan says, "Hi Trevor, I hope the
10 holidays treated you well and that 2016 is off to a
11 good start for you. I wanted to follow up from our
12 time together at the GNY Meeting" -- what's the GNY?

13 A. Greater New York.

14 Q. That's the meeting we just talked about you
15 had?

16 A. Yes.

17 Q. -- "and set up what I believe we said were the
18 appropriate next steps. If agreeable to [sic] you,
19 I'd like to find a date in the coming weeks that you
20 could visit us here in Wisconsin." And he goes on and
21 tells you Wisconsin is beautiful in January and
22 February.

23 A. Uh-huh.

24 Q. He said (as read): We can talk through our
25 proposal and then we can discuss the potential areas of

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1 conflict we discussed as it relates to our Business
2 Solutions offering.

3 So -- and you received this message.

4 A. Yes.

5 Q. So did you understand that Mr. Sullivan and
6 Mr. Cavaretta were preparing to make an offer to
7 Smile Source?

8 A. Yes.

9 Q. All right. And you were interested in
10 receiving an offer from them.

11 A. Yes.

12 Q. I now want to look at Exhibit RX 2092. And
13 for the record, so that we're clear here, this
14 document was previously designated as in camera by
15 Smile Source, and it is my understanding that
16 Smile Source no longer seeks in camera treatment of
17 this document. And their lawyer is here, and she'll be
18 able to stand up and object if I'm wrong.

19 MS. STAPLEY: That's correct.

20 BY MR. McDONALD:

21 Q. I want to focus on your e-mail to Mr. Sullivan
22 in Exhibit 2092 sent about a week after the e-mail we
23 just looked at. And you write Mr. Sullivan and you
24 say (as read): Tim, Would it offend you if I pushed
25 back our meeting until after -- I think you meant --

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1 out Exchange in San Antonio in March? We remain
2 incredibly interested in working with you.

3 Do you see that?

4 A. Yes.

5 Q. Why were you delaying a meeting with
6 Henry Schein to talk about a proposal?

7 A. Sure. Our annual meeting in March is our
8 single most important event for our members, and we
9 were focused on that. And this would have taken time
10 and resources away, so we would have potentially
11 delivered inferior product, plus I didn't think that we
12 could get our deal done before the March meeting to
13 announce it anyway, so it could wait.

14 Q. And was it your understanding that Henry Schein
15 was ready to move forward at that time?

16 A. Yes.

17 Q. And did in fact you ultimately -- you pushed
18 back the meeting with Henry Schein until after your
19 meeting in March.

20 A. I did.

21 Q. All right. And if we'll look at RX 2160, which
22 is tab 8, this is a calendar invite from you to
23 Joe Cavaretta and Brian Brady.

24 Do you see that?

25 A. I do.

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1 Q. And Mr. Cavaretta and Mr. Brady are employees
2 of Henry Schein?

3 A. Yes.

4 Q. And this is for a meeting on August 30 at the
5 Smile Source headquarters in Kingwood, Texas; is that
6 right?

7 A. Yes.

8 Q. And did this meeting occur?

9 A. It did.

10 Q. And what was the purpose of this meeting?

11 A. To see if we could work together to get closer
12 down the path of a deal.

13 Q. All right. And this -- okay.

14 Did ultimately then Henry Schein and
15 Smile Source enter into an agreement?

16 A. We did.

17 Q. And you said it was in February of '17?

18 A. Yes.

19 MR. McDONALD: Okay. Your Honor, I now need to
20 go in camera for the rest of my examination.

21 JUDGE CHAPPELL: All right. At this time we'll
22 go into in camera session. I'll need to ask those not
23 subject to the protective order to leave the courtroom.

24 (Whereupon, the proceedings were held in
25 in camera session.)

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1 (The following proceedings were held in
2 in camera session.)
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(End of in camera session.)

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1 (The following proceedings continued in
2 public session.)

3 MS. GOFF: Mr. Racowski, are you asking
4 questions on behalf of Benco?

5 MR. RACOWSKI: I was planning on it. Would you
6 like to cross and then I'll go?

7 MS. GOFF: No. I just wanted to be clear, so
8 you're cross- -- I know that Mr. Maurer is not on your
9 witness list, but I just want it to be clear what's
10 happening here.

11 MR. RACOWSKI: I'm sorry. What was the
12 question?

13 MS. GOFF: Your Honor, Mr. Maurer --

14 JUDGE CHAPPELL: She wants to know if this is a
15 friendly witness to you. Are you cross or direct?

16 MR. RACOWSKI: I was planning to ask direct,
17 but I'm --

18 JUDGE CHAPPELL: Go ahead. Let's go with
19 that. After you said "direct," forget any of the rest.
20 Go ahead.

21 MS. GOFF: But he's not on their witness list,
22 Your Honor.

23 JUDGE CHAPPELL: He's here and testifying.
24 Everybody can question him.

25 MS. GOFF: Okay. Thank you, Your Honor.

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2 DIRECT EXAMINATION

3 BY MR. RACOWSKI:

4 Q. Good afternoon, Mr. Maurer.

5 A. Hello.

6 Q. My name is Ken Racowski. I'm an attorney for
7 Benco. We met in Atlanta at your deposition last
8 year. I have a few questions for you and I'll be
9 brief.

10 A. Okay.

11 Q. Just to cover some basics pretty quickly, is it
12 correct that Smile Source is a franchise company?

13 A. That's correct.

14 Q. And does Smile Source enter into agreements
15 with independent dentists?

16 A. We do.

17 Q. Are those franchise agreements?

18 A. They are.

19 Q. What's the standard term of those franchise
20 agreements?

21 A. Five years.

22 Q. And pursuant to those franchise agreements, do
23 the dentist franchisees pay a fee to Smile Source?

24 A. They do.

25 Q. And are the fees that Smile Source collects

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1 from its franchisees its only source of revenue?

2 A. No.

3 Q. Are they its primary source of revenue?

4 A. Yes. Lion's share.

5 Q. And by "lion's share" could you put a
6 percentage on what percent the fees collected from
7 franchisees are of Smile Source's overall revenue?

8 MS. STAPLEY: Your Honor, may I instruct the
9 witness to answer that in the public session if that is
10 in line with the proper treatment in his opinion as
11 president of the company?

12 JUDGE CHAPPELL: Okay. We are in public
13 session.

14 MS. STAPLEY: I know. And if the answer he
15 gives should be in private session, I'd like for him to
16 be aware that that could be reserved.

17 JUDGE CHAPPELL: So you're not sure what he's
18 going to say?

19 MS. STAPLEY: Correct.

20 JUDGE CHAPPELL: Why don't you consult with him
21 and let us know.

22 (Witness confers with counsel.)

23 MS. STAPLEY: Your Honor, that should be
24 answered in an in camera session. Perhaps we can
25 reserve until the next --

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1 JUDGE CHAPPELL: All right. Your pending
2 question needs to be in camera. Do you have anything
3 else for public session?

4 MR. RACOWSKI: I do, Your Honor.

5 JUDGE CHAPPELL: Go ahead. Reserve that one.

6 MR. RACOWSKI: Skip over that one.

7 BY MR. RACOWSKI:

8 Q. Mr. Maurer, is it correct that there are no
9 requirements that Smile Source franchisees purchase
10 dental supplies from Smile Source vendors?

11 A. That's correct.

12 Q. And Smile Source has never represented to any
13 vendor that it requires its franchisees to purchase
14 from them.

15 A. Right. It's their choice.

16 Q. Is Smile Source involved in purchasing dental
17 supplies for its franchisees?

18 A. Not on behalf of.

19 Q. Smile Source doesn't select the dental
20 supplies, does it?

21 A. Correct.

22 Q. And Smile Source doesn't order the dental
23 supplies?

24 A. That's correct.

25 Q. Smile Source doesn't pay for the dental

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1 supplies; correct?

2 A. Correct.

3 Q. And Smile Source does not take shipment of any
4 dental supplies for its franchisees, does it?

5 A. Correct.

6 Q. During your investigational hearing, you
7 defined Smile Source as an intermediary. Do you
8 remember that?

9 A. Can you be specific? An intermediary for
10 what?

11 Q. Sure.

12 Do you agree that it's a fair characterization
13 that Smile Source is an intermediary between
14 manufacturers and dentists?

15 A. I'm trying to define your term. What
16 Smile Source does is aggregates resources across many
17 categories. Buying is one of them, so we negotiate
18 deals on behalf of our members.

19 Q. Okay.

20 A. Does that answer your question?

21 Q. Do you ever recall referring to Smile Source as
22 an intermediary?

23 A. I don't, but that doesn't mean I didn't.

24 Q. And I think you said earlier today that you
25 don't consider Smile Source to be a buying group; is

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1 that right?

2 A. Correct.

3 Q. Does the term "buying group" have negative
4 connotation to you?

5 A. To me it does.

6 Q. Why is that?

7 A. Because a buying group typically that is what
8 they offer in its entirety.

9 Q. And do you recall in your prior deposition
10 saying that you can't save your way to prosperity?

11 A. I do.

12 MS. GOFF: Your Honor, objection. What
13 Mr. Maurer said at his prior deposition is not relevant
14 at this point. I don't know whether Mr. Racowski is
15 impeaching or refreshing.

16 MR. RACOWSKI: I was going to ask him what he
17 meant, but I could do it a different way.

18 JUDGE CHAPPELL: Go ahead. Overruled.

19 BY MR. RACOWSKI:

20 Q. What did you mean when you made that
21 statement?

22 A. Say it again.

23 Q. You can't --

24 JUDGE CHAPPELL: Hold on a second.

25 Did he answer your previous question?

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1 MR. RACOWSKI: He did. He said, "I do."

2 JUDGE CHAPPELL: Yes. All right. Go ahead.

3 BY MR. RACOWSKI:

4 Q. The statement was: You cannot save your way to
5 prosperity. And my question is, what did you mean by
6 that?

7 A. Sure.

8 Saving on dental supplies or saving on dental
9 products isn't enough. In fact, I know that we have
10 said if I could get your dental supply and lab for
11 free, it still wouldn't help you have a better
12 practice, so although savings are important for those
13 that join our group, the major reason why most people
14 do join, the reason they stay and have high
15 satisfaction is the growth of the practice and the
16 camaraderie they receive in the group.

17 Q. And is it fair to say that gaining new patients
18 and gaining new revenue is more important than saving
19 money on dental supplies?

20 A. For who? Are you asking me or my dentists?

21 Q. For Smile Source franchisees.

22 A. They're equally important.

23 Q. How about in your mind?

24 A. Savings are important for attraction, and
25 growing the practice is important for retention of our

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1 offices.

2 Q. You met with Benco representatives at the
3 2014 Chicago Midwinter meeting; is that right?

4 A. I did.

5 Q. And was one of those Benco representatives
6 Chuck Cohen?

7 A. Yes.

8 Q. What happened at that meeting?

9 A. We walked away without an agreement or next
10 steps to work together. He viewed us as a buying
11 group, and we're more than that, and so he stated in
12 his opinion he didn't think we would provide value or
13 be able to drive compliance with purchasing.

14 Q. Did Mr. Cohen tell you that he didn't believe
15 Smile Source could deliver additional volume in
16 exchange for discounts?

17 A. He did.

18 Q. And Mr. Cohen told you that he viewed
19 Smile Source as a buying group?

20 A. He did.

21 Q. And is it right that you personally don't
22 believe that buying groups provide value to dentists?

23 A. That's true.

24 Q. And Mr. Cohen expressed a similar belief to you
25 at that meeting; correct?

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1 A. He did.

2 Q. So you didn't view Mr. Cohen's belief as
3 unreasonable, did you?

4 A. No. If he viewed us as a buying group, I
5 understand his decision.

6 MR. RACOWSKI: That's all the questions I have.
7 Thank you.

8 JUDGE CHAPPELL: You're going to waive the
9 in camera question?

10 MR. RACOWSKI: Yes, Your Honor.

11 JUDGE CHAPPELL: Anything else?

12 MR. OSTOYICH: Yes. I have one or two,
13 Your Honor.

14 JUDGE CHAPPELL: Go ahead.

15 - - - - -

16 DIRECT EXAMINATION

17 BY MR. OSTOYICH:

18 Q. Mr. Maurer, how are you?

19 A. Good. Thank you.

20 Q. We have never met before. My name is
21 Joe Ostoyich. I'm the lawyer for Patterson Companies.

22 Mr. Maurer, if I heard your testimony right,
23 Smile Source is not a buying group.

24 Is that right?

25 A. Correct.

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1 Q. And you don't buy dental equipment.

2 Do I got that right?

3 A. Right.

4 Q. And you don't buy dental supplies.

5 A. Correct.

6 Q. And each member of Smile Source is
7 independent.

8 A. Yes.

9 Q. So you're not a group.

10 A. Is that a question?

11 Q. So are you a group?

12 A. We are a franchise group. Yes.

13 Q. I want to drill down on when you first joined
14 the company and ask you some follow-up questions, and
15 what I'm going to do is, you as the president, you're
16 responsible for filing a franchise disclosure document
17 in certain states; is that fair?

18 A. Yes.

19 Q. And people under your direction prepare that
20 document periodically; fair?

21 A. Yes.

22 Q. And you yourself review that document from time
23 to time; fair?

24 A. Sure.

25 Q. All right. Let's call up RX 290.

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1 And if you want, I can hand you a hard copy
2 because it's a big document, but if you see the front
3 page, this is an application that Smile Source
4 submitted to the State of Minnesota Department of
5 Commerce for a franchise distribution disclosure
6 agreement, and then this cover page has the approval of
7 that application in July of 2014.

8 Do you see that?

9 A. I do.

10 Q. Would you like me to hand up a hard copy? It's
11 a big document.

12 A. No thank you.

13 Q. All right. And if we can go to page 3 of the
14 document, Kurt.

15 And just so we're clear, this is a
16 certification from your general counsel,
17 Curtis Domingue.

18 Did I pronounce that right?

19 A. Uh-huh.

20 Q. All right.

21 A. Yes.

22 Q. And this is prepared under your authority;
23 fair?

24 A. Under my what?

25 Q. Under your authority?

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1 A. Authority? Yes.

2 Q. All right.

3 Now, if we go to page 17 -- I just want to make
4 sure I got the timeline right here -- page 17, we have
5 down here that Andrew Goldsmith, about three-quarters
6 of the way down -- and maybe we can blow that up,
7 Kurt -- so he was the vice -- he was the president of
8 Smile Source until February 2013, and then he was
9 demoted; is that correct?

10 MS. GOFF: Objection. Leading.

11 MR. OSTOYICH: Well, I asked is it correct.

12 MS. GOFF: Your Honor, I've been giving some
13 leeway to Mr. Ostoyich, but a lot of these questions
14 have been leading. And again, Mr. Maurer is not on
15 Mr. Ostoyich's witness list, but assuming this is a
16 direct exam, he's not permitted to lead. And if it's
17 a -- if it's a --

18 MR. OSTOYICH: Again, I asked is it correct,
19 which gives him the opportunity to say yes or no, so
20 it's not leading.

21 JUDGE CHAPPELL: Just rephrase.

22 BY MR. OSTOYICH:

23 Q. This says that Mr. Goldsmith served as the
24 president of Smile Source from August 2011 until
25 February 2013 when he was made vice president.

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1 Is that a demotion, sir?

2 A. It is. But that would happen in November '12.
3 I guess we memorialized it in February.

4 Q. And if we scroll up, this has when you joined
5 the company up at the top, and you were named president
6 it says in January of 2014.

7 Did I get that right?

8 A. Yes.

9 Q. All right. Now, in this time period, I want to
10 ask you a little bit about the company's performance
11 before you became president, so what you inherited from
12 Mr. Goldsmith.

13 Does that make sense?

14 A. Yes.

15 Q. All right. Was the company -- was the
16 Smile Source enterprise -- were you making money at the
17 time?

18 A. I'd rather not openly discuss financials.

19 Q. It's a public document. It's been filed with
20 the State of Minnesota.

21 A. The financials?

22 Q. Yeah.

23 A. So we file a marketing document as well, so I
24 don't know which one you're referring to, but I can
25 answer your question and you can let me know if this is

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1 satisfactory.

2 It was underperforming significantly versus
3 expectations.

4 Q. Fair enough.

5 If we turn to page 73 of this -- it's public,
6 so page 73, Kurt -- you see you had to submit to the
7 State of Minnesota your consolidated financial
8 statements for 2013 and 2012.

9 And if we go to page 74 and 75 -- try another
10 one -- 76, 77 -- how's that? There we go.

11 Did the company lose money, lose more than
12 a million dollars in 2013, sir?

13 A. Well, that's the balance sheet.

14 Q. Okay. Let's go a couple pages further, Kurt.

15 A. You're asking about revenue.

16 Q. Here we go.

17 The revenue and cost of operations, am I
18 reading it right that the company lost more than
19 a million dollars in 2012?

20 A. Yes.

21 Q. And it lost more than a million dollars in
22 2013?

23 A. Uh-huh, yes.

24 Q. And that's what you inherited from
25 Mr. Goldsmith when you became president in --

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1 A. Correct.

2 Q. -- late 2013, early 2014.

3 And now, I want to ask you about the membership
4 that you inherited from Mr. Goldsmith.

5 If you could go to page 12 of this same
6 document, Kurt.

7 This is an application to become a franchisor
8 in the state of Minnesota; is that fair?

9 A. Uh-huh.

10 Q. And --

11 A. Yes.

12 Q. -- at this point in the middle of 2014 you see
13 here it's pending, do you see for Minnesota in the
14 middle?

15 A. I do.

16 Q. All right. So at the time -- you're aware that
17 Mr. Goldsmith approached Patterson in the fall of
18 2013 --

19 A. I am.

20 Q. -- to become a -- possibly have a relationship
21 with Smile Source? You're aware of that?

22 A. Yes.

23 Q. And at that time, Patterson was headquartered
24 in Minnesota.

25 Are you aware of that?

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1 A. Yes.

2 Q. And at that time, Smile Source was not
3 approved, had not even applied, to be a franchisor in
4 the state of Minnesota; is that fair?

5 A. Uh-huh. Yes.

6 Q. And if we look at the states where you have
7 approved, it looks like there are six states where you
8 were approved in 2014, so after Mr. Goldsmith was
9 demoted: California, Hawaii and Illinois, New York and
10 Washington.

11 Do I have that right?

12 A. Not in its entirety. These are the
13 registration states. There are nonregistration states
14 as well.

15 Q. Fair enough.

16 Of the registration states, you had received
17 approval as a franchisor in six states in 2014 after --

18 A. Yes.

19 Q. -- Mr. Goldsmith left his position --

20 A. Yes.

21 Q. -- as president.

22 And then you had a handful of states, Indiana,
23 Maryland, North Dakota, Rhode Island, South Dakota and
24 Wisconsin, where you were not registered in 2014; is
25 that fair?

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1 Yes?

2 A. Yes.

3 MS. GOFF: Your Honor, I'm going to object.

4 Again, all of these questions are leading.

5 MR. OSTOYICH: Again, I'm asking is it fair,
6 which gives him the option of saying --

7 JUDGE CHAPPELL: Apparently, he's summarizing a
8 document rather than eliciting facts by leading.

9 MS. GOFF: Okay. Thank you, Your Honor.

10 JUDGE CHAPPELL: So I'll allow it for now. If
11 it continues, at some point I will intervene.

12 MS. GOFF: Thank you, Your Honor.

13 JUDGE CHAPPELL: I'm not sure much of this is
14 worth disputing also.

15 Go ahead.

16 BY MR. OSTOYICH:

17 Q. And then, Mr. Maurer, two states, Minnesota
18 and Virginia, you were still pending for your
19 franchise approval; is that a fair statement of this
20 document?

21 A. Sure. Yeah.

22 Q. All right. Now, if we go to page 35, I want to
23 ask you about the total members.

24 I think you said when you joined the company in
25 the fall of 2012 you had about 32 franchisees; is

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1 that --

2 A. Yes.

3 Q. -- fair?

4 At the end of 2013, it looks likes you had
5 about 145.

6 Does that sound roughly right?

7 A. Yes.

8 Q. All right. So you inherited from
9 Mr. Goldsmith 145. And if we go to the next page,
10 page 36, we can see there's a table in here of where
11 those franchisees are located, and it looks to me like
12 you've got a couple dozen in Georgia. You see over on
13 the right-hand column it looks like about 24. Is that
14 the right way to interpret this?

15 A. I can't see the right header, but yes, from
16 memory, yeah.

17 Q. And then if we go to the next page, it looks
18 like you've got a dozen and a half, 17 or so, in
19 Tennessee at the end of 2013.

20 Does that sound about right?

21 A. Uh-huh. Yes.

22 Q. All right. So you had a cluster of
23 franchisees in Georgia and Tennessee in the Southeast
24 and West.

25 Does that sound right?

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1 A. Yes.

2 Q. And then it looks like you had a cluster of
3 franchisees at the end of 2013 in the Northwest. I see
4 Washington state, for example, you have 25.

5 Is that the right way to interpret that?

6 A. Yes.

7 Q. All right. And if we go back to the prior
8 page, you had a handful in California, and it looks
9 like you had about five. And if we go to the next
10 page again, it looks like you had a handful in the
11 state of Oregon, so on.

12 So were your customers primarily at that time
13 that you inherited from Mr. -- I'm sorry -- your
14 franchisees that you inherited from Mr. Goldsmith
15 mostly in the Southeast, the Northwest and Texas? Is
16 that fair?

17 A. Yes.

18 Q. All right. And I don't see any measurable
19 number of customers at this time in the Northeast; is
20 that fair?

21 A. Correct.

22 Q. Or the Mid-Atlantic; is that fair?

23 A. Sure.

24 Q. Or the Midwest; is that fair?

25 A. Sure.

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1 Q. All right.

2 A. Or Canada.

3 Q. All right. Or the mountain states, you didn't
4 have many franchisees back then.

5 A. Yes. We picked more.

6 Q. Now, you had -- you inherited from
7 Mr. Goldsmith -- you had a distributor in the
8 Southeast; right?

9 A. Yes.

10 Q. You had two.

11 You had Nashville Dental; right?

12 A. Yes. And Atlanta Dental.

13 Q. And you had Atlanta Dental.

14 And then you had already a distributor in the
15 Northwest, Burkhardt; is that fair?

16 A. Yes.

17 Q. Did you -- when you took over as president in
18 January '14, did you consider it critical to
19 immediately add a national distributor to help you
20 cover the Northeast, the Mid-Atlantic and the Midwest?

21 A. Not immediately critical.

22 Q. All right. Did you consider that the business
23 was attractive to a national, full-service distributor
24 at that time?

25 A. Yes.

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1 Q. Did you reach out to Patterson Companies when
2 you joined the company in January '14?

3 A. I joined in November 2012. Is the question did
4 I reach out in November 2014?

5 Q. Yeah.

6 A. Most likely. There was a time I did reach out
7 to meet them.

8 Q. Were you involved at all when Mr. Goldsmith
9 reached out to Patterson in the fall of 2013 before --

10 A. No.

11 Q. -- he was demoted?

12 Was your top priority when you became president
13 to reach back out to Patterson and find a national
14 distributor?

15 A. No.

16 Q. All right. Was your priority to grow the
17 franchisee base?

18 A. Yes.

19 Q. And to add additional educational resources and
20 other resources for Smile Source to provide to its
21 franchisees?

22 A. To grow the network. Yes.

23 Q. And in 2014 and 2015 and 2016 did you
24 accomplish adding resources and growing the network?

25 A. We did.

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1 Q. If I understood you, today you have
2 650 locations and a thousand dentists among your
3 franchisees; is that fair?

4 A. Yes.

5 Q. So you increased that from back then by four or
6 five or sixfold, maybe more; is that fair?

7 A. Sure.

8 Q. All right. In 2016, do you recall some
9 interaction you had with Patterson about seeing
10 whether Patterson would be interested after you'd
11 grown in --

12 A. I did.

13 Q. -- supplying the Smile Source franchisees?

14 A. I do.

15 Q. I'm going to show you -- can we call up, Kurt,
16 PDCO 00066405 -- and see if I can refresh your memory
17 on the time period for when that happened.

18 There's an e-mail from you, Trevor Maurer, to
19 Tim Rogan.

20 And Mr. Rogan works for my client Patterson?

21 MS. GOFF: Objection, Your Honor. This
22 document does not appear to be on any witness list. If
23 Mr. Ostoyich is using it to refresh, he should not be
24 putting it on the screen.

25 MR. OSTOYICH: Well, he said he reached out and

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1 wasn't sure of the time period, so I'm trying to
2 refresh the time period. That's all.

3 JUDGE CHAPPELL: You're refreshing his
4 recollection?

5 MR. OSTOYICH: Yeah.

6 JUDGE CHAPPELL: Then you do that. The
7 document doesn't have to be in evidence, but you don't
8 need to have it on the screen. Hand him the document.

9 MS. GOFF: Thank you, Your Honor.

10 MR. OSTOYICH: Your Honor, can I approach and
11 give him --

12 JUDGE CHAPPELL: Right. And when you question
13 him, let him know he's to look at that but not read
14 from it, because we have an objection.

15 MR. OSTOYICH: Yep.

16 BY MR. OSTOYICH:

17 Q. Mr. Maurer, take a look, and I want to see if
18 this refreshes your recollection of when you engaged
19 with Patterson.

20 Does the e-mail refresh your recollection as
21 to --

22 A. Yeah. Shortly after they won the Heartland
23 business.

24 Q. Would that -- I'd like to actually put it up,
25 and what I'm going to do is mark it as a demonstrative

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1 exhibit. We're going to mark it as RXD 230.

2 MS. GOFF: Your Honor, Mr. Ostoyich did not
3 produce this demonstrative exhibit to us 24 hours in
4 advance as the rule requires. This is the first time
5 that we've seen this document. It's not on any exhibit
6 list.

7 JUDGE CHAPPELL: And you're not on cross.

8 MR. OSTOYICH: I'm sorry. What's that?

9 JUDGE CHAPPELL: And you're not on cross, so
10 don't you have the timing obligation?

11 MR. OSTOYICH: You're right.

12 JUDGE CHAPPELL: Move along.

13 BY MR. OSTOYICH:

14 Q. Mr. Maurer, the e-mail that I just handed you
15 references Heartland.

16 What was the reach-out you made to Mr. Rogan of
17 Patterson in the fall of 2016 reference Heartland?
18 What was that about?

19 A. They'd won the business for Heartland, and the
20 e-mail was to see if they wanted to engage with us now
21 that it seemed that they are going after large group
22 business.

23 Q. And just so we're clear, what was Heartland?

24 A. The largest DSO, privately owned -- or sorry --
25 privately held but corporately owned practices.

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1 Q. And was there something about Patterson's win
2 of the Heartland business that you thought made a
3 change in their view and their willingness to deal with
4 Smile Source?

5 A. Yes.

6 Q. And what was that?

7 A. They were not really in the group dentistry
8 space prior to that.

9 Q. And so that led you to think they might be
10 interested in engaging with Smile Source at that
11 point?

12 A. Yes.

13 Q. And were they in fact interested in engaging
14 with you?

15 A. Yes.

16 Q. And did they -- after you reached out in the
17 fall of 2016, did they engage?

18 A. They did. We -- can I just speed this up?

19 Q. Yep.

20 A. We went through a process, a bid process, and
21 it became between Schein and Patterson for our
22 national business. They both bid similarly. And they
23 were both very reasonable. We were happy with both.
24 And we were so happy with both that I removed myself
25 from the final decision because I felt the pricing was

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1 similar, and the decision was eventually made to go
2 with Schein, but they were both good bids.

3 Q. Mr. Maurer, am I right that you think that both
4 the Smile Source business was more attractive to a
5 national distributor like Patterson in 2016 than it had
6 been back in 2012? Am I right about that?

7 A. Well, of course, the larger we get, the more
8 attractive we are.

9 Q. And also that Patterson itself had developed a
10 group -- a focus on dental groups that made them --
11 might make them more interested in the Smile Source
12 business?

13 MS. GOFF: Objection. Foundation.
14 Mr. Ostoyich is asking what Patterson was doing.

15 MR. OSTOYICH: But I'm asking him his
16 perspective since he sent the e-mail that he said was
17 triggered by the Heartland win.

18 JUDGE CHAPPELL: It's also blatantly leading.
19 Rephrase.

20 BY MR. OSTOYICH:

21 Q. Mr. Maurer, did you perceive, when you saw that
22 Patterson had won the Heartland business, that they
23 might be more interested in winning Smile Source
24 business?

25 A. I didn't know how their resources were

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1 structured. I just knew that that was a big piece of
2 business, and I heard that they were very aggressive to
3 get it, so I wanted to know if they'd be aggressive to
4 get ours.

5 Q. And it turned --

6 (Counsel and witness speaking at the same time
7 and cautioned by court reporter.)

8 BY MR. OSTOYICH:

9 Q. And did it turn out that they were aggressive
10 to win your business?

11 A. I said that.

12 Q. Mr. McDonald asked you -- he put up a slide and
13 he asked you whether you had knowledge of an agreement
14 alleged by the FTC between Patterson, Schein and Benco.
15 Do you remember that?

16 A. I do.

17 Q. Do you have any firsthand knowledge, did you
18 hear any Patterson witness, any employee anywhere, ever
19 talk to anyone from Schein about not selling to buying
20 groups or not discounting to buying groups?

21 JUDGE CHAPPELL: That's a compound question.
22 Rephrase.

23 BY MR. OSTOYICH:

24 Q. Mr. Maurer, do you have any firsthand
25 knowledge of any Patterson employee ever communicating

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1 with anyone from Schein about not selling to buying
2 groups?

3 A. I do not.

4 Q. Do you have any firsthand knowledge of any
5 Patterson witness ever communicating with anyone from
6 Schein about not discounting to buying groups?

7 A. I do not.

8 Q. Do you have any firsthand knowledge of any
9 witness -- employee of Patterson ever communicating
10 with anyone from Benco about not selling to or
11 discounting to buying groups?

12 A. I do not.

13 Q. I want to show you -- you've been deposed in
14 this case twice; is that fair?

15 A. Yes.

16 Q. All right. You spent hours being questioned
17 under oath by the various lawyers, including the FTC
18 lawyers in the case; fair?

19 A. Yes.

20 Q. All right. Did you ever tell anyone from the
21 government that you had firsthand knowledge of
22 Patterson's participation in a conspiracy?

23 A. No.

24 Q. Let's call up RX 2934.

25 Now, what I'm going to show you --

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1 JUDGE CHAPPELL: In your last question,
2 Counselor, were you asking the witness if he had done
3 that on the side or during all these depositions you
4 just referenced?

5 BY MR. OSTOYICH:

6 Q. Let me clarify.

7 Did you ever tell the government lawyers, under
8 oath, in any of your various testimony prior to this in
9 the case, that you had firsthand knowledge of
10 Patterson's participation in a conspiracy with Schein
11 or Benco?

12 A. No.

13 Q. Did you ever have a nondeposition conversation,
14 a phone call or an e-mail exchange where you suggested
15 to them that you had firsthand knowledge that my client
16 Patterson participated in a conspiracy with Schein or
17 Benco?

18 A. No.

19 Q. I'm going to show you what the government has
20 said. This is their responses to interrogatories.

21 And if we go to page 4 -- I'm sorry -- page 9,
22 I asked them a question. I said: Identify the factual
23 basis, including persons with knowledge, for the
24 allegations in their complaint that Patterson
25 participated in the conspiracy.

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1 Do you see that, sir?

2 A. Yes.

3 Q. And if we go to page 10, they answered, and
4 they said the following persons have knowledge of the
5 facts underlying their conspiracy allegation against my
6 client Patterson.

7 Do you see that?

8 A. I do.

9 Q. And if we go to the next page, at about the
10 bottom of the list they listed you, Trevor Maurer.

11 Do you see that?

12 A. I do.

13 Q. But you don't actually have that knowledge, do
14 you, sir?

15 A. That's correct.

16 Q. So this is false.

17 Fair?

18 A. I guess so.

19 Q. And did they ask your permission to put this
20 false answer with your name on it in their
21 interrogatory answer?

22 A. I don't know how to answer that, but nobody
23 asked me my permission to put something false in a
24 document, no.

25 MR. OSTOYICH: I have nothing further.

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1 Thank you, sir.

2 JUDGE CHAPPELL: This is our last witness
3 available today?

4 MR. OSTOYICH: We actually -- because we
5 realized we're going to fall short, we actually can
6 bring our expert in and start Dr. Wu, so we can either
7 start him --

8 JUDGE CHAPPELL: So he is available?

9 MR. OSTOYICH: He is available.

10 JUDGE CHAPPELL: All right. Thank you.
11 Cross?

12 We'll see where we stand when this finishes.

13 - - - - -

14 CROSS-EXAMINATION

15 BY MS. GOFF:

16 Q. Good afternoon, Mr. Maurer.

17 I'm Karen Goff on behalf of complaint counsel.
18 We met at your investigational hearing and your
19 deposition. It's good to see you again.

20 A. Good to see you, Karen.

21 Q. I had anticipated doing a big chunk of my exam
22 in camera, but based on a lot of what we did with
23 respondents in public session, I'm going to follow
24 their lead and do as much as I can in public session,
25 and I will go in camera a little bit later. But I

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1 invite your counsel to speak up if there's any issues.

2 A. Thank you.

3 Q. Thank you.

4 JUDGE CHAPPELL: Why don't you move up, take a
5 seat closer in case you need to jump up here.

6 Thank you.

7 That's the hot seat. That's good. Right
8 there.

9 BY MS. GOFF:

10 Q. So first, I want -- you spoke with the
11 respondents' counsel about Smile Source's business
12 model, and I just wanted to ask you in public session a
13 few questions generally about Smile Source's business
14 model.

15 A. Okay.

16 Q. Smile Source promotes independent dentists.

17 A. Yes.

18 Q. And Smile Source helps independent dentists be
19 more successful.

20 A. Yes.

21 Q. And I believe you testified about the ways in
22 which Smile Source benefits its members. There are
23 four ways: the cooperative buying program, marketing
24 services, continuing education, and best practice
25 sharing? Do I have that right?

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1 A. You do.

2 Q. And the cooperative buying program, it
3 leverages the collective purchasing power of
4 Smile Source's members to obtain discounts on dental
5 supplies?

6 A. Yes.

7 Q. And when you first joined Smile Source in
8 2012, Smile Source had that cooperative buying program
9 in place at that point; correct?

10 A. Yes.

11 Q. And when you first joined Smile Source in
12 2012, it also had -- it also offered, rather, marketing
13 services to its members?

14 A. Yes.

15 Q. And when you joined Smile Source in 2012, it
16 offered continuing education to members as well?

17 A. Very -- in a very minor way.

18 Q. At the annual meeting?

19 A. At the annual meeting, yes. Sure. Yep.

20 Q. And when you first joined Smile Source in
21 2012, Smile Source provided best practice sharing to
22 its members.

23 A. Yes.

24 Q. And then I want to talk briefly about your
25 background.

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1 Prior to joining Smile Source, you were
2 president of Vision Source; is that correct?

3 A. No. No.

4 Q. What were you?

5 A. Business development director.

6 Q. At Vision Source?

7 A. Yes.

8 Q. Thank you.

9 And you were brought over to Smile Source
10 because you had experience at Vision Source?

11 A. Yes.

12 Q. And Vision Source is similar to Smile Source
13 but for optometrists instead of dentists?

14 A. Correct.

15 Q. Prior to joining Smile Source, you did not
16 have any experience in the dental industry; is that
17 right?

18 A. Some limited recruiting knowledge.

19 Q. And then today, in your current role, you're
20 not involved directly with seeking vendors; is that
21 right?

22 A. Correct. We have a vice president of vendor
23 relations.

24 Q. And then there was a period of time and is that
25 in the 2015-2016 period when you were directly involved

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1 with vendor relations?

2 A. Yes.

3 Q. And then prior to that, Mr. Goldsmith was in
4 charge of vendor relations?

5 A. Yes.

6 And just in public should we call him
7 Dr. Goldsmith?

8 Q. Yes. Thank you for correcting me.

9 Dr. Goldsmith.

10 A. Yes.

11 Q. When you started at Smile Source in 2012,
12 Smile Source was headquartered in Kingwood, Texas?

13 A. Yes. As it is today.

14 Q. And Smile Source had -- is in the same facility
15 today as it was in 2012?

16 A. That's true.

17 Q. When you started in 2012, Smile Source had some
18 employees.

19 A. Yeah. Three in the office and a handful in the
20 field.

21 Q. And when you started, Smile Source had member
22 dentists as well.

23 A. Correct.

24 Q. Okay. In the 2013 time period, Smile Source
25 worked with three full-service distributors, Burkhart,

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1 Atlanta and Nashville; is that right?

2 A. Yes.

3 Q. It did not -- when you joined Smile Source, it
4 did not have full-service distribution partners located
5 in the entire country.

6 A. Correct.

7 Q. Smile Source did not have full-service
8 distribution in the Northeast; right?

9 A. That's right.

10 Q. And to obtain full-service distribution across
11 the country, Dr. Goldsmith considered a patchwork of
12 full-service distributors all over the country; is that
13 right?

14 A. That's right.

15 Q. He suggested the idea of using a patchwork of
16 these smaller regional distributors?

17 A. Yes.

18 Q. And is that called the NDC?

19 A. That's correct.

20 Q. Do you know what that stands for, for the
21 record?

22 A. National dealer -- something.

23 Q. Okay. Thank you.

24 A. It starts with a C.

25 Q. Thank you.

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1 Am I correct you didn't like that idea that
2 Dr. Goldsmith had?

3 A. I felt that it would be too cumbersome to
4 manage.

5 Q. And so then in 2013 Smile Source reached out to
6 some national, full-service distributors about working
7 together.

8 A. That's correct.

9 Q. And it reached out to Benco and Patterson and
10 Schein?

11 A. Yes.

12 Q. You already spoke a little bit about Benco, but
13 I just wanted to follow up and make sure I had the
14 information correct.

15 So am I correct that you met with Mr. Cohen of
16 Benco at the Chicago Midwinter meeting in February of
17 2014?

18 A. You are.

19 Q. And at that meeting Mr. Cohen informed you that
20 Benco did not want to work with Smile Source.

21 A. So the outcome eventually, yes. I'm not sure
22 if it was specifically at that table or very shortly
23 thereafter, but yes, that was the outcome.

24 Q. Thank you.

25 And Mr. Cohen referred to Smile Source as

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1 a buying group during that meeting.

2 A. Yes.

3 Q. And then in late 2013 Smile Source reached out
4 to Patterson to see if Patterson might be interested in
5 working with Smile Source?

6 A. Yes.

7 Q. I'd like to call up CX 3294.

8 And I'm going to ask to approach the witness so
9 I can hand him a binder.

10 JUDGE CHAPPELL: Go ahead.

11 THE WITNESS: Am I able to get up and meet you
12 halfway or do I have to sit here?

13 MS. GOFF: Oh, that's okay.

14 THE WITNESS: I don't know the protocol.
15 Thank you.

16 JUDGE CHAPPELL: Hold it. Pause for the
17 ceremonial exchanging of all the binders and opening of
18 the binders.

19 Everybody ready?

20 Go ahead.

21 MS. GOFF: Okay. Thank you.

22 BY MS. GOFF:

23 Q. So you have CX 3294 in your binder and it's
24 also on the screen. Feel free to look at either one.

25 A. Okay. I'll look at the screen if that's okay.

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1 Q. Sure.

2 So the e-mail chain starts at the bottom with
3 an e-mail from Dr. Goldsmith to David Misiak of
4 Patterson.

5 Do you see that?

6 A. I do.

7 Q. The e-mail is dated October 10, 2013.

8 A. Yeah.

9 Q. And Dr. Goldsmith is introducing you to
10 Mr. Misiak of Patterson.

11 Is that right?

12 A. Yes.

13 Q. Dr. Goldsmith asks for a meeting between you
14 and Mr. Misiak in Minneapolis; is that right?

15 A. Yes.

16 Q. And you responded to that e-mail and you also
17 expressed an interest in meeting with Mr. Misiak.

18 Yes; is that right?

19 A. Yes. Sure.

20 Q. Thank you.

21 And you were trying to get an in-person meeting
22 with Mr. Misiak at or near Patterson's headquarters;
23 right?

24 A. Yes.

25 Q. And you were not --

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1 (Counsel and witness speaking at the same time
2 and cautioned by court reporter.)

3 BY MS. GOFF:

4 Q. And you were trying to get an in-person meeting
5 with Mr. Misiak at or near Patterson's headquarters;
6 right?

7 A. Yes.

8 Q. And you were not successful in getting that
9 meeting --

10 A. Correct.

11 Q. -- in or around 2013.

12 A. Correct.

13 Q. And then the next e-mail chain is dated
14 December 30, 2013. And you wrote to Mr. Misiak, "I
15 never heard back from you and I find that odd. We
16 purchase over \$14 million annually in supplies, and
17 that number continues to double every year.
18 Dr. Goldsmith advised me that you are not interested in
19 working with us."

20 Do you see that?

21 A. I do.

22 Q. And when you wrote, "We purchase over
23 14 million annually in supplies," is that a reference
24 to the collective purchases of Smile Source members?

25 A. It is.

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1 Q. And in this e-mail you're telling Mr. Misiak
2 that you never heard back from him and you found that
3 odd.

4 Do you see that?

5 A. I do.

6 Q. And at the time that you wrote this e-mail, you
7 believed that 14 million in supplies annually was a
8 significant number.

9 A. I do.

10 Q. Okay. And then turning to after 2015, you
11 testified earlier that Smile Source was still looking
12 for a national, full-service distributor to partner
13 with --

14 A. Yes.

15 Q. -- is that right?

16 And did you -- you began hearing complaints or
17 suggestions from members that you didn't have a
18 full-service distributor in the Northeast?

19 A. Correct.

20 Q. And so you approached Patterson again at that
21 time?

22 Yes?

23 A. I don't recall if it was specifically in '15,
24 but if you have a document or --

25 Q. Sure. And I apologize.

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1 A. I don't -- I don't refute that I did.

2 Is that okay?

3 Q. Sure.

4 And let me just rephrase my question instead.

5 At some point after the 2015 period, in or
6 around 2015-2016, you approached Patterson again. And
7 actually, let me just strike that and just go to my
8 next question. You --

9 A. Okay.

10 Q. You approached Tim Rogan in New York at the
11 Greater New York meeting in November 2016.

12 A. Yes, I --

13 Q. Do you remember that?

14 (Counsel and witness speaking at the same time
15 and cautioned by court reporter.)

16 JUDGE CHAPPELL: All right. If you keep doing
17 this, we're going to use army radio rules and you've
18 got to say "over," so let's try it again.

19 THE WITNESS: Copy that.

20 BY MS. GOFF:

21 Q. So you approached Tim Rogan in New York at the
22 Greater New York meeting in November of 2016.

23 A. Yes.

24 Q. You informed him that Smile Source was looking
25 for a national dealer.

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1 A. Yes.

2 Q. And following that conversation, Patterson put
3 in a bid to work with Smile Source.

4 A. Yes.

5 Q. You spoke about -- a little bit about Heartland
6 with Mr. Ostoyich.

7 No one from Patterson informed you that
8 Patterson was more interested in Smile Source because
9 they had just won the Heartland business; correct?

10 A. Correct.

11 Q. That was just your assumption.

12 A. Yes.

13 Q. And you don't know when Patterson created a
14 group practice division; right?

15 A. Right.

16 Q. If Patterson witnesses testified that
17 Patterson started its Special Markets Division
18 focusing on groups in 2013, you wouldn't have any
19 reason to doubt that.

20 A. Correct.

21 Q. And when you approached Patterson, did you ever
22 send Patterson a RFP or request for proposal?

23 A. Is this approach in the '15-16 time period?

24 Q. Sure.

25 In the November 2016 period and thereafter did

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1 you ever send a formal RFP to Patterson?

2 A. I remember -- I don't know what you call it,
3 but I remember us sending a specific list of products
4 and asking for pricing.

5 Q. Okay. Do you recall referring to that as an
6 RFP?

7 A. Quite possibly. Yeah. It would make sense.

8 Q. Now let's talk about Schein. We'll go back to
9 the 2014 winter meeting that you testified with
10 Mr. McDonald about --

11 A. Okay.

12 Q. -- just to orient you.

13 I don't recall whether Schein's Mr. McDonald
14 asked you, but what is your recollection of the
15 specific proposal related to discounts on supplies that
16 Schein offered Smile Source in 2014?

17 A. In '14?

18 Q. Yes.

19 A. My recollection is it was the same as what
20 Burkhart was doing.

21 Q. You recall that the proposal that Schein
22 offered was the same as what Burkhart was already
23 providing to Smile Source?

24 A. Yes.

25 Q. And Burkhart at that time was offering pricing

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1 of about a 20 percent discount?

2 A. Yes.

3 Q. And that is what you wanted from Schein as
4 well?

5 A. Well, to be clear, the percent discount depends
6 upon the, let's call it, sticker price.

7 So when they say it will be a 20 percent or a
8 10 percent, it really depends on what price list
9 they're talking about, so at the end of the day all
10 we're interested in is the bottom-line net-net price
11 paid by the dentists, so I don't want to march myself
12 into a corner and say that they were both at 20 or they
13 were both at 10, but at the end they arrived at the
14 same level.

15 Q. So talking about the net price paid by the
16 dentists, it was a 20 percent discount about that you
17 think Burkhart was getting in 2014 -- giving
18 Smile Source members, rather?

19 MS. STAPLEY: Excuse me. Your Honor, we're
20 getting into talking about specific percentages. And
21 if this continues, it needs to be handled in camera as
22 opposed to in public session. That's proprietary
23 information that's subject to an NDA.

24 THE WITNESS: Yeah.

25 JUDGE CHAPPELL: Why don't you consult with

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1 her and see where she's going and how we need to
2 resolve this, whether we need to go in camera or not.

3 MS. GOFF: Okay. Thank you, Your Honor.

4 (Pause in the proceedings.)

5 THE WITNESS: Is this water for me, this water
6 here? Yes? Thank you.

7 JUDGE CHAPPELL: Make sure it hasn't been
8 opened already.

9 THE WITNESS: I think it looks good. It made
10 the sound.

11 (Pause in the proceedings.)

12 MS. GOFF: I apologize, Your Honor.

13 Would it be possible for us to go in camera at
14 this point?

15 JUDGE CHAPPELL: Yes.

16 And you did have a pending question.

17 MS. GOFF: I would like to retract that
18 question and wait until we go in camera.

19 JUDGE CHAPPELL: All right. At this time
20 we'll go into in camera session. I need to ask those
21 not subject to the protective order to leave the
22 courtroom.

23 (Whereupon, the proceedings were held in
24 in camera session.)

25 - - - - -

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1 (The following proceedings were held in
2 in camera session.)
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(End of in camera session.)

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1 (The following proceedings continued in
2 public session.)

3 JUDGE CHAPPELL: So the plan is, we'll finish
4 this witness, take a break and bring the next witness.

5 MR. McDONALD: I have two questions I think and
6 then I'll be done.

7 JUDGE CHAPPELL: Go ahead.

8 - - - - -

9 REDIRECT EXAMINATION

10 BY MR. McDONALD:

11 Q. You just said, Mr. Maurer, that Smile Source
12 members you believe joined for the discounts.

13 A. I believe that's the largest initial reason.

14 Q. Why do they stay?

15 A. They stay for -- we call it the camaraderie,
16 but them being able to work together in marketing,
17 education, and we call it collaborative practice
18 management where they meet locally, focus on their
19 business issues. That's what really provides a -- the
20 cement to the foundation.

21 Q. Not discounts?

22 A. Correct. The discounts need to be there. If
23 they went away, we'd have a problem. But they stay for
24 the broader reasons.

25 MR. McDONALD: That's all the questions I

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1 have.

2 MR. RACOWSKI: Nothing further from Benco,
3 Your Honor.

4 MR. OSTOYICH: Nothing from Patterson,
5 Your Honor.

6 MS. GOFF: Nothing from us, Your Honor.
7 Thank you.

8 JUDGE CHAPPELL: Thank you, sir. You may stand
9 down.

10 THE WITNESS: Thank you.

11 JUDGE CHAPPELL: At this time we'll take our
12 afternoon break.

13 We'll reconvene at 4:25.

14 (Recess)

15 JUDGE CHAPPELL: Okay. We're back on the
16 record.

17 Next witness.

18 MR. LAVERY: Good afternoon, Your Honor.

19 Patterson calls its expert Dr. Lawrence Wu to
20 the stand.

21 Your Honor, while he's sitting down, I have one
22 request since we're starting him a bit early. I only
23 have about 45 minutes to an hour on my direct. If we
24 could go a bit late tonight, he would love to get home
25 to his family. Obviously, we didn't make that request

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1 in advance. I wasn't aware that we'd be here this
2 afternoon, but just for your consideration,
3 Your Honor.

4 JUDGE CHAPPELL: When you pass the witness,
5 we'll get an estimate from the prosecutor and we'll
6 decide.

7 MR. LAVERY: Thank you, Your Honor.

8 - - - - -

9 Whereupon --

10 LAWRENCE WU

11 a witness, called for examination, having been first
12 duly sworn, was examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. LAVERY:

15 Q. Dr. Wu, good afternoon. How are you?

16 A. Good.

17 Q. Could you please introduce yourself for the
18 record.

19 A. My name is Lawrence Wu. I am an economist and
20 president at NERA Economic Consulting.

21 Q. Now, Dr. Wu, tell us a little bit about your
22 educational background if you would.

23 A. I have a B.A. in economics from
24 Stanford University and a Ph.D. in economics from the
25 University of Chicago Graduate School of Business.

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1 Q. Did you have any specialization or
2 concentration in your Ph.D. in economics?

3 A. Yes. I specialized in industrial organization,
4 and my thesis was in health economics.

5 Q. Tell us briefly about industrial organization.
6 What is that?

7 A. Industrial organization is a field of
8 economics. It falls in the category of microeconomics
9 instead of macroeconomics. And one of its main
10 applications is to think about markets, competition and
11 antitrust.

12 Q. And tell us a little bit about healthcare
13 economics. What is that?

14 A. Healthcare economics is a field in economics.
15 It's a specialized industry because of the special
16 institutional characteristics that are involved.

17 Q. Dr. Wu, how many years did it take for you to
18 get your Ph.D. in economics?

19 A. Five years.

20 Q. Did you write a dissertation?

21 A. I did.

22 Q. Did you defend that dissertation?

23 A. I did.

24 Q. Now, Dr. Wu, have you been working in any
25 capacity that utilizes your education since you got

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1 your Ph.D.?

2 A. Yes, I have. Every day.

3 Q. Have you submitted expert reports in other
4 antitrust matters?

5 A. I've submitted expert reports in many matters.

6 Q. Have you ever taught any classes in economics?

7 A. I taught an economics class when I was at the
8 University of Chicago as a student and I taught a class
9 in health economics at NYU's Wagner school of public
10 policy.

11 JUDGE CHAPPELL: What was the title of your
12 dissertation?

13 THE WITNESS: My dissertation was on for-profit
14 and not-for-profit hospitals. It was about what the
15 differences were between the two.

16 JUDGE CHAPPELL: That sounds pretty common.
17 How did you manage to get that as a topic? Don't you
18 have to narrow that a lot more?

19 THE WITNESS: Yes. Well, I did my degree in --
20 from 1987 to 1992, and back then it was not even clear
21 that competition would work in healthcare or that
22 economics could really be applied, and there was a big
23 debate about not-for-profit hospitals, are they
24 efficient or not efficient. And that was at the
25 beginning of an era of for-profit hospitals and

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1 for-profit hospital chains getting into the business,
2 and people were really worried about that, so that's
3 what prompted me to study --

4 JUDGE CHAPPELL: So even though it would appear
5 to be a general or common topic, you found a unique
6 issue to write about.

7 THE WITNESS: Yes.

8 JUDGE CHAPPELL: All right. Just checking to
9 see what kind of school that is up there in Chicago.

10 (Laughter)

11 BY MR. LAVERY:

12 Q. Dr. Wu, have you ever testified in any prior
13 antitrust matters?

14 A. I've testified many times as well.

15 Q. Is that both in court and at depositions?

16 A. Yes. I've testified in federal district court
17 and I've testified on many other occasions, too.

18 Q. Dr. Wu, have you ever testified before any
19 other government bodies or agencies on the subject of
20 antitrust economics?

21 A. Yes. I've testified before, say, a Medicare
22 provider reimbursement panel. I've testified before --
23 in an administrative law proceeding involving a
24 hospital's certificate of need. And last year I
25 testified before a House subcommittee on the proposed

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1 Aetna-CVS transaction.

2 Q. Is that the same CVS-Aetna transaction that the
3 DOJ reviewed?

4 A. Yes, it is.

5 Q. And did one of the parties ask you to testify
6 to Congress about that?

7 A. No. I was asked to testify by members of the
8 committee.

9 Q. By members of the judiciary committee?

10 A. Of the judiciary committee.

11 Q. Okay.

12 Dr. Wu, have you ever had any books published
13 on the subject of antitrust economics?

14 A. Yes. I've edited three books on the economics
15 of antitrust.

16 Q. What about articles? Have you ever authored
17 any articles on antitrust economics?

18 A. Yes, I sure have. I've authored or coauthored
19 many articles on competition issues and antitrust.

20 Q. And Dr. Wu, I think you said earlier you're
21 currently employed by NERA?

22 A. Yes.

23 Q. And what does "NERA" stand for?

24 A. NERA stands for National Economic Research
25 Associates.

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1 Q. And what's your title at NERA?

2 A. I am president of the company.

3 Q. How many economists do you have at NERA?

4 A. There are 500 economists. We have ten offices
5 in the U.S. and ten outside the U.S.

6 Q. And how long have you been the president of the
7 company?

8 A. I have been president for six years going on
9 seven.

10 Q. What sort of economic consulting do you do at
11 NERA?

12 A. Almost all of my consulting involves
13 competition and antitrust issues, and I would say they
14 fall in three categories. One would be evaluating the
15 competitive consequences of proposed mergers. That's
16 one category.

17 A second category would be evaluating market
18 power and allegations that a company or group of
19 companies have conspired to exclude a competitor from
20 the marketplace.

21 And a third category would be calculating
22 damages in price-fixing matters.

23 Q. And when did you first join NERA, by the way?

24 A. I joined NERA in 1996.

25 Q. So about 23 years ago?

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1 A. Yes, that would be it.

2 Q. Prior to 1996, where did you work?

3 A. I was a staff economist at the
4 Federal Trade Commission.

5 Q. The Federal Trade Commission here in D.C.?

6 A. In -- yes, in Washington.

7 Q. My opposing counsel here (indicating)?

8 A. Yes. For the Federal Trade Commission.

9 Q. So while you were an economist with the FTC,
10 what type of work did you do?

11 A. Most of my work was to evaluate the competitive
12 implications of proposed mergers. Most of my work
13 involved hospital mergers. And again, that was back in
14 the days when the hospital industry was in major
15 transformation.

16 Q. Now, Dr. Wu, you submitted a report in this
17 case, didn't you?

18 A. I did.

19 Q. Kurt, could you pull up RX 2833, please.

20 JUDGE CHAPPELL: You say that's when the
21 hospital industry was in a major transformation. Is
22 that what you said?

23 THE WITNESS: Yes.

24 JUDGE CHAPPELL: When are they not in a major
25 transformation?

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1 THE WITNESS: They have been in constant
2 transformation, but in 1992 Bill Clinton was elected
3 president and health reform was a major --

4 JUDGE CHAPPELL: That's right. He beat
5 George Bush and Ross Perot; correct?

6 THE WITNESS: Yes.

7 JUDGE CHAPPELL: Yes.

8 Now, when you say "a staff economist," were
9 you assigned to a particular commissioner? What does
10 "a staff economist" mean? I might be in the building,
11 but I don't have anything to do or know anything about
12 how that works.

13 THE WITNESS: So at the Federal Trade
14 Commission there is the Bureau of Economics and the
15 Bureau of Competition and, of course, the Bureau of
16 Consumer Protection. The Bureau of Economics is a
17 group of economists, and we will work on competition
18 matters or consumer protection matters.

19 We typically would not be assigned to any
20 particular project or attorneys, but many of us
21 specialize in areas of interest.

22 So when I came in, given my work in health
23 economics and given that the FTC knew that healthcare
24 competition was a major public policy issue, most of my
25 work naturally fell in this area.

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1 JUDGE CHAPPELL: So a staff economist, you're
2 in effect an economist pool.

3 THE WITNESS: Yes.

4 JUDGE CHAPPELL: All right.

5 BY MR. LAVERY:

6 Q. Dr. Wu, looking at the screen, is this --
7 RX 2833, is this the report that you submitted in this
8 case?

9 A. Yes, it is.

10 Q. And Dr. Wu, did you submit your CV as part of
11 your report?

12 A. I did.

13 Q. Kurt, could you pull up page RX 2833-065.

14 Dr. Wu, is this the first page of your CV?

15 A. It is.

16 Q. If you -- Kurt, if you could flip to the third
17 page that's ending in 067.

18 Dr. Wu, down there in your report there's a
19 section titled Expert Reports and Testimony.

20 What does that section represent?

21 A. This section lists all the matters in which I
22 have written an expert report or provided deposition
23 testimony or trial testimony.

24 Q. Okay. Dr. Wu, we're not going to go through
25 all of these, but let's look at a few.

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1 On the first page there I see one, the second
2 one down, that says "Rick Woods v. Google."

3 Were you hired as an economist in that case?

4 A. I was.

5 Q. Who hired you?

6 A. Google.

7 Q. Did you submit a report?

8 A. I did.

9 Q. Okay. Kurt, if you could flip to the next
10 page.

11 Let's take a look at the second one down,
12 Dr. Wu, in the case on behalf of Lite-On and Philips.
13 Tell us a little bit about that case.

14 A. That is a matter involving allegations of price
15 fixing. I worked on behalf of one of the defendants,
16 Philips Electronics, and I calculated damages in that
17 matter.

18 Q. Did you submit a report?

19 A. I did.

20 Q. Was that in federal district court, by the
21 way?

22 A. It was.

23 Q. Out in California?

24 A. Yes.

25 Q. And Dr. Wu, if you recall, what was the outcome

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1 of that case?

2 A. I believe the judge ruled in -- ruled in favor
3 of the defendants who had not yet settled in that case,
4 summary judgment.

5 Q. Now, let's stay on the same page, all the way
6 down at the bottom, Mark S. Wallach versus Eaton.

7 What were the allegations in that case?

8 A. That case involved allegations that a maker of
9 truck transmissions conspired with makers of trucks to
10 exclude a rival maker of transmissions.

11 Q. And did you submit a report in that case?

12 A. I did.

13 Q. Do you recall the outcome?

14 A. I believe in that case the judge denied class
15 certification.

16 Q. Okay. Dr. Wu, I'm not going to go through all
17 of these in details but --

18 JUDGE CHAPPELL: Good.

19 BY MR. LAVERY:

20 Q. In this section of your report it looks like
21 you have six pages of matters dating back to 1996; is
22 that right?

23 A. Yes.

24 Q. Okay. And now, at a high level, just tell us
25 what type of antitrust issues have you been retained to

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1 testify about in antitrust litigations.

2 A. So there would be three categories.

3 One would be analyzing the competitive
4 consequences of mergers.

5 A second category would be assessing the
6 implications of conclusionary conduct.

7 And a third would be in matters involving
8 allegations of price fixing.

9 Q. And have you testified in court on those
10 matters?

11 A. I have.

12 Q. Have you ever testified on behalf of the FTC in
13 court?

14 A. I have.

15 Q. How many times?

16 A. Twice.

17 Q. What were those cases?

18 A. I testified for the FTC in 1996 in a
19 Part 3 proceeding involving allegations against a trade
20 association, and I testified for the FTC in 1998 in a
21 challenge that the FTC brought against two merging
22 hospitals.

23 Q. Let's take those one by one.

24 The 1996 case, was that in the matter of
25 international associations?

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1 A. Yes. The International Association of
2 Conference Interpreters.

3 Q. And you said that was a Part 3 proceeding?

4 A. Yes.

5 Q. Were you an in-house economist for the FTC at
6 the time?

7 A. I was.

8 Q. And you testified on behalf of the FTC?

9 A. Yes, I did.

10 Q. And was that testimony in this courtroom?

11 A. Yes. I believe so.

12 Q. All right.

13 Dr. Wu, what was the other case that you
14 testified on behalf of the FTC?

15 A. The other case was in federal district court.
16 The FTC challenged a merger of the only two hospitals
17 in a small town in Missouri, and I testified for the
18 FTC in that one.

19 Q. And was that FTC versus Tenet Health Care?

20 A. Yes.

21 Q. Did you submit a report in that case?

22 A. I did.

23 Q. Did you testify in court?

24 A. I did.

25 Q. And who was your employer when you worked on

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1 that case?

2 A. The same employer I have today, NERA Economic
3 Consulting.

4 Q. So the FTC hired NERA to conduct an economic
5 analysis and submit a report and testify at trial in
6 that case?

7 A. Yes.

8 Q. Has the FTC engaged NERA on other matters since
9 then?

10 A. Yes.

11 So the FTC has engaged NERA. Probably one of
12 the more high-profile recent examples would be when the
13 FTC challenged Whole Foods and Wild Oats. That was an
14 acquisition, and NERA worked for the
15 Federal Trade Commission in that matter.

16 Q. Dr. Wu, have you performed analyses in the past
17 for litigation dealing with all the major antitrust
18 issues in this case?

19 A. I have.

20 Q. Dr. Wu, have you done work on any cases similar
21 with similar allegations to the case here?

22 A. I have.

23 Q. Do you have substantial experience in all the
24 issues that are required for analysis in this case?

25 A. I do.

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1 Q. Has a court ever excluded you from testifying,
2 sir?

3 A. No.

4 Q. Has a court ever precluded you from testifying
5 about any topic you discussed in your report or
6 declaration?

7 A. No.

8 MR. LAVERY: At this time, Your Honor, I'd like
9 to formally move for Dr. Wu to be admitted as an expert
10 in this case.

11 JUDGE CHAPPELL: Any opinions that meet the
12 proper legal standards will be considered.

13 MR. LAVERY: Thank you, Your Honor.

14 BY MR. LAVERY:

15 Q. Now, Dr. Wu, I want to turn to your work on
16 this case now.

17 First, can you tell us what your assignment
18 was.

19 A. My assignment was to assess the FTC's
20 allegations regarding Patterson's participation in the
21 alleged conspiracy, and in doing that analysis, I
22 assessed whether Patterson's conduct was consistent
23 with its unilateral self-interest.

24 Counsel for Patterson also asked me to review
25 and comment on the expert report submitted by its

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1 economic expert, Dr. Robert Marshall.

2 Q. Kurt, can you pull up RXD 0226, please.

3 Dr. Wu, is this a fair summary of your
4 assignment?

5 A. Yes.

6 Q. And by the way, Dr. Wu, were you paid to write
7 this report?

8 A. NERA was compensated for the work I did on this
9 matter.

10 Q. And did NERA charge Patterson \$2.5 million for
11 your report and testimony?

12 A. No, NERA did not. NERA's fees were not
13 \$2.5 million.

14 Q. Not nearly that high?

15 A. No.

16 Q. Roughly how much did you charge?

17 A. Roughly around a million dollars.

18 Q. Okay. Now, Dr. Wu, after you got your
19 assignment in this case, what did you do next?

20 A. The first thing I did was to read the FTC's
21 complaint. I wanted to understand the allegations and
22 I wanted to understand the industry.

23 I then requested documents and testimony and
24 any information that would help me understand the
25 dynamics of the industry.

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1 The FTC's economic expert submitted his report,
2 expert report, in August. I read that report, and that
3 framed the analyses that ultimately appeared in my
4 expert report which I filed in September.

5 Q. So let's take those one by one.

6 So, Dr. Wu, I believe you just said you
7 reviewed documents, testimony and other evidence?

8 A. Yes.

9 Q. And did you review Dr. Marshall's report?

10 A. I did.

11 Q. And Dr. Wu, as part of your analysis in this
12 case were you content to just review a few e-mails and
13 then reach a conclusion?

14 A. No.

15 Q. Why not?

16 A. As an economist, I cannot possibly presume to
17 divine what someone may have meant or intended in an
18 e-mail. But as an economist, I can look at those
19 e-mails and use them to help frame an economic question
20 that I can analyze.

21 Q. Kurt, could you pull up RX 2833-089, please.

22 Dr. Wu, this is Exhibit 2 to your report,
23 titled Documents Relied On [sic].

24 Can you tell us what this is?

25 A. Yes. This is a list of all the documents that

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1 I relied upon to reach my conclusions.

2 Q. Now, Dr. Wu, based on your analysis of all the
3 information in this case and Dr. Marshall's report, did
4 you reach any summary conclusions?

5 A. Yes.

6 Q. What were those conclusions?

7 A. My first conclusion is that Patterson acted in
8 its unilateral self-interest in its practice related to
9 buying groups. It was conduct consistent with its
10 strategies and business model.

11 Q. Okay. Oh, sorry. Dr. Wu, I'm going to pull up
12 RXD 0227.

13 Dr. Wu, is this a fair summary of your
14 conclusion with respect to Patterson?

15 A. Yes, it is.

16 Q. Okay. Did you form any other conclusions?

17 A. Yes.

18 I reviewed the expert report of Dr. Marshall.
19 Dr. Marshall concludes that it was profitable to work
20 with buying groups and that Patterson should have
21 worked with buying groups and would have found it
22 profitable to work with buying groups had there not
23 been a conspiracy. I do not -- I do not believe the
24 facts line up to support those conclusions.

25 Q. Dr. Wu, did you find Dr. Marshall's conclusions

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1 to be economically reliable?

2 A. My conclusions are that Dr. Marshall's
3 conclusions are not economically reliable.

4 Q. Kurt, could you please pull up RXD 228.

5 Dr. Wu, is this a fair summary of your
6 conclusion regarding Dr. Marshall?

7 A. Yes, it is.

8 Q. Okay. Dr. Wu, I'm going to focus today on the
9 part of your report where you critique Dr. Marshall's
10 opinion and dig into that a little bit.

11 Dr. Wu, starting off broadly, why did you
12 conclude that Dr. Marshall's analysis was economically
13 unreliable? What are the main reasons?

14 A. There are three reasons.

15 The first is that, in Dr. Marshall's report, he
16 analyzes two buying groups when he calculates that it
17 would be profitable to work with buying groups. That's
18 two buying groups out of 40 buying groups that he
19 mentions in his report.

20 Given how different buying groups are, I do not
21 see how it makes economic sense to infer that if it was
22 profitable to work with two buying groups that we could
23 infer that it also would have been profitable for
24 Patterson to work with buying groups.

25 Q. Okay. Dr. Wu, what's your next reason? I

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1 think you said there are three?

2 A. Yes.

3 The second reason is that Dr. Marshall
4 examines not just two buying groups but three
5 distributors and their agreements with those two
6 buying groups. Dr. Marshall concludes that if it was
7 profitable for those three distributors to work with
8 buying groups, then it also would be profitable for
9 Patterson to work with those buying groups.

10 But Dr. Marshall has not shown that the
11 economics of those three distributors line up with the
12 economics of Patterson, so I don't think it makes
13 economic sense to conclude that we can infer that it
14 also would have been profitable for Patterson to work
15 with buying groups.

16 Q. Okay. Dr. Wu, is there another reason?

17 A. The third reason is that in Dr. Marshall's
18 calculations that it would be profitable to work with
19 buying groups he ignores the costs, risks and
20 uncertainties that Patterson faced during the
21 conspiracy period.

22 If we want to understand why a company did what
23 it did at some point in the past, we really need to
24 understand what factors affected that company's
25 thinking at that time. It's Dr. Marshall ignoring

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1 those factors that make it -- make his conclusions
2 unreasonable.

3 Q. Kurt, could you pull up RXD 229, please.

4 Dr. Wu, is this a fair summary of why you
5 think Dr. Marshall's analysis is economically
6 unreliable?

7 A. Yes.

8 Q. Okay. Dr. Wu, I want to dig into these three
9 reasons that you listed here one by one. Let's start
10 with the first one.

11 Why did you think it was economically
12 unreasonable for Dr. Marshall to only study two buying
13 groups?

14 A. So Dr. Marshall looked at two buying groups.
15 He wants the court to infer that if it was profitable
16 to work with two buying groups, it would have been
17 profitable for Patterson to work with all buying
18 groups. But that only makes sense if those two buying
19 groups are representative of other buying groups, the
20 other 38 buying groups mentioned in Dr. Marshall's
21 report.

22 The facts show that buying groups are very
23 different from each other.

24 Q. Dr. Wu, did you see anything in Dr. Marshall's
25 report or his testimony supporting his opinion that the

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1 two buying groups that he studied were representative
2 of others?

3 A. No. And I believe Dr. Marshall also admits
4 that buying groups are very different from each other.

5 In the record, if we look at the different
6 buying groups that have been discussed in this matter,
7 buying groups differ in so many different ways, and
8 that's why, if you just look at two buying groups or
9 just one buying group, you've only seen one buying
10 group.

11 Q. Now, Dr. Wu, based on your review of all of
12 the information in the record, all of the testimony,
13 did you see anything that would lead you to believe
14 that all buying groups are the same?

15 A. So in looking at buying groups, I found that
16 they differ in many important ways that affect whether
17 they are likely to be a profitable opportunity or not.

18 They differ in how they're organized. Some
19 buying groups are very loose collections of dentists.
20 Some are more formally organized. Some buying groups
21 provide services to their members; some buying groups
22 don't provide any services at all. Some buying groups
23 have many members; some have no members at all.

24 If we look at Kois and Smile Source, for
25 example, which are two buying groups that have gotten a

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1 lot of attention in this matter, those two buying
2 groups are very different from all the other buying
3 groups. I believe Dr. Marshall testified that he
4 doesn't know of any other buying group that is
5 organized like Smile Source, and I think he said the
6 same about Kois. He doesn't know of another buying
7 group that's organized like Kois.

8 Q. Now, Dr. Wu, did you see contemporaneous
9 documents in the record from Patterson witnesses
10 regarding their views regarding whether buying groups
11 were all similar?

12 A. I did.

13 So if I looked at how Patterson looked at
14 buying groups during the conspiracy period, they
15 rec- -- there was a lot of discussion about buying
16 groups and what buying groups even meant and what they
17 did.

18 And probably the most colorful quote was from
19 Neal McFadden, who I believe was head of
20 special markets at Patterson, and he basically said, if
21 you look at -- buying groups are like jelly beans in a
22 jar. They all taste differently.

23 Q. Yeah, let's actually pull that up. Kurt, could
24 you please pull up RX 2833-010.

25 Now, if -- it's a little blurry I know, but,

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1 Kurt, if you could blow up footnote 17.

2 Dr. Wu, a copy of your report is in that
3 binder if you can't see it, but if you can use the
4 screen -- now, this is from paragraph 13 of your
5 report; right?

6 A. Yes.

7 Q. Now, is this what you were just referring to,
8 Neal McFadden deposition?

9 A. Yes, it is.

10 Q. Okay. And so Neal McFadden said in his
11 deposition that buying groups were not all created
12 equally.

13 Was he the only person in the entire record
14 that felt that way?

15 A. No. There are many comments to the same
16 effect, not just -- it's comments from other
17 distributors, comments from buying groups. In fact,
18 the footnotes 18 basically make the same point, and
19 that was from Trevor Maurer.

20 Q. Now, Dr. Wu, did you think it was important to
21 take this information into account when formulating
22 your opinion?

23 A. Yes, it does.

24 Q. Why?

25 A. Because Dr. Marshall wants to infer from two

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1 buying groups, the profitability of working with two
2 buying groups, that it would be profitable to work
3 with all buying groups, but buying groups are so
4 different, I don't think we can make that inference.

5 Q. So did Dr. Marshall just ignore all this
6 evidence?

7 A. He did. And he's assuming that the two buying
8 groups that he analyzed are sufficient to make the
9 inference that it would be profitable for Patterson to
10 work with buying groups and it would be profitable for
11 Patterson to work with buying groups.

12 Q. Now, Dr. Wu, as an economist, is it reasonable
13 as a matter of economics to just take two buying groups
14 and make that assumption?

15 A. It's not reasonable in this case given how
16 different buying groups are. But if someone were to
17 show that there's a market and it's -- and that two
18 buying groups could be representative of all the other
19 buying groups or if buying groups were sufficiently
20 similar or homogeneous, then possibly. But
21 Dr. Marshall has not shown that here.

22 Q. Now -- and for the record, what were the two
23 buying groups that Dr. Marshall studied?

24 A. Dr. Marshall's examples focused on Kois and
25 Smile Source.

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1 Q. Okay. Now, based on your review of all the
2 information in this case, did you find that
3 Smile Source and Kois were highly representative of all
4 other buying groups?

5 A. They are not representative of other buying
6 groups given how different they are on all the
7 dimensions I mentioned a couple minutes ago, and
8 they're not even similar to each other.

9 Q. Why not?

10 A. Kois, for example, is a buying group that's
11 essentially an educational center. Dentists take
12 classes from Kois, and through that they can purchase
13 supplies through Kois. As I mentioned earlier,
14 Dr. Marshall does not know of another buying group
15 that's organized that way.

16 Smile Source is completely different. It is
17 organized around a franchise model. Dentists have to
18 sign an agreement with Smile Source, and they become a
19 franchisee. And what they pay Smile Source is a
20 percentage of their revenues, so again that's a
21 completely different model. And Dr. Marshall also
22 recognized that he doesn't know of any other buying
23 group that's organized like Smile Source.

24 Q. And why does that matter?

25 A. It matters because it shapes whether a buying

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1 group is going to be a profitable opportunity or not.

2 Q. Okay. Now -- by the way, how many buying
3 groups did Dr. Marshall identify in his report?

4 A. Dr. Marshall identified 40 buying groups in his
5 report.

6 Q. And did you take a look at some of those buying
7 groups?

8 A. I did.

9 Q. Did you see the one that was run by a
10 veterinarian?

11 A. So there's a whole range of buying groups.
12 Yes, there is one that's run by a veterinarian.

13 There is one that's just run by a single
14 doctor. I think that's Stephen Sebastian.

15 And over the period there are some buying
16 groups that had zero members when they approached
17 Patterson and there were those that had more members.
18 They're just -- so it's just all over the lot.

19 Q. And based on your review of just the 40 buying
20 groups that Dr. Marshall identified in his report, did
21 you conclude that there is a one-size-fits-all
22 definition of a buying group?

23 A. Buying groups are so different, it's not one
24 size fits all. And again, it's not just my conclusion,
25 that's the conclusion of many individuals who have

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1 given testimony in this case.

2 Q. Now, Dr. Wu, next I believe you said that
3 Dr. Marshall only looked at three distributors.

4 Do I have that right?

5 A. Yes.

6 Q. Why was it economically unreasonable for
7 Dr. Marshall to only study three dental distributors?

8 A. So let's start with what Dr. Marshall wants
9 the court to infer from that.

10 Dr. Marshall analyzes three distributors and
11 their agreements with two buying groups. He
12 calculates that it was profitable for those three
13 distributors to work with those two buying groups.
14 From that he wants the court to infer that it also
15 would be profitable for Patterson to work with those
16 buying groups and all buying groups.

17 But Dr. Marshall has not shown that the
18 economics for those three distributors are similar to
19 the economics of Patterson. That's what you need if
20 you want to assume, if you want to make that leap,
21 that it also would have been profitable for Patterson.
22 And when I look at it, I think Patterson's economics
23 are completely different.

24 Q. Dr. Wu, what were the three distributors that
25 Dr. Marshall looked at as part of his study?

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1 A. The three distributors are Atlanta Dental,
2 Burkhart and Schein.

3 Q. Now, Dr. Wu, let's start off with Burkhart and
4 Atlanta Dental.

5 In your review of all the information in the
6 record and Dr. Marshall's report, did you find that
7 Burkhart and Atlanta Dental were similar to Patterson?

8 A. They are not similar to Patterson.

9 Probably the most obvious difference is their
10 national footprint. If you look at shares nationally,
11 Patterson's share is around 23 percent, but if you look
12 at Burkhart and Atlanta Dental, their national shares
13 are very small compared to that. I believe
14 Atlanta Dental's share is around half a percent and
15 Burkhart's share is around 1 percent.

16 Q. And Dr. Wu, why does that matter? Why do the
17 differences between Patterson and Burkhart and
18 Atlanta Dental -- why does that matter?

19 A. It matters in whether a particular buying group
20 or profit opportunity is going to be meaningful or not
21 and something that they want to go after.

22 For -- for Burkhart and Atlanta Dental, for
23 example, a -- the profit opportunity for, you know,
24 maybe, you know -- you know, of working with Kois, for
25 example, may be very important for Atlanta Dental and

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1 Burkhart, so -- so Dr. Marshall does his calculation.
2 When he looks at Burkhart and Kois, he finds that that
3 agreement led to around \$1.4 million of profit for
4 Burkhart. For Burkhart, that's a big deal.

5 When he does the same calculation for
6 Patterson, he finds that Patterson lost around
7 \$855,000 because it did not work with Kois. But
8 \$855,000 for Patterson is tiny. It's a different --
9 it's a completely different scale.

10 So to conclude that going after Kois is the
11 same for a small distributor or a large one isn't the
12 same. And I think even Dr. Marshall has said exactly
13 that. He said the opportunity will be much more
14 important for a smaller distributor than a larger
15 distributor.

16 Q. So what was Dr. Marshall trying to show with
17 these calculations in his report?

18 A. Dr. Marshall was trying to show that it was
19 profitable for Burkhart to work with Kois. He's trying
20 to show that it would have been profitable for
21 Patterson to work with Kois. And that's where I think
22 he goes wrong, because he wants us to infer that it
23 would have been profitable for Patterson to work with
24 Kois.

25 Q. And as a matter of economics, was it proper for

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1 him to infer that?

2 A. I do not think so.

3 Q. And Dr. Wu, did you review Dr. Marshall's trial
4 testimony on this topic?

5 A. I did.

6 Q. Did that convince you that he was right?

7 A. No.

8 Q. I'm actually going to pull up a demonstrative.
9 Kurt, could you pull up RXD 207.

10 Now -- and could you go to the -- so right
11 here, this is the -- did you read the part of
12 Dr. Marshall's testimony where he was shown this
13 document at trial?

14 A. Oh, yes.

15 MR. GOODMAN: Objection, Your Honor. This
16 demonstrative and this line of questions appears to
17 ask the witness something beyond the scope of his
18 expert report related to Dr. Marshall's trial
19 testimony.

20 MR. LAVERY: This was a demonstrative used
21 with Dr. Marshall at trial, but Dr. Wu's report -- this
22 section is his critique of Dr. Marshall and what
23 exactly Dr. Marshall was reporting here.

24 JUDGE CHAPPELL: If it's in this expert's
25 report, you may question him about it; if it is not,

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1 you may not.

2 MR. LAVERY: This specific demonstrative?

3 JUDGE CHAPPELL: That's right.

4 MR. LAVERY: I'll take it down and move on.

5 JUDGE CHAPPELL: If he talked about this in his
6 report -- I don't know what's in the report.

7 MR. LAVERY: I can ask the questions without
8 showing the demonstrative.

9 BY MR. LAVERY:

10 Q. So, Dr. Wu, I think you just testified that
11 855,000 was a tiny, tiny fraction of Patterson's
12 overall revenue?

13 A. Yes.

14 Q. And why is that significant?

15 A. That's significant because now we can
16 understand why it is that Burkhart and Atlanta Dental
17 might find it a much more profitable opportunity to go
18 after Kois than Patterson, so it's not quite right to
19 infer that just because we see Burkhart going after
20 Kois that we also should have seen Patterson going
21 after Kois.

22 Q. Dr. Wu, to be fair, Dr. Marshall did point out
23 that Burkhart's share, for example, in the markets he
24 studies, it was higher than its national market share,
25 didn't he?

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1 A. Yes.

2 Q. Does that matter for your analysis?

3 A. It does not.

4 Q. Why not?

5 A. Sure, there may be markets where Burkhart or
6 Atlanta Dental may have shares that are comparable to
7 or similar to that for Patterson, but it's -- but
8 this -- but the point I'm trying to make is not just
9 about market share. It's also about business models
10 and it's also about whether the distributor is already
11 doing work with the dentists in the area.

12 So, for example, in some of the markets
13 that -- or in a -- in one of the markets that
14 Dr. Marshall looks at, Patterson was already doing
15 business with many of the dentists in the area, but
16 Burkhart was not, so the opportunity to work with a
17 buying group would have generated more opportunity for
18 Burkhart than for Patterson.

19 Q. And Dr. Wu, let's turn to Schein.

20 You said Schein was the third distributor that
21 Dr. Marshall studied?

22 A. Yes.

23 Q. Did you find that Schein was a good comparison
24 to Patterson?

25 A. So Schein is not a good comparison for a

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1 different reason. Schein has a completely different
2 business model and focus, so if we look at -- if we
3 start with a different -- with strategies, Schein and
4 Patterson have different strategies.

5 Patterson was always focused on going after
6 individual dentists. Schein already had a good
7 business going after the larger dental organizations
8 like the dental service organizations. In fact, I
9 think their share of the DSOs, the dental service
10 organizations, was around 75 percent, so different
11 strategies.

12 That means they've got different capabilities.
13 And because they have different capabilities, they have
14 different clients.

15 So again, Schein is really set up to work with
16 dental service organizations and large groups.
17 Patterson, their sweet spot or I believe the term that
18 I've seen in the record is their strike zone is with
19 individual dentists. And back in 2013, Patterson was
20 only beginning to set up its Special Markets Division.

21 Q. Now, Dr. Wu, why does that matter that
22 Patterson's strategy and strike zone, as you put it,
23 was to go after the individual dentists?

24 A. It matters because it's something we should
25 think about if we want to understand why Schein is

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1 interested in going after a buying group but why
2 Patterson may not view that same account as being a
3 profitable opportunity. It goes to why Patterson
4 thought -- thinks about the costs and the risks of
5 going with buying groups in a completely different
6 way.

7 For Patterson, it was viewed as a costly,
8 potentially costly, opportunity because they may have
9 to make investments in infrastructure. They weren't
10 set up to do that.

11 Q. And so you also referred to capabilities in the
12 difference between Schein and Patterson.

13 Why is that significant specifically?

14 A. That's significant because if Patterson has to
15 make investments to serve a large group, that will make
16 an opportunity with a buying group a less profitable
17 opportunity than, for example, for Schein that already
18 has that infrastructure set up.

19 Q. And do you recall when Patterson launched its
20 Special Markets Division?

21 A. I do.

22 Q. When was that?

23 A. Around 2013.

24 Q. And at that time, roughly what percentage of
25 the DSO market did Schein already have?

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1 A. Around 75 percent.

2 Q. Okay. So you said that Patterson and Schein
3 had different strategies, capabilities and clients.

4 Does that have any relevance for profit
5 opportunities?

6 A. It does.

7 So that -- that's why I say the economics for
8 Schein is different from the economics for Patterson.

9 So just because it may be a good profit --
10 working with buying groups may be a good profit
11 opportunity for Schein does not imply that it also
12 would have been a good opportunity for Patterson.
13 They're in -- they have different strategies,
14 therefore different capabilities and therefore
15 different clients.

16 Q. Okay. So now just to summarize what you told
17 us, Dr. Wu, what was the real problem with what
18 Dr. Marshall did here when he only looked at the three
19 distributors?

20 A. The problem is he wants to make an inference
21 based on what he has seen with three distributors.
22 It's like if you went to Texas and you see three black
23 cows and you want to infer that all the cows in Texas
24 are black, but -- that would make sense if you knew
25 that all cows were black. But if there are

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1 differences across the distributors, then I don't think
2 you can do that. And that's my point here.
3 Dr. Marshall has not shown that the economics for the
4 distributors he studies is similar to the economics of
5 Patterson.

6 Q. And so Dr. Marshall ignored the differences
7 between the distributors in this case?

8 A. Yes.

9 Q. Did Dr. Marshall ignore the differences between
10 buying groups in this case?

11 A. Yes. Even though he recognizes that there are
12 differences.

13 Q. And as a matter of economics, is it reasonable
14 to assume that giving up \$855,000 representing
15 .000004 percent of your revenue -- is that reasonable
16 to assume that Patterson did not act in its unilateral
17 self-interest?

18 A. It's not reasonable to assume that once you
19 understand Patterson's situation in the relevant
20 period, had a completely different business model and
21 infrastructure.

22 Q. And Dr. Wu, you also said that Dr. Marshall
23 ignored the uncertainty that Patterson faced.

24 Do I have that right?

25 A. Yes.

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1 Q. What do you mean by that?

2 A. Well, what I mean by that is, as Patterson
3 considered the buying groups that approached it, it
4 considered each buying group on a case-by-case basis.
5 And it was far from clear for Patterson whether or not
6 working with that buying group would be a profitable
7 opportunity.

8 And by "profitable opportunity" the
9 uncertainty is not only whether a buying group would
10 generate incremental revenues. There was also
11 uncertainty about what costs Patterson would have to
12 incur to serve that buying group and whether Patterson
13 would have any cost savings by working with a buying
14 group.

15 So these are the considerations that were in --
16 that were factors for Patterson.

17 Q. Dr. Wu, why is it important to take costs,
18 risks and uncertainties into consideration when doing
19 this type of analysis?

20 A. It's important because -- because this is the
21 third thing Dr. Marshall wants the court to assume or
22 conclude.

23 So Dr. Marshall does calculations showing that
24 it was profitable for three distributors to work with
25 two buying groups, but that's an after-the-fact

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1 analysis. It's like Monday morning quarterbacking.
2 It's easy on Monday morning to show that this is the
3 play that the team should have run on Sunday. Once you
4 see the outcome, it's easy to say that, but it's a much
5 harder decision to know what play to run before the
6 fact.

7 So Dr. Marshall calculates that it was
8 profitable for Burkhardt and Kois to work together. But
9 to make that inference for Patterson ignores a couple
10 things. It ignores Patterson's view of the world at
11 the time it was considering buying groups like Kois.

12 And the second thing is doing analysis like
13 that after the fact ignores changes in the marketplace.
14 Distributors have changed over time and buying groups
15 even changed over time.

16 Q. Now, you just mentioned Dr. -- or I'm sorry.
17 You just mentioned the Kois buying group; right? And
18 that's one of the two buying groups that Dr. Marshall
19 analyzed?

20 A. Yes.

21 Q. Did you see any evidence in the record and all
22 the information that you reviewed that would lead you
23 to believe that it might have been an incoherent
24 opportunity to look at Kois at the time?

25 A. So Kois would be an example of the costs and

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1 uncertainty that Patterson viewed without buying
2 groups.

3 When Kois approached Patterson in 2013, it was
4 approached by a fellow named Qadeer Ahmed. I believe
5 Mr. Ahmed was claiming that Kois had 1700 members when
6 it really had zero members. I believe Mr. Ahmed also
7 made other claims which Patterson could not verify.

8 But this is exactly the situation that we want
9 to think about. When we want to think about whether
10 it's profitable for Patterson to work with Kois, it's
11 not just a calculation that we can make after the fact
12 by looking at Kois and Burkhart. We have to consider
13 what Patterson knew and expected at the time it was
14 considering working with that buying group.

15 Q. And what about the other buying group that
16 Dr. Marshall looked at, Smile Source?

17 So Dr. Marshall assumes that Patterson bid for
18 Smile Source in 2017 and should have bid for
19 Smile Source in 2012 or 2013, didn't he?

20 A. Yes, that's right.

21 Q. Is that reasonable?

22 A. No. And it's not reasonable for the same or
23 similar issues.

24 So Dr. Marshall looks at Patterson making a
25 bid for Smile Source in 2016 and 2017, and he infers

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1 from that that Patterson should have made a bid for
2 Smile Source during the relevant period. But that
3 assumes that Smile Source in 2016 and '17 was exactly
4 the same Smile Source in 2013, but Smile Source was
5 completely different.

6 I think according to Dr. Marshall, Smile Source
7 had 566 or so members in 2017, but it had maybe
8 166 members or, you know, between a hundred and two
9 hundred members in 2013.

10 If you then -- if you look also at what
11 Patterson did in 2013 when Smile Source approached
12 Patterson in 2013, what did Patterson do. It didn't
13 know who Smile Source was. It went to the website.
14 It looked for dentists who might be members. And when
15 it did a search for the dentists, it found that the
16 dentists that they saw were dentists that Patterson
17 was already doing business with.

18 So that's an example of if we go back in time
19 to understand why did a company do something, you
20 might see something different.

21 So that would be an example where Patterson
22 realized that you know what, I'm not sure there would
23 be much incremental revenue from working with
24 Smile Source.

25 Q. Did you see any evidence in the record that

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1 Smile Source was a better opportunity for Patterson in
2 2017 than it was in 2013?

3 A. Yes. Smile Source was bigger, and I believe
4 they also have made changes in their own organization
5 to improve their management and services that they
6 provide.

7 Q. So to sum up what you just said, Dr. Wu, even
8 if we accept Dr. Marshall's calculations regarding
9 whatever profit Patterson would have made, was it
10 appropriate for Dr. Marshall to draw the inferences he
11 drew based on hindsight about these small profits?

12 A. It's not appropriate because if we want to
13 understand what a company was thinking at the time
14 decisions were made, we have to go back and understand
15 what factors were relevant, and that's the inference
16 that Dr. Marshall wants the court to make.

17 Dr. Marshall wants the court to look at two
18 buying groups, three distributors. He wants to show
19 that because it was profitable for those three
20 distributors to work with those two buying groups that
21 it would have been profitable for Patterson to do that
22 in the relevant period.

23 MR. LAVERY: Dr. Wu, I have nothing further.
24 I'll pass the witness.

25 MR. OLIVER: If I could very briefly,

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1 Your Honor.

2 JUDGE CHAPPELL: Go ahead.

3 - - - - -

4 DIRECT EXAMINATION

5 BY MR. OLIVER:

6 Q. Good afternoon, Dr. Wu.

7 I'm Geoffrey Oliver on behalf of Benco Dental.

8 A. Good afternoon.

9 Q. And I have just a couple of questions for you.
10 And just to set the stage for you, we had a couple of
11 questions earlier today regarding the extent to which
12 the opinions of an expert that were called by one
13 respondent might be relevant to the other respondents
14 in this matter. And with that regard, I'd like to ask
15 you a couple of questions from the perspective of
16 Benco Dental.

17 A. Okay.

18 Q. And in particular, I'd like to ask you the
19 extent to which your conclusions here would also be
20 relevant to Benco Dental.

21 I'm going to skip over the first of your
22 conclusions, that Patterson acted in its own unilateral
23 self-interest, and I'd like to go to the second of your
24 conclusions: Dr. Marshall's conclusions are
25 economically unreliable and are also contradicted by

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1 facts in the record.

2 Did I accurately summarize that conclusion?

3 A. Yes.

4 Q. Now, Dr. Wu, to what extent would that
5 conclusion also be relevant to Benco Dental in this
6 matter?

7 A. The same -- the same inference would apply
8 because the examples that Dr. Marshall used with two
9 buying groups and three distributors also apply to the
10 respondents, so two buying groups -- to make an
11 inference from two buying groups about all buying
12 groups, that would also apply to -- to Benco.

13 With respect to the economics for Benco versus
14 Patterson, I believe they also have different
15 strategies with respect to buying groups, so the way
16 they view it also would be very different.

17 MR. GOODMAN: Objection, Your Honor, to this
18 testimony and this line of questions from Benco.

19 Dr. Wu's report was very specific that it was
20 limiting his opinions to testifying regarding to
21 Patterson, so I think it would be beyond the scope of
22 his report to begin testifying about the relevance of
23 his analyses to other respondents in this case.

24 MR. OLIVER: Your Honor, I disagree with that,
25 that he was called as a witness by Patterson, he was

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1 engaged by Patterson to prepare a report, but to the
2 extent that he has offered economic conclusions, as
3 he's just testified, many of his economic conclusions
4 apply more generally to the industry structure in this
5 case, to the actions of distributors and also to the
6 analysis of Dr. Marshall in this case.

7 Certainly the analysis of Dr. Marshall is not
8 specific to Patterson, and as a result, much of
9 Dr. Wu's testimony, as he's just explained, is also
10 relevant to the other respondents.

11 JUDGE CHAPPELL: Well, we'll battle this out in
12 the posttrial briefs, but I'll allow testimony or
13 questioning regarding an opinion to one respondent
14 applies to another respondent. I'm going to allow
15 that. I mean -- and not testimony but an opinion,
16 whether an opinion as to one respondent would apply
17 equally to another respondent.

18 I don't know about relevant. I don't know what
19 good that does you. But whether it applies equally,
20 that's something I'm fine with.

21 MR. OLIVER: Thank you, Your Honor.

22 BY MR. OLIVER:

23 Q. Dr. Wu, had you finished your answer?

24 A. Yes.

25 Q. Okay. Would it be fair to say -- would it be

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1 fair to say then that much of the reasoning that you
2 also offered from your testimony here this afternoon
3 would also be applicable to Benco Dental?

4 A. Well, I would assume so. My -- my comments
5 really have to do with Dr. Marshall's methodology and
6 the inferences he wants the court to make from the
7 examples that he uses in his report.

8 MR. OLIVER: Thank you. I have no further
9 questions.

10 MR. McDONALD: I have no questions,
11 Your Honor.

12 JUDGE CHAPPELL: How much time do you think
13 you need for cross?

14 MR. GOODMAN: I would estimate two and a half
15 hours, Your Honor.

16 JUDGE CHAPPELL: What did you say?

17 MR. GOODMAN: Two and a half hours.

18 JUDGE CHAPPELL: Two and a half?

19 MR. GOODMAN: Yes, Your Honor.

20 JUDGE CHAPPELL: Two and a half cross on less
21 than one hour of direct?

22 MR. GOODMAN: Well, Your Honor, we've heard a
23 lot of very high-level opinions expressed by Dr. Wu,
24 but I think that our cross-examination would require us
25 to actually go into the underlying basis for those

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1 opinions, which would take a bit of time.

2 JUDGE CHAPPELL: I'm not going to limit you. I
3 just wondered if you could explain it. You did a good
4 job.

5 MR. GOODMAN: Thank you, Your Honor.

6 JUDGE CHAPPELL: We're not going to be able to
7 finish today, but what we can do today we don't need to
8 do tomorrow, so let me ask the boss.

9 When it gets near 6:00 I'm going to cut it off,
10 but let's keep going for right now.

11 And Mr. Bailiff, you can take off whenever you
12 need to.

13 THE BAILIFF: Yes, sir.

14 JUDGE CHAPPELL: What are the time estimates on
15 this Kathleen Titus tomorrow?

16 MR. McDONALD: One of my colleagues is doing
17 her examination, but my guess is an hour and a half.
18 At the most.

19 JUDGE CHAPPELL: Who's crossing that witness?

20 MS. KAHN: Ours is about an hour and a half I
21 believe, although Ms. Goff is not here. She's the one
22 doing the cross-examining.

23 JUDGE CHAPPELL: All right. Thank you.

24 MR. McDONALD: But I say that at most,
25 Your Honor. I wouldn't be surprised if it's an hour.

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1 JUDGE CHAPPELL: Okay. Thank you.

2 Go ahead.

3 MR. GOODMAN: Good afternoon, Your Honor.

4 Joshua Goodman for complaint counsel.

5 - - - - -

6 CROSS-EXAMINATION

7 BY MR. GOODMAN:

8 Q. Good afternoon, Dr. Wu.

9 A. Good afternoon.

10 Q. Dr. Wu, you were first retained in connection
11 with this case in June 2018; correct?

12 A. Yes.

13 Q. And the person who first contacted you about
14 this case was one of Patterson's lawyers; right?

15 A. Yes.

16 Q. And after that point, you had a number of
17 subsequent conversations with Patterson's lawyers;
18 correct?

19 A. Yes.

20 Q. You've never held a full-time teaching position
21 at any university; correct?

22 A. I have not.

23 Q. How much money per hour did you bill for your
24 time when you were working on your expert report in
25 this case?

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1 A. My hourly rate is \$1100 per hour.

2 Q. So you also billed at the \$1100 per hour for
3 your time during your depositions in this case?

4 A. Yes.

5 Q. And are you also billing \$1100 per hour for
6 your time today?

7 A. Yes.

8 Q. Now, you're the president of an economic
9 consulting company called NERA; right?

10 A. Yes, I am.

11 Q. And as president of this company, you receive
12 additional monetary compensation beyond hourly billings
13 based on your work on this case; correct?

14 A. That's indirect. As president of the company,
15 I am compensated for how I help the firm develop and
16 how I help the economists at NERA be better and to do
17 more and that, you know, if the firm grows, then --
18 you know, in aggregate, then there is -- you know,
19 there's a link to my compensation.

20 JUDGE CHAPPELL: Is this firm a partnership?

21 THE WITNESS: It's not a partnership, so which
22 is why it's not directly linked. NERA is a subsidiary
23 of a corporation called Marsh & McClennan.

24 JUDGE CHAPPELL: So you don't have something
25 similar to partnership draws that a law firm would

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1 have?

2 THE WITNESS: That's right.

3 So we are not a partnership, we do not have
4 equity and we do not get draws like that, right.

5 BY MR. GOODMAN:

6 Q. So when you said it's indirect, was that a yes
7 in response to my question that you receive additional
8 compensation beyond hourly billings?

9 A. Yes. If the person I report to at
10 Marsh & McClennan deems it's appropriate that I've
11 done a great job for the company. In my management
12 role.

13 Q. Did you receive -- does that happen at the end
14 of the year?

15 A. Yes.

16 Q. Did you receive additional compensation beyond
17 your hourly billings for the year 2018 in connection
18 with this case?

19 A. Well, again, I don't limit it to just this
20 case. I'm rewarded for helping grow the entire
21 organization.

22 Q. Can you explain how much additional
23 compensation you'll receive beyond your hourly billings
24 based on NERA's work on this case?

25 A. I cannot.

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1 JUDGE CHAPPELL: Does the company that hired
2 you, the law firm that hired you -- do they pay you
3 anything other than your hourly rate?

4 THE WITNESS: No.

5 JUDGE CHAPPELL: Thank you.

6 BY MR. GOODMAN:

7 Q. You're not offering any opinion on whether
8 Patterson participated in the agreement alleged in the
9 FTC's complaint; correct?

10 A. I'm not offering an opinion on whether
11 Patterson participated. I am evaluating whether
12 Patterson's conduct was consistent with its unilateral
13 incentives, in other words, that the behavior and
14 conduct of Patterson was consistent with its own
15 competitive interests.

16 Q. So you're not offering an opinion on whether
17 Patterson participated in the agreement alleged in the
18 FTC's complaint; correct?

19 A. Well, this -- this is the way I would put it.
20 If Patterson is acting unilaterally, then it was not
21 involved -- as an economist, my conclusion is -- has to
22 do with Patterson acting unilaterally. It is a
23 question for lawyers and the finder of fact whether
24 that means that Patterson participated in the
25 conspiracy. But as an economist, I'm focused on the

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1 economic issue, did Patterson act in its unilateral
2 self-interest, and my answer there is yes.

3 Q. At your deposition, you were asked, "You are
4 not offering an opinion on whether Patterson actually
5 participated in the agreement alleged in the FTC's
6 complaint. Correct?"

7 There was an objection.

8 And you responded, "I'm just saying that I am
9 not opining on whether there was an agreement or
10 whether Patterson agreed to do what the FTC has
11 alleged."

12 Is that testimony still accurate?

13 A. Yes. That's what I was trying to say.

14 There is a legal question surrounding questions
15 about whether Patterson participated in the conspiracy
16 or, as you said in your question, whether there was an
17 agreement. As an economist, I can say that Patterson
18 acted in its unilateral self-interest.

19 Q. We're going to get well into that opinion as
20 well.

21 You are not offering any opinion on whether
22 Benco or Schein participated in the agreement alleged
23 in the FTC's complaint; correct?

24 A. Correct, I'm not.

25 Q. Your -- one of your expert opinions in this

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1 case is that buying groups did not offer Patterson
2 cost savings compared to Patterson dealing with
3 individual dentists outside of a buying group;
4 correct?

5 A. Yes.

6 Q. You state that opinion in section 4.2.1 of your
7 report; correct?

8 A. Yes.

9 Q. You did not do any quantitative analysis to
10 show that buying groups would not have offered
11 Patterson any cost savings; correct?

12 A. That was a conclusion based on testimony. That
13 was not a quantitative analysis.

14 Q. I'm going to put up a demonstrative, CXD 15,
15 on the ELMO just to keep track of your opinions and
16 how you've reached them.

17 Let's start with this one, the opinion that
18 buying groups did not offer Patterson any cost savings,
19 and whether there was quantitative analysis, we're
20 going to mark that no.

21 Another of your expert opinions is that it is
22 likely that contracting with buying groups during the
23 relevant period would have increased Patterson's costs;
24 correct?

25 A. Yes.

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1 Q. You report that opinion in section 4.2.2 of
2 your report; right?

3 A. Yes.

4 Q. You did not do any quantitative analysis
5 showing that contracting with buying groups would have
6 actually increased Patterson's costs; correct?

7 A. That's correct, I did not. That was based on
8 my review of the documents.

9 Q. Let's mark that down.
10 Another of your expert opinions you're offering
11 in this case is that in the beginning of the relevant
12 period, the opportunity cost of Patterson dealing with
13 buying groups was too high; correct?

14 A. Yes.

15 Q. You did not do any quantitative analysis to
16 support the conclusion that Patterson had too high an
17 opportunity cost to deal with buying groups; correct?

18 A. I did not.

19 Q. You did not calculate opportunity costs at
20 all.

21 A. I did not calculate opportunity cost. Those
22 were issues that were raised by Patterson, however.

23 Q. You also did not do any quantitative analysis
24 identifying what level of opportunity cost would be
25 too high for a firm to deal with buying groups;

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1 correct?

2 A. I did not.

3 Q. Let's mark that down.

4 You testified earlier this afternoon that in
5 2013 Patterson started the Special Markets Division to
6 pursue business with group practices and DSOs;
7 correct?

8 A. Yes.

9 Q. And you did not do any quantitative analysis
10 showing that the Special Markets Division could not
11 also handle doing business with buying groups;
12 correct?

13 A. Patterson created the Special Markets Division
14 to explore the opportunity to work with larger groups
15 like dental service organizations and other
16 organizations that might offer them cost savings and
17 other opportunities to grow their business.

18 Q. I think you may have answered a slightly
19 different question than the one I asked.

20 My question was: You did not do any
21 quantitative analysis showing that the
22 Special Markets Division could not also handle doing
23 business with buying groups; correct?

24 A. Well, I did not.

25 Q. Let's mark that down.

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1 You're also offering the opinion that it was
2 more costly for Patterson than for Schein to deal with
3 buying groups; right?

4 A. What I -- yes. Because they had different
5 strategies, and therefore, in 2013 they were in
6 different places with respect to doing work with buying
7 groups.

8 Q. But you didn't do any quantitative analysis
9 comparing Patterson's costs of dealing with buying
10 groups with Schein's cost of dealing with buying
11 groups; correct?

12 A. I did not.

13 Q. Let's update the chart.

14 By the way, you agree that Patterson is a
15 publicly traded company with multiple billions of
16 dollars in revenue per year; correct?

17 A. Yes.

18 Q. And you also agree that Burkhardt is much
19 smaller than Patterson in terms of revenue?

20 A. Yes. I said that earlier. Patterson is much
21 bigger than Burkhardt.

22 Q. And at the same time, you also agree that
23 Schein is a publicly traded company with even greater
24 revenues than Patterson; right?

25 A. I believe that's correct.

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1 Q. And you discuss that both Burkhart and Schein,
2 in your view, dealt with buying groups during the
3 period from 2011 to 2015; right?

4 A. Yes. Those are examples that Dr. Marshall
5 points out. And again, my point is that looking at
6 those two distributors doesn't help us understand the
7 economics of Patterson's decisions.

8 Q. So your expert opinion based on no
9 quantitative analysis is that this larger company
10 Schein and smaller company Burkhart were both readily
11 capable of dealing with buying groups in this period,
12 but somehow this multibillion-dollar, publicly traded
13 company Patterson could not do so because of the
14 opportunity costs, which you never calculated; is that
15 right?

16 A. Yes. Reading the documents and the testimony
17 of Patterson personnel, Patterson's strategy had always
18 been focused on going direct to the individual
19 dentists. That was their model.

20 Q. You're also offering the opinion that
21 Patterson had unilateral reasons for declining to work
22 with the buying groups it rejected; right?

23 A. Yes. What I say in my report is that
24 Patterson viewed each buying group that approached it
25 on a case-by-case basis.

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1 Q. And you convey that opinion in section 5.3.1 of
2 your report; correct?

3 A. I don't remember the particular paragraph, but
4 sure.

5 Q. If you'd like to look at your report, I think
6 it can be found at RX 2833 page 037.

7 A. That's fine.

8 Q. You don't recall the section of your report
9 that discusses this issue?

10 A. No. I'm just not -- I just don't recall the
11 specific -- you just mentioned a specific paragraph. I
12 just don't remember whether that's the right section
13 heading and number. I remember writing it, yes.

14 Q. Okay. Well, in this section of your report
15 that addresses whether Patterson had unilateral
16 reasons for declining to work with buying groups,
17 there's no quantitative analysis to be found; correct?

18 A. No. This is not a quantitative analysis
19 because what it is instead is looking at Patterson's
20 reasons for declining to work with a buying group, and
21 in looking at those reasons, I discovered that the
22 reasons were very different for each buying group.
23 It's not a quantitative issue.

24 Q. Let's update our chart anyway with that
25 knowledge.

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1 So let's take now a closer look at this
2 section 5.3.1 of your report where you address this
3 issue.

4 In this section you walk through a list of ten
5 buying groups and offer your expert opinion on why
6 Patterson did not do business with each listed group;
7 right?

8 A. Yes.

9 Q. And in this section of your report, you did not
10 address the buying group New Mexico Dental Cooperative;
11 correct?

12 A. I believe I mention it elsewhere. I don't
13 recall whether I mentioned it in that particular
14 section.

15 Q. Would you like to review the section to see
16 whether you did mention it?

17 A. Sure.

18 Q. Okay. It begins at RX 2833 page 037.

19 (Document review.)

20 A. Okay.

21 Q. Are you there?

22 A. Yes.

23 Q. Okay. So in this section of your report
24 addressing Patterson's rationale for not dealing with
25 buying groups you didn't address the buying group

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1 New Mexico Dental Cooperative; correct?

2 A. I did not.

3 Q. You are familiar with evidence in the record
4 concerning interfirm communications between Patterson
5 and Benco relating to Patterson's involvement with
6 New Mexico Dental Cooperative; correct?

7 A. Yes.

8 Q. You don't believe that communications between
9 the president of Patterson and the president of Benco
10 about whether they would do business with a buying
11 group is somehow unilateral conduct, do you?

12 A. I am an economist, and I'm not reading an
13 e-mail to make an inference on whether an e-mail
14 represents unilateral conduct or something else. It's
15 just not something that is in my area of expertise. I
16 would not presume to do that.

17 Q. Well, in fact, you've cited multiple e-mails in
18 this section about whether Patterson's conduct was
19 unilateral conduct, haven't you?

20 A. I do because the e-mails explain the reasoning
21 and thought process that -- that might -- that help me
22 understand why Patterson declined to work with a
23 particular buying group. That's a description of why
24 Patterson did what it did. I'm not opining on
25 whether -- from an e-mail at least, whether that is

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1 unilateral or not unilateral conduct.

2 Q. Is it your testimony that communications
3 between the president of Patterson and the president
4 of Benco about whether they would do business with a
5 buying group could constitute unilateral conduct under
6 your understanding of the term "unilateral conduct"?

7 A. Would you -- would you ask that question
8 again.

9 Q. Sure.

10 Is it your testimony that communications
11 between the president of Patterson and the president
12 of Benco about whether they would do business with a
13 buying group could constitute unilateral conduct under
14 your understanding of the term "unilateral conduct"?

15 A. As an economist, I'm not drawing an inference
16 based on that, based on reading an e-mail. It's just
17 not what an economist does, and I'm not doing that.

18 Q. But you are offering an opinion with respect
19 to the ten other buying groups listed in
20 section 5.3.1 that Patterson's rationale for dealing
21 with them was unilateral; correct?

22 A. I am because I'm looking at the conditions that
23 describe the situation with each buying group.

24 Q. And that's based on your analysis of e-mail and
25 other documents in the record; correct?

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1 A. It's based on my review of the -- the
2 documents in the record, yes, which reflects
3 deposition testimony, documents, contemporaneous
4 business documents, and that would include e-mails.

5 Q. One of the buying groups you do address in
6 section 5.3.1 of your report is Kois in paragraph 82;
7 correct?

8 A. Yes.

9 Q. And there you offer the opinion that
10 "Patterson's decision to not work with Kois was based
11 on the lack of profitability due to unreasonably low
12 margins it saw in contracting Kois"; correct?

13 A. Yes.

14 Q. You did not perform any quantitative analysis
15 showing that it would not be profitable for Patterson
16 to work with Kois; correct?

17 A. That was not based on my quantitative analysis.
18 That was based on comments made by Patterson personnel
19 at the time.

20 Q. So your opinion in paragraph 82 is not based on
21 your quantitative analysis, it's based on comments made
22 by Patterson personnel as you interpret them; is that
23 right?

24 A. Yes.

25 Q. And you also did not perform any quantitative

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1 analysis showing that it would not have been
2 profitable for Patterson to work with Kois; correct?

3 A. I did not do a quantitative analysis.

4 Q. You also did not perform any quantitative
5 analysis to determine what constitutes an unreasonably
6 low margin, as you used that term in paragraph 82 of
7 your report; correct?

8 A. I did not. I'm just describing the view of
9 Patterson as it evaluated that opportunity at that
10 time.

11 Q. And in fact, the only source you cited for your
12 conclusions about Kois in paragraph 82 is a single
13 e-mail; right?

14 A. Yes. Well, there are -- oh, yes, it's -- I
15 cite it twice, but it's one document that I cite. It's
16 a document that says that Patterson's internal e-mails
17 reveal that "their," that is, Kois, "presentation
18 numbers are crazy as they are asking us to cut margins
19 to the bone."

20 Q. And that document doesn't contain a
21 profitability analysis, does it, Dr. Wu?

22 A. I don't recall.

23 Q. You don't know whether that document contains
24 any profitability analysis; is that fair?

25 MR. LAVERY: Objection. Asked and answered.

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1 He just said he didn't know.

2 THE WITNESS: I don't remember.

3 JUDGE CHAPPELL: He answered it twice.

4 Go ahead.

5 BY MR. GOODMAN:

6 Q. You did not apply any accepted methodology from
7 the field of economics to reach your opinion that
8 Patterson's decision to not work with Kois was based on
9 a lack of profitability; correct?

10 A. I think it's accepted methodology for an
11 economist to ask the right questions and to review the
12 documents and data to help me answer those questions.
13 Some questions can be answered in a quantitative
14 manner. Others we have to read -- we have to review
15 the documents and make that assessment.

16 The only distinction I'm making is I'm not
17 inferring from any document what someone's intent was,
18 and I'm not trying to draw any legal conclusion from a
19 document, but I think it's perfectly appropriate for an
20 economist to read a document and to consider it and to
21 apply it appropriately.

22 Q. You're here testifying only as an expert
23 witness economist, not a fact witness; correct?

24 A. I believe I am here as an expert witness. Yes.

25 Q. Another group you addressed in section 5.3.1 of

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1 your report is ADC; correct?

2 A. Yes.

3 Q. "ADC" refers to Atlantic Dental Care; is that
4 right?

5 A. Yes.

6 Q. And you addressed ADC in paragraph 85 of your
7 report; is that right?

8 A. Yes.

9 Q. And even though you've provided an opinion on
10 Patterson's supposedly unilateral reasons for not
11 bidding on ADC, ADC is not a buying group; correct?

12 A. Are you asking me whether ADC is a buying
13 group?

14 Q. Yes.

15 They're not a buying group; correct?

16 A. Well, I don't want to get hung up on labels,
17 but if they are a buying group -- if they are --
18 you know, if they're not a buying group, then I
19 don't -- then -- then it's -- then the example doesn't
20 really have implications for the allegations that the
21 FTC is concerned about.

22 If it is a buying group, then I'm looking at
23 whether or not Patterson's actions are consistent with
24 its unilateral behavior, and again, what I've said is
25 Patterson was looking at ADC on a case-by-case basis.

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1 Q. You don't know if ADC is a buying group?

2 A. Well, I've -- I believe ADC appears in
3 Dr. Marshall's report as a buying group, which is why
4 I list it here.

5 There is controversy about what a buying group
6 is, what it does and what benefits it has. That is for
7 sure. But --

8 JUDGE CHAPPELL: We'll go about five more
9 minutes.

10 THE WITNESS: But because Dr. Marshall lists
11 ADC as a buying group, I wanted to address it.

12 BY MR. GOODMAN:

13 Q. I'd ask if you'd just respond directly to my
14 questions. If there's further follow-up or
15 elaboration, your counsel will have an opportunity to
16 ask questions later on.

17 A. Okay.

18 Q. So as you're sitting here today, you're not
19 aware of whether ADC is a buying group or not in your
20 view; is that fair?

21 MR. LAVERY: Asked and answered three or four
22 times now.

23 JUDGE CHAPPELL: Well, he said Dr. Marshall
24 lists it as a buying group. I haven't heard him
25 answer whether he knows or whether it is or not.

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1 Overruled.

2 THE WITNESS: For purposes of this report, I
3 considered it as a buying group, but if it's not a
4 buying group, then it wouldn't have any implications.

5 BY MR. GOODMAN:

6 Q. Now, your opinion that you offered in your
7 report is that Patterson did not do business with ADC
8 because partnering with ADC would not likely offer cost
9 savings to Patterson and did not promise to increase
10 Patterson's customer base since ADC could have signed
11 on multiple suppliers; correct?

12 A. Yes. That's what I wrote.

13 Q. You did not perform any profitability analysis
14 related to Patterson's decision not to deal with ADC;
15 correct?

16 A. I did not do a separate profitability analysis,
17 no.

18 Q. I think you said you did not do a separate
19 profitability analysis. My question was whether you
20 did any profitability analysis.

21 A. Oh, I'm sorry. No, I did not.

22 Q. Thank you.

23 And you did not perform any quantitative
24 analysis at all related to Patterson's decision not to
25 deal with ADC; correct?

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1 A. I did not. I'm just showing Patterson's
2 thinking at the time.

3 Q. Similar to what we saw before, the only source
4 you cited in paragraph 85, which provides your opinion
5 on ADC, is a single Patterson document; correct?

6 A. Yes.

7 MR. GOODMAN: Now would be a good time to stop.
8 We can stop there.

9 JUDGE CHAPPELL: Okay.
10 We'll start again in the morning.

11 You need to remove that document from the
12 screen.

13 MR. GOODMAN: Yes, Your Honor.

14 JUDGE CHAPPELL: I don't see the ELMO is even
15 on. I'm not sure how that was on the screen. I guess
16 it is on. I usually see a light there.

17 MS. KAHN: Just the light is not on,
18 Your Honor.

19 JUDGE CHAPPELL: We'll reconvene at 9:45 in the
20 morning.

21 We're in recess.

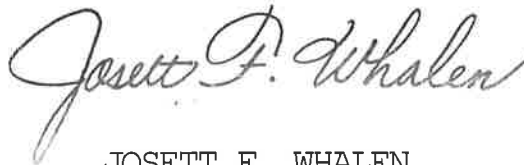
22 (Whereupon, the foregoing hearing was adjourned
23 at 5:53 p.m.)

24

25

CERTIFICATE OF REPORTER

1
2
3
4 I, JOSETT F. WHALEN, do hereby certify that the
5 foregoing proceedings were taken by me in stenotype and
6 thereafter reduced to typewriting under my supervision;
7 that I am neither counsel for, related to, nor employed
8 by any of the parties to the action in which these
9 proceedings were taken; and further, that I am not a
10 relative or employee of any attorney or counsel
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13
14 

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